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*Feb. 3.
*Oct. 6.

THE PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK (DEFENDANT) ..... } APPELLANT;

AND

ALICE MARIE VANDEPITTE (PLAINTIFF) ..... } RESPONDENT;

AND

R. E. BERRY (DEFENDANT).

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Insurance, accident—Automobile driven by insured's daughter—Judgment obtained against her for negligent driving—Action defended by insurance company—Action against insurance company to recover amount of judgment—Liability—Estoppel—Insurance Act, B.C., 1925, c. 20, s. 24.

B, the owner of an automobile, was insured against loss in the appellant company. The respondent was injured while riding in a car driven by her husband which collided with B's car driven by his daughter with B's permission and recovered judgment against her for damages, the appellant company taking charge of the defence on the trial. The re-

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

spondent then brought an action against the appellant insurance company under section 24 of the *Insurance Act* (B.C.) 1925, c. 20, to recover the amount of the judgment rendered against B's daughter. That section provides: "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." Under the policy, the indemnity to the owner was also "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 * * * with the permission of the insured * * *."

Held, reversing the judgment of the Court of Appeal (43 B.C. Rep. 161), that the respondent was not entitled to recover judgment against the appellant company for the amount recovered in the judgment against B's daughter as the latter was not "insured" within the meaning of s. 24 of the *Insurance Act*. Section 24 of the *Insurance Act* is a provision in aid of execution and in the nature of a garnishee proceeding. The action thereby authorized lies only if the judgment debtor, in this case B's daughter, is insured or has a right to recover indemnity from the insurer. The policy being between B. and the appellant company, B's daughter is not a party to it and there is no consideration moving from her to the insurer for the covenant upon which the respondent relies to establish that B's daughter was insured within the meaning of section 24. While it may be that B, according to the covenant, may recover from the insurer, presumably for the benefit of a person driving his car with his permission, it cannot be said that the insured can be compelled to exercise such a right of recovery or to undertake the duties and responsibilities of a trustee, unless by his consent or by reason of his having become a custodian of indemnity belonging to his daughter. Section 24 does not confer upon the 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 for the recovery and the insured cannot be compelled to become a trustee for a stranger for no other cause than that he had permitted the stranger to drive his car or to ride in it at a time when that stranger negligently caused an accident in which a third party suffered bodily injuries.

Held, also, that the appellant company, by its conduct in defending the respondent's action against B's daughter, was not estopped from denying liability under the insurance policy on the ground that she was not "insured" within the meaning of section 24 (*).

(*) *Reporter's Note:* Leave to appeal to the Privy Council was granted on application to the latter, on the 7th of December, 1931.

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APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, Gregory J. (2) which had maintained the respondent's action for $5,000 and allowing, on a cross-appeal, a further sum of $648.70.

The material facts of the case and the question at issue are stated in the above head-note and in the judgments now reported.

W. N. Tilley K.C., and *N. B. Gash K.C.*, for the appellant.

C. L. McAlpine for the respondent.

DUFF, J.—I agree with the conclusion of my brother Newcombe and in substance with his reasons.

The action out of which the appeal arises was instituted under s. 24 of the B.C. *Insurance Act* of 1925, c. 20, which reads 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.

The respondent was injured in a motor accident, the car in which she was a passenger having come into collision with a car owned by the defendant, R. E. Berry, and driven by his daughter, Jean Berry. The judgment was against Jean Berry for $4,600 damages and costs taxed at $780.25. In the action Jean Berry was the sole defendant, and she was defended by solicitors appointed by the appellants, professing to act in pursuance of the policy, her father, R. E. Berry, having given notice of the accident pursuant to the policy.

The B.C. courts held that by virtue of this policy, Miss Jean Berry was "insured" within the meaning of s. 24 in respect of any liability attaching to her by reason of automobile accidents while driving a car belonging to her father, and consequently that the respondent was entitled to recover from the appellants the amount of her judgment up to the sum named in the policy.

(1) (1930) 43 B.C. Rep. 161; [1930] 3 W.W.R. 143.
(2) (1929) 42 B.C. Rep. 255.

I agree that the insurance contemplated by s. 24 is one which confers a right of indemnity, that is within the protection of the law, that is to say, one which the person incurring the liability has the legal means, direct or indirect, of enforcing. I think this is so for two reasons. First, unless it is so restricted in its operation, it is difficult to assign any certain limits to the scope of the section. Second, 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 cases, no doubt, the same result might be achieved through a receiver by way of equitable execution—perhaps in all cases; but the legislature has seen fit to give to the person injured a direct action against the insurance company in his own name, and there may have been very good reasons for doing so. So long as the enactment is limited to enforcing against the insurance company a right which could have been enforced through the courts by the person responsible for the injury, the insurance company, so far as one can see, can have nothing to complain of, especially in cases in which the same object could have been effectuated by a more circuitous method. It would, however, be an obvious injustice to establish by legislation a right of recourse against the insurance company in respect of which no person having a right of indemnity enforceable against the insurance company, is in any way responsible. Here the father, R. E. Berry, was responsible for his daughter's act under s. 12 of c. 44 of the British Columbia statutes of 1926 and 1927, but the respondent elected to proceed against the daughter. No judgment having been recovered against the father, the conditions never arose, under which, alone, by the terms of the policy, the insurance company could be called upon to indemnify him in respect of his liability to the respondent. It would, I repeat, be a monstrous injustice to impose 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 a construction leading to that result ought not to be accepted unless the language employed is so clear as to leave no reasonable way of escape.

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The respondent bases her claim upon two alternative contentions. The first is that Miss Berry was entitled to require the insurance company to indemnify her in respect of the judgment recovered against her, either directly or indirectly, by calling upon her father to take proceedings under the policy. The second ground is that in consequence of the steps taken by the insurance company in defence of the action, they are estopped from denying Miss Berry's right to indemnity under the policy, as against both Miss Berry and the plaintiff.

It will be convenient to consider these contentions in the order in which I have stated them. I agree with my brother Newcombe, that there is no ground for holding that the policy was effected by R. E. Berry as trustee for Miss Berry.

The clause relied upon, by which the indemnity under section E becomes available for the benefit of the classes of persons mentioned in it, does not, I think, disclose an intention to declare that the named insured is contracting as trustee. That clause is in these words:—

> The foregoing indemnity provided by section 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 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 may be that a trust would arise in consequence of a written direction by the insured under this clause; but until there is such a direction, at all events, it seems clear that the named insured is entirely master of the situation, and under no enforceable obligation to require the company to indemnify any one of the classes of persons described. Indeed until a direction in writing is given, he is not entitled to require the insurance company to provide indemnity in respect of any liability other than his own.

Then as to agency. The fair inference from the clause as a whole is that he is not contracting as agent; and since he is not professing to contract as agent, ratification (assuming there be adequate evidence of ratification) would be of no avail.

A word upon *Williams* v. *Baltic Insurance Association of London* (1). There the action was brought by the named insured; and ratification by the beneficiary before the accident occurred brought the case within the scope of Lord Campbell's judgment in *Waters'* case (2). The question of the right of the beneficiary to recover on the policy in her own name is not discussed in the judgment, and, apparently, that question was not considered material by Roche J. The judgment lends no support to the respondent.

There remains the question whether, by defending the action, the appellants have precluded themselves from denying that Miss Berry was "insured" under policy within the meaning of s. 24. The appellants professed to undertake the defence of the action on her behalf under the policy, and upon the invitation of the father. That was a recognition that the claim against Miss Berry was a claim covered by the policy; but it was not necessarily a recognition of Miss Berry's right to require indemnity either directly or indirectly by compelling her father to proceed. The course of the company is quite naturally attributable to a desire to fulfil their obligations to R. E. Berry himself; and there is no evidence to justify the conclusion that the solicitors who acted for Miss Berry had not her full consent to do so. It is impossible to affirm, judicially, upon the evidence before us, that the solicitors derived their authority solely from the policy. Whether, in assuming the defence of the action in execution of a contract with the father, and with the daughter's consent, the company may have exposed themselves to a charge of maintenance, is another question. The appeal should be allowed and the action dismissed with costs throughout.

The judgment of Newcombe, Rinfret, Lamont and Cannon JJ. was delivered by

NEWCOMBE, J.—The respondent was injured while riding in a car, driven by her husband, which collided with a car belonging to the defendant, R. E. Berry, and driven by his daughter, Jean Berry. The respondent, in an action against Jean Berry, recovered judgment on 13th June, 1928, for $4,600 damages and costs, taxed at $780.25; and, in third

(1) [1924] 2 K.B. 282. (2) (1856) 5 E. & B. 870.

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party proceedings, the respondent's husband was held liable to contribute to Jean Berry $2,300 and costs, upon the finding that he and she, the drivers of the two cars, were guilty of negligence in the same degree.

The defendant, R. E. Berry, was insured, by a combination automobile policy of the appellant company, against legal liability for bodily injuries or death of one person, for $5,000; and it was provided by the clause described as "Insuring agreements," printed upon the back of the policy, that the insurers agreed, among other clauses, to section E, entitled "Legal liability for bodily injuries or death", and thereby undertook (quoting the words and figures),

(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 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 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 is provided by the *Insurance Act* of British Columbia, 1925, c. 20, s. 24, that

> 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.

The defendant, R. E. Berry, had given notice of the accident to the insurers, pursuant to the policy, and his daughter, Jean, in the action to which I have referred, was represented and defended by solicitors named and instructed by the appellant company.

The present action was commenced on 20th May, 1929, against the appellant company as sole defendant; but, by order of 7th October, 1929, R. E. Berry was added as a defendant, subject to a proviso

> that the joinder should not in itself entitle the plaintiff to any relief which she could not have claimed if the action had commenced at the time of such joinder.

The action was tried before Gregory, J., of the Supreme Court of British Columbia (1), who held that the plaintiff (respondent) was entitled to recover from the defendant company (appellant) the sum of $5,000 and her costs. The company appealed, and the respondent cross-appealed claiming that the amount of her recovery was insufficient and should be increased by the sum of $648.70. The Court of Appeal, composed of Martin, Galliher and McPhillips, JJ. (2), dismissed the appeal and allowed the cross-appeal, directing that the judgment should be increased by the sum claimed.

Upon the appeal to this court the appellant company contends that Jean Berry was not entitled to sue upon the policy, and that a case of liability under the policy has not been established. There are other submissions on behalf of the appellant, to which, in my view, it will be unnecessary to refer.

The main question depends upon the interpretation of s. 24 of the *Insurance Act* in its application to the provisions of section E of the Insuring agreements, by which it is

(1) (1929) 42 B.C. Rep. 255.

(2) (1930) 43 B.C. Rep. 161; [1930] 3 W.W.R. 143.

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provided, as already shewn, that the indemnity 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 * * *.

Section 24 is obviously a provision in aid of execution and in the nature of a garnishee proceeding. The action thereby authorized lies only if the judgment debtor, in this case Jean Berry, is insured, or, as I interpret it, has a right to recover indemnity from an insurer. Now the policy is between R. E. Berry, the insured, and the appellant company, the insurer, and Jean Berry, the insured's daughter, is not a party to it. Moreover, there is no consideration moving from her to the insurer for the covenant upon which the respondent relies to establish that Miss Berry is insured, within the meaning of section 24 of the statute. In *Colyear* v. *Mulgrave* (1), to which the Court of Appeal referred with approval In *re D'Angibau, Andrews* v. *Andrews* (2), it was held that where two persons for valuable consideration as between themselves covenant to do some act for the benefit of a third person, that person cannot enforce the covenant against the two, though either of the two might do so against the other.

In *Tweddle* v. *Atkinson* (3), in the Queen's Bench, the judgment of Wightman, J., in which Crompton and Blackburn, JJ. agreed, is as follows:

> Some of the old decisions appear to support the proposition that a stranger to the consideration of a contract may maintain an action upon it, if he stands in such a near relationship to the party from whom the consideration proceeds, that he may be considered a party to the consideration. The strongest of those cases is that cited in *Bourne* v. *Mason* (4), in which it was held that the daughter of a physician might maintain assumpsit upon a promise to her father to give her a sum of money if he performed a certain cure. But there is no modern case in which the proposition has been supported. On the contrary, it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit.

In *Gray* v. *Pearson* (5), Willes, J., said, at the beginning of his judgment:

> I am of opinion that this action cannot be maintained, and for the simple reason,—a reason not applicable merely to the procedure of this country, but one affecting all sound procedure,—that the proper person to bring an action is the person whose right has been violated.

(1) (1836) 2 Keen 81; 44 E.R. 191.
(2) (1880) 15 Ch. D. 242.
(3) (1861) 1 B. & S. 393.
(4) (1695) 1 Vent. 6.
(5) (1870) L.R. 5 C.P. 568, at 574.

In *Gandy* v. *Gandy* (1), Bowen, L.J., said

> It was supposed at one time in the history of our common law, that there was an exceptional class of cases, in which where a contract was made for the benefit of a person who was not a contracting party, that is to say, a stranger, it could be enforced by that person at law. It would be mere pedantry now to go through the history of that idea: it is sufficient to say that in the case of *Tweddle* v. *Atkinson* (2), to which we were referred, the true common law doctrine has been laid down. But whatever may have been the common law doctrine, if the true intent and the true effect of this deed was to give to the children a beneficial right under it, that is to say, to give them a right to have these covenants performed, and to call upon the trustees to protect their rights and interests under it, then the children would be outside the common law doctrine, and would, in a Court of Equity, be allowed to enforce their rights under the deed. But the whole application of that doctrine of course depends upon its being made out that upon the true construction of this deed it was a deed which gave the children such a beneficial right.

Numerous other cases might be cited to the same effect, and Lord Haldane's speech in *Dunlop Pneumatic Tire Coy.* v. *Selfridge and Coy.* (3), should not be overlooked.

I construe the policy to have effect only as between the parties to it, namely, R. E. Berry and the company; and while it may be that the former, according to the covenant, may recover from the insurer, presumably for the benefit of a person driving his car with his permission, I find nothing to convince me that the insured can be compelled to exercise such a right of recovery or to undertake the duties and responsibilities of a trustee, unless by his consent or by reason of his having become the custodian of indemnity belonging to his daughter. The intention of the clause is, perhaps, not perfectly clear; but it should be so construed, if possible, as to make it operative for some purpose. Certainly, it does not confer upon the 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 for the recovery; and it seems unreasonable to suppose that the insured would be compelled to become a trustee for a stranger for no other cause than that he or a member of his household had permitted the stranger to drive his car or to ride in it at a time when that stranger negligently caused an accident in which a third party suffered bodily injuries.

But it is said that this case is different because of what I am about to state.

(1) (1885) 30 Ch. D. 57, at 69. (2) (1861) 1 B. & S. 393.
(3) 1915 A.C. 847 at 853.

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The plaintiff, in her action against Miss Berry, in answer to the company's denial that Miss Berry was insured, pleaded that the company, by its conduct in defending the plaintiff's action against her, was estopped from denying liability under the insurance policy issued by the company to Miss Berry's father. The evidence is that Mr. Berry, as the insured, under that policy, gave, in his own name, notice of the accident to the insurer, and that, on the back of this notice, his daughter filled up and signed the form requiring a statement of particulars from her as the "person driving car at time of accident". Mr. Berry is asked "Who defended the action?" and he says "The insurance company". In his examination for discovery, he said that he knew the action against his daughter was defended by the insurance company, and that neither he nor his daughter paid for any legal services in connection with that lawsuit. Referring to the company, he says that "They got all the information from my daughter; they did not ask me for anything". The adjusters, he says, took the whole matter over. Miss Berry, upon discovery after judgment, says that she knew the company's solicitors were her solicitors. The learned judges in British Columbia seem to have thought that in view of these facts, the company became liable, as insurer, to indemnify Miss Berry; but, with due respect, I do not agree. What the evidence suggests, and what I think may be assumed, is that the company was acting in pursuance of its practice under section E of the Insuring agreements, and not with the intention or effect of incurring, or as representing itself as willing to incur, any obligation for payment of indemnity to the insured's daughter not enforceable by her under the policy. The essentials of estoppel are lacking; and the company's defence of the plaintiff's action against Miss Berry does not, in my opinion, cut any figure in determining liability in this case, wherein the respondent is asserting a direct statutory obligation of the company, as the insurer of Miss Berry, to pay the respondent's judgment up to the face value of the policy.

I would allow the appeal and dismiss the action with costs throughout. *Appeal allowed with costs.*

Solicitors for the appellant: *Walsh, Bull, Housser, Tupper & Molson.*

Solicitor for the respondent: *W. H. Campbell.*