Privy Council Appeal No. 11 *of* 1932.

Alice Marie Vandepitte - - - - - - *Appellant*

v.

The Preferred Accident Insurance Company of New York - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH NOVEMBER, 1932.

Present at the Hearing:

LORD TOMLIN.
LORD THANKERTON.
LORD MACMILLAN.
LORD WRIGHT.
SIR GEORGE LOWNDES.

[*Delivered by* LORD WRIGHT.]

The appellant, Alice Marie Vandepitte, sustained injuries on the 5th March, 1928, owing to the motor-car, in which she was a passenger and which her husband was driving, being involved in a collision with a motor-car driven by Jean Berry. Jean Berry was the daughter of R. E. Berry and was driving the car which was her father's property, with his permission. As she was a minor living with her father, he was civilly liable, under Section 12 of the Motor Vehicles Amendment Act, 1927, of British Columbia, for injuries sustained by the appellant due to his daughter's negligence, but in the case the appellant brought her action in the Supreme Court of British Columbia against Jean Berry, claiming that she was injured by Jean Berry's negligent driving. In the proceedings, the appellant's husband, E. J. Vandepitte, was brought in as third party. On the 13th June, 1928, judgment was given for the appellant for $4,600 and costs against Jean Berry, and for Jean Berry against E. J. Vandepitte for $2,300 and costs on the basis that both drivers

were negligent in the same degree. The appellant issued an execution against Jean Berry, but it was returned unsatisfied. Thereupon, on the 20th May, 1929, the appellant brought the present action in the Supreme Court of British Columbia, against the respondents, claiming to recover $5,648.71, the amount of the judgment and costs, in virtue of section 24 of the Insurance Act of British Columbia (Chapter 20 of 1925). The appellant succeeded in the Supreme Court and on appeal in the Court of Appeal of British Columbia, but in the Supreme Court of Canada the respondents' Appeal was allowed, and the appellant's action was dismissed with costs throughout. From that judgment the matter comes on appeal by special leave before their Lordships.

Section 24 of the Insurance Act (Chapter 20 of 1925) is in the following terms :—

> " 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."

Section 10 is as follows :—

> " (1) Every contract by way of gaming or wagering is void. (2) A contract is deemed to be a gaming or wagering contract where the insured has no interest in the subject-matter of the contract."

Part VII of the Act contains special provisions relating to automobile insurance, among which is section 152, which provides that no insurer shall make a contract for a period exceeding 14 days without a written application therefor, signed by the applicant or his agent duly authorised in writing, and sets out the particulars required : section 153 is in the following terms :—

> " Every policy 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 or other consideration 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."

Section 154 contains statutory conditions which are to be deemed to be part of any contract in force in the Province and to be printed on every policy, including paragraph 8, which reads as follows :—

> " (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. The insured shall not interfere in any negotiations for settlement or in any legal proceeding, but, whenever requested by the insurer, shall aid in securing information and evidence and the attendance of any witnesses, and shall co-operate with the insurer, except in a pecuniary way, in all matters which the insurer deems necessary in the defence of any action or proceeding or in the prosecution of any appeal.

" (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."

The policy here in question was for a period from noon on 14th April 1927, to noon on 14th April 1928. It was issued on a form of application as required by the statute, signed by R. E. Berry as the insured. The policy was headed " Combination Automobile Policy No. A. 12498," and embodied contracts between the insured R. E. Berry and two separate insurance companies, the New Jersey Insurance Company and the Preferred Accident Insurance Company, the respondents. It embodied the terms of the application by R. E. Berry and the Statutory Conditions. Sections A, B and C defined the obligations of the former company in respect of damage to or loss of the insured automobile, and Section D defined the same company's obligation in respect of " legal liability for damage to property of others," which was expressed to be to indemnify the insured against loss by reason of the legal liability imposed by law upon the insured " in respect of damage done to property." Section E embodied the obligations of the respondents and was in the following terms :—

" *Section E.—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 . . . . . 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 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 providing such immediate surgical relief as is imperative at the time such injuries are sustained."

The final clause of the policy was as follows:—

"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."

It was contended on behalf of the appellant that under the policy, and in the events which happened, Jean Berry was the insured within section 24 of the Act, and hence that the respondents were liable to pay the Appellant the amount of the loss. The contention was put in the alternative, either that Jean Berry was directly and in law a party to the contract being within the description of the persons other than R. E. Berry to whom the indemnity was available or that if not in law a party to the contract, she was a *cestui que trust* of the promise contained in the contract to extend the indemnity to such a person as herself, R. E. Berry having so stipulated as trustee. There is a further contention based on estoppel which may be considered separately and later.

The first mode of stating the appellant's case involves that R. E. Berry as his daughter's agent made a contract of insurance between her and the respondents. But a contract can only arise if there is the *animus contrahendi* between the parties: there is here no evidence that Jean Berry ever had any conception that she had entered into any contract of insurance. She certainly took no direct part in the conclusion of whatever contract there was: the policy was entirely arranged between R. E. Berry and the respondents and he alone filled in and signed in his own name and behalf the application required by section 152 of the Statute. It is said that the wide words defining the persons to whom the indemnity is available are sufficient to found the inference that R. E. Berry was intending to contract not only on behalf of himself but of any one who might come within the policy words "any person or persons while riding in or legally operating the automobile for private or pleasure purposes" with the appropriate permission, and reliance in support of this contention was placed on the well-known rule in regard to marine policies in which only the name of the agents need be stated, and

which are expressed to be made by them "as agents" or more frequently "as well in their own name as for and in the name or names of all and every person to whom the same doth may or shall appertain in whole or in part." But even under these wide words no one can claim the benefit of the policy, even if answering the general description, unless it is established that the person who directed the insurance to be effected actually intended to cover that particular person, or at least some one who should answer the description. The mere generality of the language is not in itself sufficient. Thus in *Graham Joint Stock Shipping Co.* v. *Merchants Marine Insurance Co.* [1924], A.C. 294, it was held that the policy only protected the owner and not the mortgagees: the rule had been previously illustrated by many cases, including *Boston Fruit Co.* v. *Brit. and Foreign M.I. Co.* [1906], A.C. 336, and also by *Yangtsze Insce. Ass.* v. *Lukmanjee* [1918], A.C. 585. In the present case there is no evidence that R. E. Berry had any intention to insure anyone but himself: even if in some cases the words of the policy taken with the surrounding circumstances might be held to found the necessary inference of intention that inference would fail here by reason of the statutory application. But even if he had so intended, he had no authority from Jean Berry to insure on her behalf and at no time did she purport to adopt or ratify any insurance even if made on her behalf. In these circumstances it is impossible to say that a contract existed between Jean Berry and the respondents, that is, it cannot be held that she was in law "insured" under the policy. This conclusion is arrived at quite apart from the provision of section 153 of the statute, which requires the insured's name and other particulars to be inserted in the policy. It is also arrived at apart from the form of the policy, which throughout in referring to the insured, refers back as a matter of construction to the named insured R. E. Berry, who filled in the statutory application form. The very clause on which the contention is based draws a pointed distinction merely as matter of words between "the insured" and "any person or persons riding, &c.," and between the named insured and "the other persons entitled to indemnity under the terms of this section." Furthermore there was no consideration proceeding from Jean Berry.

It is, however, argued on behalf of the appellant that even if their Lordships should hold, as they do, that Jean Berry was not a party in law to the insurance contract, she was a party in equity, and in that way was "insured" by the respondents within the meaning of section 24. These two steps of the argument require separate consideration.

The contention firstly is that R. E. Berry, as part of the bargain and for the consideration proceeding from him, stipulated that the respondents should indemnify his daughter, Jean Berry, as coming under the general words of description, in the same

manner and under the same conditions as himself, that is, that he created a trust of that chose in action for her as beneficiary. It cannot be questioned that abstractly such a trusteeship is competent. No doubt at common law no one can sue on a contract except those who are contracting parties and (if the contract is not under seal) from and between whom consideration proceeds: the rule is stated by Lord Haldane in *Dunlop Pneumatic Tyre Co., Limited*, v. *Selfridge & Co., Limited*, [1915] A.C. 847, at p. 853:—

> "My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quæsitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*."

In that case, as in *Tweddle* v. *Atkinson*, 1 B. & S. 393, only questions of direct contractual rights in law were in issue, but Lord Haldane states the equitable principle which qualifies the legal rule, and which has received effect in many cases, as for instance, *Robertson* v. *Wait*, 8 Ex. 299; *Affréteurs Réunis* v. *Leopold Walford*, [1919] A.C., 801; *Lloyds* v. *Harper*, 16 Ch. D. 290, viz., that a party to a contract can constitute himself a trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on the third party. The trustee then can take steps to enforce performance to the beneficiary by the other contracting party as in the case of other equitable rights. The action should be in the name of the trustee; if, however, he refuses to sue, the beneficiary can sue, joining the trustee as a defendant. But, though the general rule is clear, the present question is whether R. E. Berry can be held in this case to have constituted such a trust. But here again the intention to constitute the trust must be affirmatively proved: the intention cannot necessarily be inferred from the mere general words of the policy. Thus in *Irving* v. *Richardson*, 2 B. & Ad., 193, a mortgagee effected in the usual form an insurance on the full value of the ship. He claimed to recover the full amount, which was in excess of the mortgage debt, on the general principle now embodied in section 14 (2) of the Marine Insurance Act, 1906, that a mortgagee may insure on behalf and for the benefit of other persons interested as well as for his own benefit, "and recovering the whole, will hold the surplus beyond his own debt in trust for the mortgagor or other persons interested." It was held that the plaintiff was not entitled beyond the extent of his interest, that is, the mortgage debt, because he did not satisfy the jury of his actual intention in effecting the insurance to cover more than that. In the present case, there are not only the difficulties arising from the statutory provisions quoted above, but there is no evidence that R. E. Berry had any intention to create a beneficial interest for Jean Berry, either specifically or as member of a described class. Indeed, at no time either when the policy

was effected or before or after the accident is there any suggestion that R. E. Berry had any such idea. It is true that she was in the habit of driving the insured automobile, but if R. E. Berry read the clause or thought of the matter at all, he would naturally expect that if she did damage the claim would, under the Act quoted, be against him, as she was a minor living in his family. There is a further difficulty in the appellant's way under this head: R. E. Berry is the contracting party in law, but he has no insurable interest in Jean Berry's personal liability, since natural love and affection does not give such an interest in law: whenever she drove the car, if she was an insured person, she had an insurable interest in the chance that she might be held liable in damages for negligence, but on the assumption now being considered, viz., that she was no more than a *cestui que trust* in regard to the insurance, the contracting party was R. E. Berry, who had no insurable interest: hence the policy, in respect of that particular risk, was void under the express words of section 10 of the statute cited above. No doubt it has been held as a special rule in certain cases that a person having a special property in goods can insure on behalf and for the benefit of other persons interested as well as for his own benefit as is illustrated by section 14 (2) of the Marine Insurance Act, 1906, and *Waters* v. *Monarch Life Co.*, 5 El. & Bl., 870, but here no question of a special property in goods was involved: R. E. Berry had no insurable interest in the possible liability of his daughter. But if it is to be said that the *cestui que trust* is to be treated as if in law the contracting party, then Jean Berry must have satisfied the requirements of the Statute, as being the "insured," in particular sections 152 and 153, which it cannot be said that she did. There is a further objection to applying to her case the idea of her being the *cestui que trust* under the policy, since the doctrine of the equitable interest of a beneficiary under a contract of a third party relates to benefits under the contract, whereas in an insurance such as that contended for serious duties and obligations rest on any person claiming to be insured, which necessarily involve consent and privity of contract.

Their Lordships are of opinion that no trusteeship is here made out, but in any case, they could not hold that the provisions of section 24 were satisfied by any but a contract at law, enforceable directly against the insurers by the insured in her own name. That section must be read with the relevant sections of the Act, which have been quoted above and also with the terms of the policy. In their Lordships' opinion, an equitable right in Jean Berry (even if it were constituted) enforceable only in the name of the statutory insured, R. E. Berry, would not satisfy section 24, which involves an added burden on the insurance company, and must be strictly construed.

A decision of Roche J. in *Williams* v. *Baltic Insurance Association of London*, 1924, 2 K.B. 282, has been relied on by the appellants' counsel. The facts in that case and the contractual

terms were however different from those in question here and the provisions of the relevant statutes were not the same: nor is it clear whether the learned Judge treated the driver of the car as directly insured or as a *cestui que trust*. Their Lordships have not been able to derive from that case any principles helpful to the issue now before the Board.

The decision their Lordships have arrived at involves the conclusion that the final paragraph of the policy gives no enforceable right to anyone. The clause constitutes, in their opinion, merely a promissory representation or statement of an intention on the part of the insurers not binding in law or equity. On the other hand "honour policies" are common in insurance business, and any insurance company which failed to fulfil its "honourable obligations" would be liable to pay in loss of business reputation. The defence in the present case is however taken under somewhat unusual circumstances in a claim by strangers on a special statutory enactment: neither Jean Berry nor R. E. Berry is asserting any right.

The appellant raised a further point that even if in fact she was not the insured within the meaning of Section 24, she became so by reason of an estoppel. But the only estoppel alleged was a matter between the respondents and Jean Berry: the respondents took up and conducted Jean Berry's defence in the claim for damages, and it was said that in doing so, they conclusively admitted she was the insured. Even, however, if that were so, that would not benefit the appellant, because she was no party to any such estoppel and further section 24 is dealing with one who is insured in fact and by an actual contract. Their Lordships do not think, however, that any such estoppel is made out even as between Jean Berry and the respondents. This point also fails.

In their Lordships' opinion the appeal should be dismissed with costs, and they will humbly so advise His Majesty.

In the Privy Council.

ALICE MARIE VANDEPITTE

v.

THE PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK.

DELIVERED BY LORD WRIGHT.

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