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In the Privy Council.

No. 11 of 1932.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

ALICE MARIE VANDEPITTE (Married Woman the wife of E. J. Vandepitte) ... (*Plaintiff*) *Appellant,*

AND

THE PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK ... ... (*Defendants*) *Respondents.*

CASE FOR THE RESPONDENTS

THE PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK.

Record.

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada (Duff, Newcombe, Rinfret, Lamont and Cannon JJ.) delivered on the 6th October, 1931, allowing an appeal from a judgment of the Court of Appeal of British Columbia (Martin, Galliher and McPhillips JJ.A.) dated the 30th June, 1930, which dismissed the Respondents' appeal and allowed the Appellant's cross appeal from a judgment of the Supreme Court of British Columbia (Gregory J.) dated the 24th December, 1929. p. 64. p. 37. p. 29.

2. The Appellant, who was injured, on the 5th March, 1928, in a collision between a motor-car driven by her husband, in which she was a passenger, and a motor-car driven by one Jean Berry, brought an action against Jean Berry on the 14th March, 1928, in the Supreme Court of British Columbia claiming damages for personal injuries. p. 74.

On the 13th June, 1928, the Appellant obtained judgment against the said Jean Berry for the sum of $4,600 and costs. On the same day in third party proceedings in the same action the said Jean Berry obtained judgment against E. J. Vandepitte, the Appellant's husband, for $2,300 p. 91, l. 15. p. 92.

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Record. p. 98, l. 32. and costs upon the finding that she and he, the drivers of the two cars, were guilty of negligence in the same degree.

pp. 80-81. The Appellant on the 7th July, 1928, issued execution against Jean Berry and on the 9th July, 1928, a return of nulla bona was made by the Sheriff.

3. The motor-car which was being driven by Jean Berry at the time p. 17, l. 20. of the accident was the property of her father, R. E. Berry, and was driven by her with his consent. The car had been insured by the father with the Exhibit 3. Respondents under a " Combination Automobile Policy " against inter alia, " Legal Liability for bodily injuries or death " to third parties, the indemnity to be limited in the case of bodily injuries sustained by one person to $5,000.

4. The main question which arises in the appeal is whether having regard to the terms of the said Policy and by virtue of section 24 of the British Columbia Insurance Act (1925, 16 Geo. V. ch. 20) the Appellant is entitled to recover from the Respondents the amount of her judgment against Jean Berry.

5. Section 24 of the Insurance Act is as follows :—

" 24. Where a person incurs liability for injury or damage to the " person or property of another, and is insured against such liability, " and fails to satisfy a judgment awarding damages against him in " respect of such liability, and an execution against him in respect " thereof is returned unsatisfied, the person entitled to the damages " may recover by action against the insurer the amount of the judgment " up to the face value of the policy, but subject to the same equities as " the insurer would have if the judgment had been satisfied."

6. Section " E " of the insuring agreement endorsed on the policy issued by the Respondents to R. E. Berry is as follows :—

Exhibit 3. " LEGAL LIABILITY FOR BODILY INJURIES OR DEATH.—(1) To " indemnify the Insured against loss from the liability imposed by " law upon the Insured for damages on account of bodily injuries " (including death, at any time resulting therefrom) accidentally " suffered or alleged to have been suffered by any person or persons " (excluding employees of the Insured engaged in the operation, " maintenance and repair of the automobile, and employees of the " Insured who at the time of the accident are engaged in the trade, " business, profession or occupation of the Insured as a result of the " ownership, maintenance or use of the automobile ; provided that on " account of bodily injuries to or the death of one person the Insurer's " liability under this section shall not exceed the sum of FIVE THOUSAND " DOLLARS ($5,000.00), and subject to the same limit for each person " the Insurer's liability on account of bodily injuries to or the death " of more than one person as the result of one accident shall not exceed " the sum of TEN THOUSAND DOLLARS ($10,000.00).

" (2) To serve the Insured in the investigation of every accident Record.
" covered by this Policy and in the adjustment, or negotiations therefor,
" of any claim resulting therefrom.

" (3) To defend in the name and on behalf of the Insured any
" civil actions which may at any time be brought against the Insured
" on account of such injuries, including actions alleging such injuries
" and demanding damages therefor, although such actions are wholly
" groundless, false or fraudulent, unless the Insurer shall elect to settle
" such actions.

" (4) To pay all costs taxed against the Insured in any legal
" proceeding defended by the Insurer; and all interest accruing after
" entry of judgment upon such part of same as is not in excess of the
" Insurer's limit of liability, as hereinbefore expressed.

" (5) To reimburse the Insured for the expense incurred in pro-
" viding such immediate surgical relief as is imperative at the time such
" injuries are sustained.

" The foregoing indemnity provided by Sections D and/or E shall
" be available in the same manner and under the same conditions as
" it is available to the Insured to any person or persons while riding in
" or legally operating the automobile for private or pleasure purposes,
" with the permission of the Insured, or of an adult member of the
" Insured's household other than a chauffeur or domestic servant;
" provided that the indemnity payable hereunder shall be applied, first,
" to the protection of the named Insured, and the remainder, if any,
" to the protection of the other persons entitled to indemnity under
" the terms of this section as the named Insured shall in writing direct."

Statutory condition 8 endorsed on the Policy is in part as follows:—

" ACCIDENTS TO THE PERSONS AND PROPERTY OF OTHERS.—
" 8. (1) Upon the occurrence of an accident involving bodily injuries
" or death, or damage to property of others, the Insured shall promptly
" give written notice thereof to the Insurer, with the fullest information
" obtainable at the time. The Insured shall give like notice, with full
" particulars of any claim made on account of such accident, and every
" writ, letter, document or advice received by the Insured from or on
" behalf of any claimant shall be immediately forwarded to the Insurer.

" (2) The Insured shall not voluntarily assume any liability or
" settle any claim, except at his own cost. . . .

" (3) No action to recover the amount of a claim under this policy
" shall lie against the Insurer unless the foregoing requirements are
" complied with and such action is brought after the amount of the
" loss has been ascertained either by a judgment against the Insured
" after trial of the issue or by agreement between the parties with the
" written consent of the Insurer and no such action shall lie in either
" event unless brought within one year thereafter."

7. The Insured, R. E. Berry, gave due notice of the accident but he p. 17, l. 39.
did not at any time give any direction to the Respondents in regard to Exhibit 4.

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p. 12, l. 24.
p. 17, l. 3.

payment of the indemnity pursuant to the last mentioned provision of section " E " endorsed on the policy. The Respondents, however, instructed their solicitors to defend the action against Jean Berry. The Appellant was not aware until after the trial of this action that the Respondents had given the instructions.

pp. 106-109.

8. Following the judgment against Jean Berry correspondence took place in July and August, 1928, in which the Respondents' solicitors, while denying liability, offered in settlement to pay the Appellant the amount of her judgment against Jean Berry, less the amount of the judgment obtained by Jean Berry against the Appellant's husband: but this offer was not accepted.

p. 93.
p. 98.
p. 100, l. 9.
p. 103.
p. 105.

9. In September, 1929, the Appellant, on the ground that Jean Berry was not of age, unsuccessfully moved to strike out all proceedings in the action subsequent to the Writ, " with an ulterior object in view," as stated by Mr. Justice Macdonald in his judgment, and upon appeal to the Court of Appeal, her appeal also was dismissed on December 5th, 1928.

pp. 1-2.

10. The Appellant subsequently instituted proceedings against the Respondents and by her Statement of Claim, delivered on the 20th May, 1929, and amended on the 21st October, 1929, alleged that Jean Berry was a person insured within the meaning of section 24 of the Insurance Act, and that the Respondents as Insurers were bound in accordance with the Act to satisfy the judgment against Jean Berry.

pp. 3-4.

11. The Respondents by their defence alleged inter alia that Jean Berry was not insured with them; that she could not have maintained an action on the policy; that it was a condition of the policy that no person other than the Insured, R. E. Berry, should have a right of indemnity unless the Insured should so direct in writing; that no such direction had been given and that the policy did not contain the name or address of Jean Berry.

12. Section 13 of the Insurance Act (British Columbia Statutes 1925 ch. 20) is as follows:—

> " 13. Every policy issued by an Insurer shall contain the name " and address of the insurer, the name, address, and occupation or " business of the insured, the name of the person to whom the insurance- " money is payable, the premium for the insurance, the subject-matter " of the insurance, the indemnity for which the insurer may become " liable, the event on the happening of which such liability is to accrue, " and the term of the insurance."

p. 6, l. 16.

13. By order of the Court dated the 7th October, 1929, the Appellant obtained leave to amend by adding the name of R. E. Berry as a party defendant upon condition that such joinder ' shall not in itself entitle " the Plaintiff (now Appellant) to any relief which she could not have

" claimed if the action had commenced at the time of such joinder." The time for bringing an action on the policy had then expired. Record. Exhibit 3.

14. The judgment of the Supreme Court of British Columbia (Gregory J.) directing recovery by the Appellant of $5,000 was delivered on the 24th December, 1929. The learned Judge while inclined to think that Jean Berry was entitled to sue on the policy did not expressly so decide. He held in effect that the Respondents, by defending the Appellant's action against Jean Berry, had admitted their liability to her and deprived themselves of the right to rely on the defences set up. He also held, that the policy was not a gaming contract within the meaning of section 10 of the Insurance Act. p. 29, l. 18. p. 32, l. 3. p. 32, l. 11. p. 31, l. 29.

15. The Respondents having appealed to the Court of Appeal and the Appellant having cross-appealed the Court delivered judgment on the 30th June, 1930, dismissing the Respondents' appeal and allowing the Appellant's cross-appeal by increasing the amount of the judgment to $5,648. p. 37.

16. Mr. Justice Galliher, who delivered the leading judgment held that, while Jean Berry was not specifically named in the Insurance Policy, she answered the description of parties interested and to whom indemnity is available under section E and, in his opinion, she would be entitled to bring an action on proof that she came within the section. He did not regard the last line of section E " as the named insured shall in writing direct " as a condition precedent. The learned Judge distinguished the case of *Continental Casualty Company* v. *Yorke*, 1930, Supreme Court Reports, 180, from the present case on the ground that in the former the Company did not take any part in the proceedings instituted. pp. 38-40. p. 38, l. 22. p. 38, l. 35. p. 39, l. 4.

17. The Respondents' appeal to the Supreme Court of Canada was allowed on the 6th October, 1931. p. 64.

18. Mr. Justice Duff agreed with the conclusion of Mr. Justice Newcombe and in substance with his reasons. He agreed that the insurance contemplated by section 24 of the Insurance Act was one which conferred a right of indemnity, that is one which the person incurring the liability has the legal means, direct or indirect, of enforcing. Unless it be so restricted in its operation, it would be difficult to assign any certain limits to the scope of the section and secondly the section does provide for a method by which the liability of the Insurance Company to the person responsible for the injuries may be made available for the benefit of the person injured. In many, perhaps in all, cases the same result might be achieved through a receiver by way of equitable execution ; but the legislature had given the person injured a direct action against the Insurance Company in his own name. So long as the enactment is limited to enforcing a right which could have been enforced through the Courts by the person responsible for the injury the Insurance Company can have nothing to complain of, especially in cases in which the same object could have been effected by a more circuitous method. He considered that it would be an injustice to impose pp. 65-68. p. 66, l. 3. p. 66, l. 29.

Record. upon the Insurance Company by statute a liability to the daughter or to persons injured by the act of the daughter, which the daughter could not enforce directly or indirectly in the absence of some such enactment and that a construction leading to that result ought not to be accepted unless the language employed were so clear as to leave no reasonable way of escape. He also agreed that there was no ground for holding that the policy was
p. 66, l. 45. effected by R. E. Berry as Trustee for his daughter or that R. E. Berry was contracting as her agent.

p. 67, l. 34. As regards the question whether the Respondents by defending the action, had precluded themselves from denying that Jean Berry was "insured" under the policy within the meaning of section 24, the learned Judge considered that this was a recognition that the claim against her was a claim covered by the policy, but that it was not necessarily a recognition of Jean Berry's right to require indemnity either directly or indirectly by compelling her father to proceed.

pp. 68-72. **19.** Mr. Justice Newcombe, with whom Rinfret, Lamont and Cannon JJ.
p. 69, l. 46 to concurred, considered that it was unnecessary to refer to the submissions
p. 70, l. 3. of the Respondents other than the submission that Jean Berry was not entitled to sue upon the policy and that a case of liability under the policy
p. 70, l. 11. had not been established. He thought that section 24 of the Insurance Act was obviously a provision in aid of execution and in the nature of a garnishee proceeding. The action thereby authorised lies only if the judgment debtor, that is Jean Berry, is insured or has a right to recover indemnity from the insurer. Jean Berry was not a party to the contract between the Respondents and R. E. Berry and there was no consideration moving from her to the insurer for the covenant upon which the Appellant relies to establish that Jean Berry was insured within the meaning of
p. 71, l. 23. section 24. He considered the policy to have effect only as between the parties to it, namely R. E. Berry and the Respondents, and that, while the former might recover from the insurer, there was nothing to convince him that the insured could be compelled to exercise such a right of recovery or to undertake the duties or responsibilities of a trustee and he considered that the clause of the policy in question did not confer upon a licensee of the car a right of action upon the policy to recover against the insurer or to compel the insured to exercise his remedies. In regard to the Appellant's
p. 71, l. 42. contention that the Respondents were estopped by their conduct, in defending the action against Jean Berry, from denying liability under the policy, the learned Judge considered that the evidence suggested that the Respondents were acting in pursuance of their practice under section E of the Insuring Agreement and not with the intention or effect of incurring any obligation and in his opinion the essentials of estoppel were lacking and the Respondents' defence of the action against Jean Berry did not determine liability in a case where the Appellant was asserting a direct statutory obligation of the Respondents.

20. The Respondents submit that the judgment of the Supreme Court of Canada is right and should be affirmed for the following, among other

REASONS.

1. Because under the Policy in question the only person entitled to claim against the Respondents is the Insured, R. E. Berry.

2. Because Jean Berry had no legal or equitable interest in the Policy.

3. Because Jean Berry was not " insured " within the meaning of section 24 of the Insurance Act.

4. Because the purpose of section 24 is to simplify proceedings by giving a judgment creditor a direct, instead of a circuitous, remedy and that section does not purport to modify the terms of the contract of insurance.

5. Because the action of the Respondents in defending the Insured's daughter did not, in the circumstances, amount to an admission of liability or create an estoppel.

6. Because the Appellant at the trial of this action failed to establish liability on the part of Jean Berry so as to satisfy section 24 of the Insurance Act.

7. Because the indemnity clauses in the contract and statutory condition 8 (3) clearly contemplate that no action should be brought for any relief except by the named insured, R. E. Berry, and the extension of indemnity to the other classes referred to should only operate pro tanto through him to the indemnification of himself and any member of such classes as he should in writing direct.

8. Because the joinder of R. E. Berry as a co-defendant was ineffectual for any purpose, as the Appellant then had no possible claim against him or through him against the Respondents.

9. For the reasons given by Mr. Justice Duff and Mr. Justice Newcombe in the Supreme Court of Canada.

W. N. TILLEY.

ALFRED BULL.

In the Privy Council.

No. 11 of 1932.

On Appeal from the Supreme Court of Canada.

BETWEEN

ALICE MARIE VANDEPITTE (Married Woman the wife of E. J. Vandepitte) (*Plaintiff*) *Appellant,*

AND

THE PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK (*Defendants*) *Respondents.*

CASE FOR THE RESPONDENTS

THE PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK.

BLAKE & REDDEN,
17, Victoria Street, S.W.1.