1934
*Nov. 23
*Dec. 21

TRANS-CANADA INSURANCE COMPANY (DEFENDANT)..... APPELLANT;

AND

ANNIE M. WINTER (PLAINTIFF).... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Statutes—Insurance—Motor vehicles—Repeal of provision in statute and enactment at same time in another statute of substantially the same provision—Retrospective construction of latter provision—Injury to passenger in motor car—Action and recovery of judgment by injured person against owner (driver) of car, and subsequent action by injured person against owner's insurer; the actions being taken subsequent to expiry of insurance policy and subsequent to later repeal and enactment of certain respective legislation—Right of injured person to judgment against insurer—S. 87 (4) (repealed September 1, 1932) of The Highway Traffic Act (Ont.) (as amended in 1930, c. 47) —S. 183 (h) (coming into force September 1, 1932) of The Insurance Act (Ont.) (as amended in 1932, c. 25)—"Motor Vehicle Liability Policy"—Time limitation for bringing action.

Appellant insured A. by an automobile insurance policy, dated May 2, 1931, and expiring May 2, 1932. On February 9, 1932, an accident occurred in which respondent, a passenger in A.'s car (driven by A.), was injured. On December 3, 1932, respondent commenced action for damages against A. The action was tried and on March 29, 1933, judgment was given against A. Respondent, not having received payment, commenced, on May 8, 1933, an action against appellant for the amount of the judgment (and taxed costs and subsequent interest), claiming under s. 87 (4) of *The Highway Traffic Act* (Ont.) (as enacted in 1930, c. 47, s. 6) and, or in the alternative, under s. 183 (*h*) of *The Insurance Act* (as enacted by *The (Automobile) Insurance Act, 1932,* c. 25). On September 1, 1932, said s. 87 (4) had been repealed, and on the same date said s. 183 (*h*) had come into force. On a stated case (in which certain facts were admitted) appellant claimed that, in point of law, respondent was not entitled to judgment against it.

Held, affirming judgment of the Court of Appeal for Ontario, [1934] O.R. 318, that respondent was entitled to succeed.

Per Rinfret, Cannon, Crocket and Hughes JJ.:

In view of the repeal on September 1, 1932, of provisions, dealing with certain subject matters, in *The Highway Traffic Act,* and the enactments, taking effect on the same date, introducing into *The Insurance Act* provisions dealing with the same subject matters, and on comparing and considering the provisions repealed and enacted respectively as aforesaid, said s. 183 (*h*), introduced as aforesaid into *The Insurance Act,* between which section and s. 87 (4) (repealed as aforesaid) of *The Highway Traffic Act* there was (as was held) no substantial difference as to the rights of third parties against an insurer, should be construed as retrospective. Such construction was impelled by a consideration of effects of a contrary construction—

*PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ.

effects which it was inconceivable that the legislature intended. *Ex parte Todd; In re Ashcroft*, 19 Q.B.D. 186, at 195, cited and applied.

The words "motor vehicle liability policy" in said s. 183 (*h*) are wide enough in form to cover the policy in question. It cannot be said that a motor vehicle liability policy is necessarily the one prescribed by *The (Automobile) Insurance Act, 1932* (amending *The Insurance Act*, and coming into force September 1, 1932) merely because *The Highway Traffic Act, 1932* (c. 32), s. 9, (coming into force September 1, 1932), introduces into *The Highway Traffic Act* s. 87 (1) to the effect that a motor vehicle liability policy shall be in the form prescribed by *The Insurance Act*.

The exclusion, by s. 183 (*d*) of *The Insurance Act* (as enacted by *The (Automobile) Insurance Act, 1932)*, from an insurer's liability under an owner's policy or a driver's policy, of a claim by a passenger in the motor vehicle unless the coverage is expressly extended under s. 183 (*f*), did not exclude respondent's claim, as at the time of the accident there was no such exclusion from liability and such liability was in fact provided for by A.'s policy.

As respondent's action against appellant was brought within two months after respondent's judgment against A.—and within two months after respondent's "cause of action arose"—the limitation of one year, either in the statutory conditions in the policy or in the statutory conditions brought into force by *The (Automobile) Insurance Act, 1932*, did not bar respondent from recovering against appellant.

APPEAL by the defendant insurance company from the judgment of the Court of Appeal for Ontario (1) dismissing its appeal from the judgment of Kingstone J. (2) who held (upon a stated case in which certain facts were admitted) that in point of law the plaintiffs (including the present respondent) were entitled to judgment against the defendant for the amount of the judgments recovered by the plaintiffs against one Axford and their taxed costs. (On motion for judgment in accordance with said holding, judgment was given for the present respondent against the defendant for $2,000, and for the other plaintiffs for $200 and $280 respectively, and for the taxed costs of the action against Axford and for interest.)

(An application by defendant to the Court of Appeal for Ontario for leave to appeal from its judgment to the Supreme Court of Canada as to the claims of the plaintiffs other than the present respondent was refused).

The material facts of the case and the questions in issue are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

(1) [1934] O.R. 318; [1934] 3 D.L.R. 17.

(2) [1934] O.R. 87; [1934] 1 D.L.R. 358.

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A. C. Heighington K.C. for the appellant.

R. J. Waterous for the respondent.

DUFF C.J.—I concur in the dismissal of the appeal.

The judgment of Rinfret, Cannon, Crocket and Hughes JJ. was delivered by

HUGHES J.—On or about the 9th of February, 1931, the respondent Annie M. Winter and one Gertrude Mosley were riding in a motor vehicle owned and operated by one J. Leslie Axford, when an accident occured resulting in injury to the passengers. At the time of the accident J. Leslie Axford was insured by a contract of automobile insurance with the appellant. The policy was dated May 2nd, 1931, and expired according to its terms on May 2nd, 1932.

On December 3rd, 1932, Annie M. Winter, Gertrude Mosley and George Mosley, husband of Gertrude Mosley, commenced an action for damages for negligence against Axford. The action duly came on for trial and on March 29th, 1933, judgment was given against Axford in favour of the plaintiffs as follows:—Annie M. Winter $2,000, Gertrude Mosley $200, and George Mosley $280, together with the costs of the action which were subsequently taxed at $650.95. The judgment creditors did not receive payment from Axford and on May 8th, 1933, they commenced an action against the insurer for the amounts awarded to them by the judgment and for the taxed costs and interest from the date of the judgment. They claimed that they were entitled to recover against the insurer by virtue of section 87 (4) of *The Highway Traffic Act,* as enacted by Statutes of Ontario, 1930, chapter 47, section 6, and, or in the alternative, by virtue of section 183 (*h*) of *The Insurance Act,* as enacted by *The (Automobile) Insurance Act, 1932,* Statutes of Ontario, 1932, chapter 25, section 2. The defence of the insurer was that the former provision was repealed on September 1st, 1932, and that the latter statute, which came into force on that date, was not applicable. A special case was submitted to the court and the Honourable Mr. Justice Kingstone gave judgment against the insurer. The latter appealed to the Court of Appeal for Ontario and the appeal was dismissed. The

insurer now appeals to this Court in respect to that part of the judgment which awards to Annie M. Winter $2,000 and interest from the date of the judgment.

The dates and events are somewhat numerous and it may be helpful to set them out in chronological order.

2nd May, 1931—Delivery of policy.

9th February, 1932—Accident.

2nd May, 1932—Expiration of policy.

1st September, 1932—Repeal of section 87 (4) of *The Highway Traffic Act.*

1st September, 1932—Coming into force of *The (Automobile) Insurance Act, 1932,* including sections 169 to 183 (*k*) of *The Insurance Act.*

3rd December, 1932—Action commenced against insured.

29th March, 1933—Judgment against insured.

8th May, 1933—Action commenced against Insurance Company.

The parties to this appeal admitted in the stated case that the respondent, at the time of the accident, was riding in a motor vehicle owned and operated by J. Leslie Axford, that the respondent commenced an action on December 3rd, 1932, against Axford for damages for negligence arising out of the operation by Axford of the automobile and that she recovered a judgment against him on March 29th, 1933, for $2,000 and costs and that the judgment and costs were unpaid when, on May 8th, 1933, the respondent commenced this action against the appellant. It was further admitted that Axford was insured at the time of the accident by a policy of automobile insurance with the appellant in respect of the automobile in question, effective from May 2nd, 1931, to May 2nd, 1932, with a coverage sufficient in amount. It was further admitted that the injuries for which the damages were awarded to the respondent were occasioned by the negligent operation by Axford of the automobile described in the policy.

The above section 183 *h* (1) provides that any person having a claim against an insured for which indemnity is provided by a motor vehicle liability policy shall, although such person is not a party to the contract, be entitled upon recovering a judgment therefor against the insured to have the insurance money payable under the policy applied in or towards satisfaction of the judgment and may maintain

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an action against the insurer to have the insurance money so applied. Section 169 (*f*) of *The Insurance Act*, enacted at the same time as 183 (*h*), provides that "Motor Vehicle Liability Policy" shall mean a policy or that part of a policy insuring the owner or driver of an automobile against liability for loss or damage to persons or property. The term "motor vehicle liability policy" appears in the following sections added to *The Highway Traffic Act* by section 6 of *The Highway Traffic Amendment Act, 1930*: —78 (1) (*a*); 78 (3); 87 (1); 87 (3); 87 (4); 87 (4) (*a*); 87 (4) (*b*); 87 (5); 87 (6) and 87 (7). The words "motor vehicle liability policies" appear in *The Insurance Act, 1931*, Statutes of Ontario, Chapter 49, section 4. It cannot, therefore, well be said, as contended by the appellant, that a motor vehicle liability policy is necessarily the one prescribed by *The (Automobile) Insurance Act, 1932*, merely because *The Highway Traffic Act, 1932*, section 9, introduces into *The Highway Traffic Act* section 87 (1) to the effect that a motor vehicle liability policy shall be in the form prescribed by *The Insurance Act*. I am, therefore, of opinion that the words "motor vehicle liability policy" in section 183 (*h*) are wide enough in form to cover the policy in question in the appeal. It follows, therefore, that idemnity is or was provided by a motor vehicle liability policy. The indemnity is or was an indemnity to the insured, and his right to indemnity arose when the accident occurred, namely, during the term of the policy. If the insurer had cancelled the policy immediately after the accident, the insured's right to indemnity would not have been affected in any way. The right of the insured to indemnity did not terminate when the term of the policy expired. If on the day when action was commenced against the insured, namely, on December 3rd, 1932, the respondent had in the words of section 183 (*h*) said to the insured, "I have a claim against you," the insured could truly have replied, "Indemnity is provided by a motor vehicle liability policy."

The appellant, however, contends that *The (Automobile) Insurance Act, 1932*, is not retrospective. In this connection, it is important to observe at the outset that many of the provisions introduced into *The Highway Traffic Act* by *The Highway Traffic Amendment Act, 1930*,

section 6, concerned largely the subject matter of insurance, for example, 87 (1), which defined the coverage of every motor vehicle liability policy; 87 (2), which permitted excess coverage; 87 (3), which provided for approval of the form of the policy by the superintendent of insurance; 87 (4), which provided that every motor vehicle liability policy should be subject to certain provisions notwithstanding any law to the contrary. One of the latter provisions was that a judgment creditor with a judgment arising out of a claim against an insured for which indemnity was provided by a motor vehicle liability policy should, on behalf of himself and all other persons having similar judgments or claims, be entitled to maintain an action against the insurer to have the insurance money applied in satisfaction of such judgment or judgments. I have referred to the above provisions at some length in order to make it quite obvious that many of the provisions were largely insurance provisions which were rather more appropriately to be sought in an insurance Act. The desired alterations in these largely insurance provisions, whether formal only or substantial, could not be accomplished by amendment, as there was a transfer also, so to speak, of them from *The Highway Traffic Act* to *The Insurance Act,* and repeal and re-enactment were necessary. On September 1st, 1932, many wholly or partly insurance provisions disappeared from *The Highway Traffic Act* and appeared in more or less altered form in *The Insurance Act.* For example, provisions relating to the following subject matters may be found in the following sections of *The Highway Traffic Act* as amended by *The Highway Traffic Amendment Act, 1930,* chapter 47, section 6, and in *The Insurance Act,* as amended by *The (Automobile) Insurance Act, 1932,* chapter 25, section 2, respectively:— approval of motor vehicle liability policies by the superintendent of insurance, 87 (3) and 183 (*f*); extent of ordinary coverage, 87 (1) and 183 (*a*) (*b*) (*d*) and (*e*); excess coverage, 87 (2) and 183 (*f*); rights of third parties against insurer, 87 (4) and 183 (*h*). It is significant, however, that the following provision of *The Highway Traffic Act* (as amended in 1930):

71 (2) This Part shall only apply * * * to motor vehicle liability policies issued or in force after the date of coming into force of this Part,

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re-appeared as section 170 (1) of *The Insurance Act* as follows:—

> This Part shall apply to automobile insurance and to any insurer carrying on the business of automobile insurance in the Province and to all contracts made in the Province on or after the date of coming into force of this Part.

It is to be observed that the latter enactment does not contain the word "only," and it should not be construed as necessarily restrictive.

It is inconceivable that the legislature intended to cut off claims of third parties in all policies expired or in force at the time of the repeal of 87 (4) and the enactment of 183 (*h*). Such a conclusion would mean that the potential claims or rights *in futuro* of third parties in policies issued as late as August 31st, 1932, would be barred although the whole term of the policy with the exception of the day of delivery was within the time covered by the new enactment.

Now, there is no substantial difference between the rights of third parties against an insurer under 87 (4) and under 183 (*h*), although the appellant contends that the rights of third parties under 183 (*h*) were substantially different from their rights under 87 (4) in that (*a*) the repealed statute applied to judgment creditors only, and (*b*) under the repealed statute, it was necessary to shew an attempt to collect from the insured. These contentions are not well founded. Both 87 (4) and 183 (*h*) apply to judgment creditors; and 87 (4) did not provide that an attempt to collect first from the insured should be shewn. The latter was necessary only under the former section 85 of *The Insurance Act*. See *The Continental Casualty Company* v. *Yorke* (1). In his judgment in the Court of Appeal for Ontario (2), the Honourable Mr. Justice Macdonnell referred to a statement in the judgment of Lord Esher, M.R., in *Ex parte Todd; In re Ashcroft* (3). The point involved in that case was whether section 47 of the *Bankruptcy Act*, 1883, which avoided certain voluntary settlements executed by a bankrupt, was or was not retrospective. Lord Esher, in the course of his judgment, referred to the fact that in

(1) [1930] Can. S.C.R., 180. (2) [1934] O.R. at 323-4.
(3) (1887) 19 Q.B.D. 186, at 195.

In re Player (1), Mathew J. had expressed the opinion that so much of section 47 as was identical with section 91 of the former Act applied to matters which happened before the Act came into operation but that any part of it which was a new enactment was not retrospective. Later on Lord Esher stated:—

> In determining whether any provision of an Act was intended to be retrospective or not, I think the consequences of holding that it is not retrospective must be looked at, and to my mind it is inconceivable that the legislature, when, in a new Act which repeals a former Act, they repeat in so many words certain provisions of the repealed Act, should have intended that persons who, before the passing of the new Act, had broken the provisions of the old Act—who had been doing that which the legislature thought to be wrong—should entirely escape the consequences of their wrongdoing by reason of the repeal of the old Act. I think, therefore, that, so far as s. 47 is a repetition of s. 91, the legislature obviously intended to replace the old enactment at once by the new one, and that, to that extent, s. 47 must apply to transactions which took place before the commencement of the new Act. But why should we carry it any further, and say that the new part of s. 47 applies to antecedent transactions? I can see no reason for doing so, and I think it is a wholesome doctrine to hold that the section is retrospective so far as it is a repetition of the former enactment, but that it is not retrospective so far as it is new.

Fry, L.J., said that to say that a section of an Act was in part retrospective and in part not, struck him as a somewhat novel mode of interpretation. Lopes, L.J., agreed with Lord Esher. The view of the latter was unanimously applied by the Court of Appeal to the right against the insurer of the respondent third party in the case at bar, and I have not been able to find any valid reason why it should not have been so applied.

The appellant also contends that the respondent was a passenger in the automobile owned and driven by Axford and that section 183 (*d*) of *The Insurance Act* as enacted by section 2 of *The (Automobile) Insurance Act, 1932*, excludes from the liability of an insurer under an owner's policy or a driver's policy, a claim by a passenger in the motor vehicle unless the coverage is expressly extended under section 183 (*f*). At the time of the accident, however, there was no such exclusion from liability and such liability was in fact provided for by sections (A) and (B) of the insuring agreements in the policy which the appellant delivered to Axford and which was in force at the time of the accident.

(1) (1885) 54 L.J. (Q.B.D.) 553.

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The appellant further contends that there was no money payable under the policy at the time the action was brought against the insurer because at that time the rights of the insured to recover under the policy, in any event, were barred by lapse of time. The policy does not support this contention, as it provides by Automobile Statutory Condition 8 (3) (printed on the policy) that no action under the policy shall lie against the insurer unless 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 action shall lie in either event unless brought within one year thereafter. This action was brought within two months after the judgment. The statutory conditions brought into force by *The (Automobile) Insurance Act, 1932,* section 2, provide that every action or proceeding in respect of loss or damage to persons or property shall be commenced within one year after the cause of action arose and not afterwards. This action was brought within two months after the respondent's cause of action arose.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Symons, Heighington & Shaver.*

Solicitors for the respondent: *Waterous, Wallace & Hagey.*