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*Oct. 4, 5.
*Dec. 22.

HOME INSURANCE COMPANY OF NEW YORK AND UNITED STATES FIDELITY AND GUARANTY COMPANY (DEFENDANTS) ..... } APELLANTS;

AND

LENA LINDAL AND JOHN BEATTIE (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEALS FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Insurance—Automobile—Statutory condition No. 5—Exception of liability when driver intoxicated—Applicability to insured—Action by injured person, a passenger against insurer under section 180 of Alberta Insurance Act—Whether public policy prevents injured person recovering when insured driver was intoxicated—Contract—Illegality—Public policy—Contract of indemnity against criminal act—Effect of estoppel of insurer—Alberta Insurance Act, 1926, c. 31, ss. 179, 180, 254—Criminal Code, s. 285 (4)—Alberta Vehicles and Highway Traffic Act, 1924, c. 31, s. 59.

The respondent Lindal, who was injured in an accident while being driven by the respondent Beattie in his motor car, sued him for damages. The respondent Beattie was insured under a "combination policy" issued by the two appellant companies, under which he was insured by one company with respect to legal liability for bodily injuries or death and by the other with respect to damage to his car. The respondent Beattie had given notice of the accident to the appellant companies, which made a full investigation and, after unsuccessful efforts to reach a settlement with the respondent Lindal, undertook the defence of the action against the respondent Beattie, which action was maintained for $1,636.05 and $353.40 costs. After a return of *nulla bona*, the respondent Lindal brought an action against the appellant companies under section 180 of *The Alberta Insurance Act*, 1926, c. 31. The respondent Beattie also brought action against the appellant companies, claiming to be indemnified from the Lindal judgment and also for the damage suffered to his automobile. In both actions the appellant companies alleged that the respondent Beattie was intoxicated and contended therefore that, under statutory condition No. 5 of the *Alberta Insurance Act*, they were relieved from liability. The trial judge, Ives J., before whom both actions were tried together, found that the respondent Beattie was intoxicated and he dismissed both actions; but that judgment was reversed by a majority of the Appellate Division.

Held, Crocket J. dissenting, that this appeal should be allowed and the respondents' actions dismissed.

Statutory condition 5 of schedule *d.* of the *Alberta Insurance Act*, 1926, c. 31, provides that the insurer under an automobile insurance policy shall not be liable under the policy "while the automobile * * * is being driven by * * * an intoxicated person."

*PRESENT:—Duff C.J. and Rinfret, Lamont, Smith and Crocket JJ.

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Held, that this condition, as to intoxication, does not apply to the insured himself.

Held, also that the fact, that respondent Beattie's act occurred while he was "manifestly" intoxicated when driving his automobile at the time of the accident, as found by the trial judge, constituted a violation of section 285 (4) of the Criminal Code sufficient to prevent him from recovering, on ground of public policy. Crocket J. dissenting.

Held also, Crocket J. dissenting, that section 179 of the *Insurance Act* of Alberta has no application to contracts for indemnity in respect of losses occasioned by violating some provisions of a Dominion statute, (in this case, respondent Beattie violated section 285 (4) of the Criminal Code providing penalties for driving an automobile when intoxicated). The Alberta legislation does not directly validate a contract of indemnity which would otherwise be invalid because the insurer has proposed to insure against an act or the consequences of an act that would be a criminal offence under the Criminal Code, or under the criminal law of the Dominion prevailing throughout Canada as distinguished from the penal laws of the province.

Held, also, that the appellant companies, by undertaking the defence of the action brought by the respondent Lindal against the respondent Beattie were not estopped from denying liability on the policies although they had full knowledge of the circumstances surrounding the accident. The real foundation of the appellants' defence was not, that the policy was not in full force and effect, but that they never contemplated indemnifying the respondent Beattie for liability arising through his own criminal act. Crocket J. expressing no opinion.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of the trial judge, Ives J., and maintaining the respondent's actions with costs.

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

Thomas N. Phelan K.C. for the appellants.

N. D. Maclean K.C. for the respondent Lindal.

S. Bruce Smith for the respondent Beattie.

The judgment of the majority of the Court, Duff C.J. and Rinfret, Lamont and Smith JJ. was delivered by

LAMONT J.—About 3 a.m. on the 15th day of March, 1932, in the city of Edmonton, the respondent, Lena Lindal, was a passenger in an automobile owned and driven by the respondent, John Beattie, when the automobile came into collision with a street railway standard. As a result

(1) [1933] 1 W.W.R. 334.

of the collision Miss Lindal was very seriously injured and the car badly damaged. Miss Lindal brought an action for damages against Beattie for the injuries she had suffered, alleging that her injuries were caused by his negligence. She recovered a judgment against him for $1,636.05, and costs which were taxed at $353.40. Execution was issued against Beattie but it was returned by the sheriff unsatisfied.

At the time the accident took place Beattie carried automobile insurance in the form of a combination policy with the Home Insurance Company, New York, and the United States Fidelity & Guaranty Company, Baltimore. By this policy the latter company agreed to indemnify him against all loss or damage which he should become legally liable to pay for bodily injuries caused to any person by the ownership, maintenance or use of the automobile, up to the amount mentioned in the policy. The Home Insurance Company agreed to indemnify him against collision damage to his automobile.

When her execution was returned by the sheriff unsatisfied, Miss Lindal commenced an action, under section 180 of the *Alberta Insurance Act*, against the United States Fidelity & Guaranty Company, to recover the sum of $2,005.20, the amount of her judgment, interest and costs. At the same time Beattie brought an action against both insurance companies in which he claimed from the Home Insurance Company the sum of $525 for collision damages to his car, and from the Fidelity & Guaranty Company the sum necessary to relieve and indemnify him against his liability to Lena Lindal. The companies set up that they were not liable because Beattie had committed a breach of statutory condition 5 of the policy, which reads as follows:—

> Risks not covered: 5. The insurer shall not be liable under this policy while the automobile, with the knowledge, consent or connivance of the insured, is being driven by a person under the age limit fixed by law, or, in any event, under the age of 16 years, or by an intoxicated person.

By section 254 of the *Insurance Act* of 1926, this statutory condition, along with others, is deemed to be a part of every contract of insurance in force in Alberta.

These two actions were tried together before Mr. Justice Ives who, on the evidence, held that at the time of the accident Beattie was driving his car while in an intoxicated

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condition, and, not only was he intoxicated, but, by reason of the quantity of alcohol which he had consumed, he was unable to drive a motor car with safety. These findings, in the light of the learned judge's reasons, clearly involve, as we think, the conclusion that the accident was due to Beattie's intoxication. On the above findings the trial judge held that the accident was not a risk insured against, and he dismissed both actions. From his judgment an appeal was taken to the Appellate Division of the Supreme Court of Alberta, which reversed the judgment (Clarke and McGillivray JJ. dissenting) (1). The majority of the court held that both plaintiffs were entitled to recover. From the judgment of the Appellate Division the companies now appeal to this court.

That respondent Beattie was in an intoxicated condition when driving his automobile at the time of the accident the trial judge found on conflicting evidence. The view of the judge as to the relative weight to be ascribed to the testimony of different witnesses ought not to be disturbed on appeal in the absence of the gravest reasons. In this case the reasons advanced on behalf of the appellants have not satisfied us that the finding ought to be set aside.

The appellants contend that Beattie's driving his automobile while intoxicated relieves them from liability for two reasons: (1) that, under statutory condition 5, such risk was not covered by the policy, and (2) if covered, the claim for indemnity is unenforceable as being contrary to public policy.

The exclusion from liability, under statutory condition 5, is only "while the automobile, with the knowledge, consent or connivance of the insured, is being driven by * * * an intoxicated person." This is not apt language to describe an act done by the insured himself. It is, however, just the language one would expect to be used if the intention was to exclude liability where the automobile was being driven by a third person with the permission of the insured. Apart from the inaptness of the language there is, we think, another difficulty. To exclude liability, the automobile, when driven by an intoxicated person, must be driven with the knowledge of the insured. If statutory condition 5 is construed so as to include the insured himself, we should

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have this remarkable result: that, if the insured were so intoxicated as not to know what he was doing, the condition would not apply owing to the insured's want of knowledge; while, if he were but slightly intoxicated, he would know that he was driving and the condition would be applicable. In our opinion condition 5 is not to be construed as applicable to the insured.

The appellants' second contention is that they are exempt from liability because the peril insured against was brought into operation by a wrongful act of the insured, which constituted a violation of the criminal law, and that, under these circumstances, it would be contrary to public policy for the court to assist the respondent in securing indemnity for an illegal act.

Section 285 (4) of the Criminal Code reads as follows:

> Everyone who while intoxicated * * * drives any motor vehicle or automobile * * * shall be guilty of an offence and liable upon summary conviction for the first offence to a term of imprisonment not exceeding thirty days and not less than seven days, for a second offence to a term of imprisonment not exceeding three months and not less than one month, and for each subsequent offence to a term of imprisonment not exceeding one year and not less than three months.

The respondents do not dispute that if the liability arose from a wrongful act of the insured, intentionally or wilfully done, the insured is not entitled to be indemnified against its consequences. They do, however, contend that it is only an intentional wrongful act on the part of the insured that will bar his right to indemnity. Mere negligence, however gross, no matter to what criminal consequences it may expose the insured, is, they contend, not sufficient, for one of the objects of insurance is to protect the insured against the consequences of negligence. For that reason it is said the doctrine of public policy has no application where the liability arises not from the wilful act of the insured but from his negligence.

Does the fact that Beattie's act constituted a violation of the Criminal Code prevent him from recovering on grounds of public policy?

There are two cases in which the question has been answered in the negative: *Tinline* v. *White Insurance As-*

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sociation (1), and *James* v. *British Insurance Company* (2). On the other hand the question is answered in the affirmative in *O'Hearn* v. *York Insurance Company* (3), which was a case of an insured who while driving his car on the public highway in an intoxicated condition and at an excessive rate of speed, struck and injured a man who died as the result of his injuries. The insured was convicted of an offence under section 285 of the Criminal Code, and the judge at the trial of the action, which he brought against the insurance company for indemnity, found that he had been guilty of the offence. Both the trial judge and the Court of Appeal, in that case, held that the insured should not be indemnified against the consequences of his own criminal act. Reference was there made to the case of *Lundy* v. *Lundy* (4), where this court held that no devisee can take under the will of a testator whose death has been caused by the criminal and felonious act of the devisee himself, and, that in applying this rule, no distinction can be made between a death caused by murder and one caused by manslaughter. Chief Justice Strong, in giving judgment, said as follows:—

> The principle upon which the devisee is held incapable of taking under the will of the person he kills is, that no one can take advantage of his own wrong. Then surely an act for which a man is convicted of manslaughter and sentenced to a long term of imprisonment was a wrongful, illegal and formerly * * * a felonious act.

The principle which, in our opinion, is applicable to the present case is that stated by Kennedy J. in *Burrows* v. *Rhodes* (5), as follows:—

> It has, I think, long been settled law that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. An express promise of indemnity to him for the commission of such an act is void.

In the recent case of *Haseldine* v. *Hoskins* (6), Scrutten L.J. says as follows:—

> It will be noticed that Kennedy J., used two phrases "manifestly unlawful," or "the doer of it knows it to be unlawful." These two phrases must mean two different things, because if the first phrase means that the act is manifestly to the man who does it unlawful, there was no need to use the second phrase, "or the doer of it knows it to be unlawful." I

(1) [1921] 3 K.B. 327.
(2) [1927] 2 K.B. 311.
(3) 51 O.L.R. 130.
(4) (1895) 24 Can. S.C.R. 650.
(5) [1889] 1 Q.B., at 828.
(6) (1933) 102 L.J. K.B. 44.

think that the learned judge is clearly meaning such an act, that there can be no doubt that it is unlawful.

It is, therefore, sufficient to bring in the doctrine of public policy that Beattie should have been "manifestly" intoxicated while driving his automobile at the time of the accident. On this point the judgment of the learned trial judge leaves no doubt.

The learned judge described Beattie's action as follows:—

> Admittedly the street conditions were most dangerous—that is his own evidence—slippery, old winter ice, snowing and sleeting heavily, with only the view that under such conditions the operation of his windshield wiper afforded him. Yet he was going at the rate of thirty miles per hour when there was no need for such speed. He insisted on passing a car going in the same direction which had not obeyed his horn signal to turn out, as he admits, although he had only that block to travel before himself leaving that street. Such conduct constitutes such a degree of reckless carelessness that it may be inferred the actor was not in a normal condition.

It was, however, contended on the part of the respondents that, whatever may have been the rule as to public policy in former times, public policy in Alberta permits an insurer to agree to indemnify the insured against loss or damage for which he may become liable by reason of driving his automobile while intoxicated. By section 179 of the *Insurance Act* of Alberta, 1926, it is provided:—

> It shall be lawful for an insurer to contract to indemnify an insured against financial loss occasioned by reason of liability to a third person, whether or not the loss has been caused by the insured through negligence or while violating the provisions of any municipal by-law or any Act of this legislature.

Prior to the passing of this section the legislature of Alberta had, by section 22 (2) of the *Motor Vehicle Act,* 1911-12, enacted, with certain prescribed penalties, the following:—

> 22 (2). No intoxicated person shall drive or operate a motor vehicle in any place.

This provision, with a slightly altered phraseology, has continued on the statute book ever since and it is now found as section 59 of the *Vehicles and Highway Traffic Act,* chapter 31 of 1924.

From 1921 the material part of section 285 (4) of the Criminal Code has been in force, and, it is not questioned that it is valid legislation of the Dominion Parliament.

The respondents contend that the effect of this legislation is to make inapplicable, in Alberta, the doctrine of public policy in circumstances such as we are here con-

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cerned with. It is, therefore, necessary to consider what effect must be given to these sections of provincial Acts, especially in view of the legislation of section 285 (4) of the Criminal Code.

We think the contention of the respondents ought to be rejected for this reason: first of all, it does not appear to be open to doubt that the phrase "Act of this legislature" in section 179 of the *Insurance Act* imports legislation which is legally operative. No doubt, in enacting section 22 (2) of 1911-12, and in prescribing penalties in respect of the violation of it, the Alberta legislature was creating an offence which, in view of the decisions of the Privy Council in *Rex* v. *Nat. Bell Liquors* (1), and *Naden* v. *The King* (2), is properly described as a criminal offence: provided, of course, that the legislation was operative.

In 1921, however, as already stated, the Dominion Parliament passed legislation adding a section to the Criminal Code in terms almost identical with those of the provincial enactment (section 22 (2)) and making it a criminal offence, in the strictest sense, to drive an automobile while in a state of intoxication. The effect of this legislation by Parliament was to supersede existing provincial legislation, which was legislation in the same field; and thereafter, as long, at all events, as the Dominion legislation should remain in force, the provincial legislation would necessarily be inoperative. The Dominion legislation has remained in force until the present day. There was not, therefore, at the time of the accident, or at the date of the policy, an Act of the provincial legislature in force, within the meaning of section 179 of the *Insurance Act,* prohibiting the driving of a motor vehicle while in a state of intoxication.

This point was not taken in argument, and that is regrettable, because on all questions touching the validity of provincial legislation it is the practice of this court to invite the Attorney-General of the province to present such considerations as he thinks right upon the matter under consideration. It is not necessary, however, that the judgment should be put upon this ground, and, therefore, we do not think it proper to delay judgment for the purpose of hearing the Attorney-General.

(1) [1922] 2 A.C. 128. (2) [1926] A. C. 482.

In our view the effect of section 179 of the *Alberta Insurance Act* is this: Contracts by an insurer to indemnify an insured against financial loss occasioned by reason of liability to a third person, shall be recognized by the law as binding, notwithstanding the fact: 1st, "that the loss has been occasioned by the insured while violating the provisions of any municipal by-law or an Act of the legislature" of Alberta. That is to say, a contract for indemnity is not illegal on the ground of public policy because the right of indemnity extends to losses so occasioned or arising under such circumstances. To that extent the rule which strikes contracts with invalidity on grounds of public policy is modified, but to no greater extent. The statute has no application to contracts for indemnity in respect of losses occasioned by violating the provisions of the Criminal Code. Nothing of the kind is expressed and nothing of the kind can be implied.

It follows that the Alberta legislation does not directly validate a contract of indemnity which would otherwise be invalid because the insurer has professed to insure against an act or the consequences of an act that would be a criminal offence under the Criminal Code or under the criminal law of the Dominion prevailing throughout Canada as distinguished from the penal laws of the provinces.

It might be argued, however, that the Alberta legislation is evidence establishing the conclusion—upon which the courts ought to act—that a contract of indemnity against a crime, or the consequences of it, where the crime consists simply in driving an automobile while in a state of intoxication, is not a contract opposed to public policy. To that there appears to us to be two answers: The first is, that by the legislation of 1921, already mentioned, such conduct had become a criminal offence under the Criminal Code. This legislation was a part of the criminal law of the Dominion on the very subject with which the Alberta Legislature was dealing in passing section 179 of the Insurance Act of 1926. Notwithstanding this fact, the section is carefully restricted, in so far as it specifically refers to legislation, to "the provisions of * * * any Act of this Legislature." In view of this, it would not, we think, be an admissible inference that the Legislature contemplated the modification of the doctrine of public policy in the wide sense contended for.

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The second reason is this: the rule as formulated by Mr. Justice Kennedy in the passage already quoted above from his judgment in *Burrows* v. *Rhodes* (1), although it may be said that, in its origin, it merely exemplified the power of the court to refuse to enforce contracts on the ground that they infringed some dictate of public policy, is a long settled rule. And we do not think it is now competent to the courts to refuse to give effect to it in the absence of direct legislative sanction or, at all events, of such legislation as should demonstrate the intention of the Legislature that such contracts should no longer be regarded as exceptions to the general principle of freedom of contract.

Two other points require to be noticed. The first is that the appellants do not, in their pleadings, allege that Beattie's act was illegal as being contrary to public policy, and it is contended, therefore, that they are precluded from relying on Beattie's intoxication. The rule upon this point, as stated by Lord Moulton in *N.W. Salt Co.* v. *Electrolytic Alkali Co.* (2), is:—

> If the contract and its setting be fully before the Court it must pronounce on the legality of the transaction. But it may not do so if the contract be not *ex facie* illegal, and it has before it only a part of the setting, which it is not entitled to take, as against the plaintiffs, as fairly representing the whole setting.

In this case the act which constituted the illegality was Beattie's driving his automobile when he was intoxicated. That he was driving his automobile at the time of the accident he admits. That he was then intoxicated was expressly set up in the pleadings and the court was entitled to assume that it had before it in evidence all the relevant surrounding circumstances relating to his intoxication. If on that point Beattie, when before the trial court, did not put in all his relevant evidence, the responsibility must be laid at his door. We think, therefore, that Beattie's admission and the proof made at the trial, irrespective of the argument before the Appellate Division, where the question was raised, were sufficient to justify the court in passing upon Beattie's act as being illegal on the ground of public policy.

The other point is that by undertaking the defence of the action brought by Lindal against Beattie, with full

(1) [1899] 1 Q.B. 816. (2) [1914] A.C. 461.

knowledge of the circumstances surrounding the accident, they are estopped from denying liability on the policy.

This argument was strongly pressed upon us but, however effective it might be in some cases, we do not think it can prevail against the defence that Beattie's act constituted a crime and that to permit the recovery of indemnity in this case would be to give effect to an illegality. If the defence here had been that the appellants were denying liability on the ground that the policy was not binding on them because Beattie had made a material misrepresentation or had failed to fulfil some condition precedent to liability, it might be argued that, having undertaken Beattie's defence in the action brought against him by Lena Lindal for damages for personal injuries, they could not, afterwards, be held to deny their liability under the policy. That, however, is not this case. The real foundation of the defence in this case is not, that the policy was not in full force and effect, but that it never contemplated indemnifying Beattie for liability arising through his own criminal act.

The appellants here were insisting that they were entitled under the policy to conduct Beattie's defence. Suppose that Beattie had said to them that he would agree to their conducting his defence, but only on condition that they would not raise against him, when he would sue for indemnity, any defence based upon his intoxication or his criminal act; and suppose further that the appellants had given him an undertaking in writing to that effect; of what avail would that have been to Beattie? Even in the absence of an allegation that Beattie's act was illegal or criminal, once such illegality or criminality were brought to the attention of the court, it would be the duty of the judge, even of his own motion, to refuse, on grounds of public policy, to enforce indemnity and he should dismiss the action. If an express undertaking would not be enforceable, we are of opinion that conduct, whether by way of estoppel, waiver or election, cannot preclude the appellants from denying liability.

The appeal should be allowed, the judgment below set aside, and the judgment of the trial judge restored. The appellants are entitled to their costs throughout.

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CROCKET J. (dissenting).—I regret that I have to differ from my brethren in their conclusion that s. 179 of the *Alberta Insurance Act* does not contemplate a loss caused by the insured while violating that provision of the *Alberta Motor Vehicles Act,* which prohibits the driving of a motor vehicle by a person who is intoxicated, because at the time of the passage of the former statute the Criminal Code contained a provision declaring that every one who while intoxicated drives any motor vehicle shall be guilty of an offence and liable upon summary conviction to a term of imprisonment.

It is no doubt true, as held in my brother Lamont's judgment, that the incorporation in the Criminal Code of this provision renders the prohibition of the Alberta statute inoperative, so far at least as concerns a prosecution for the imposition of the penalty fixed by the Alberta statute for that offence against the provincial Act; but I do not think that this fact can fairly be said to read that portion of s. 59, which enacts the prohibition against the driving of a motor vehicle by an intoxicated person, entirely out of the provincial *Motor Vehicles Act* as if it had been expressly repealed or never been enacted. Notwithstanding that it may be inoperative so far as prosecutions for the imposition of the penalties prescribed by the penalties section of the Alberta statute are concerned, it still remains in that statute as an unrepealed enactment, and one which is not now held to be void. It is, therefore, one, which I think the legislature must be held to have had in contemplation with all other prohibitions of the *Motor Vehicles Act,* when it passed its *Insurance Act* in 1926. Section 179 of this Act deals entirely with the validity of motor insurance contracts for the indemnification of a motor vehicle owner against loss occasioned by reason of his liability to a third person—a liability which can only be created by negligence or some other wrongful act on the part of the owner or on the part of one for whose acts he is responsible. It expressly declares that it shall be lawful for an insurer to contract to indemnify the owner against such loss, notwithstanding that it has been caused by him through negligence or while he was violating any of the provisions of any municipal by-law or any of the provisions of any Act of the legislature. It in no manner concerns or contem-

plates the subject of prosecutions for criminal negligence or of prosecutions for violation of any of the provisions of either the provincial *Motor Vehicles Act* or of the Criminal Code, and refers to the violation of " the provisions of any municipal by-law or any Act of this legislature," solely for the purpose of indicating the wrongful and illegal acts in respect of which an insurance company may lawfully contract to indemnify a motor vehicle owner. The fact that the Dominion Parliament had provided in the Criminal Code that every one who drives a motor vehicle while intoxicated, and thus does something which the *Alberta Motor Vehicles Act* prohibits, shall be guilty of an offence under the Code and liable to a gaol sentence, cannot, it seems to me, fairly be taken to exclude the act of the owner in driving a motor vehicle while intoxicated from the purview of s. 179 of the provincial *Insurance Act*, any more than the fact of gross or criminal negligence rendering the driver of a motor vehicle liable to prosecution and conviction for manslaughter, if such negligence on his part causes the death of another, can be taken to exclude gross or criminal negligence from the purview of that section. The thing done remains from the point of view of the intention of the provincial legislature just as much a thing which falls within the prohibitory provisions of the *Motor Vehicles Act* as it did before.

I find it impossible to believe that s. 179 of the provincial *Insurance Act* did not contemplate any and all degrees of negligence, whether that negligence should constitute an offence under the Criminal Code or not, and that it did not also contemplate all prohibitory provisions of provincial statutes, irrespective of whether the violation of any of those provisions would constitute an offence against the Criminal Code. The clear purpose of the enactment, in my view, was to make it lawful for an insurance company to contract to indemnify an owner of a motor vehicle against liability to third persons by reason of all or any such acts of negligence and all or any such wrongful and illegal acts as those described in the prohibitory provisions of the Alberta *Motor Vehicles Act* or in any other Act of the Alberta legislature or in any by-law of any municipality within the province, quite irrespective of whether the violation of any such prohibitory provisions constituted an

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offence under the Criminal Code or not. To give the language any other meaning, it seems to me, is tantamount to reading into the section a proviso that it shall not apply to any of those acts of negligence or prohibited acts if they were acts which were then or might subsequently be prohibited by the Criminal Code as well, and, with all deference, I cannot think that the mere fact that the section makes no mention of the Criminal Code has the same effect as if the Legislature had incorporated such an express proviso in the enactment.

To give the section such a construction would render of little value these insurance policies and all other similar policies, by which insurance companies specially agree to indemnify motor vehicle owners against losses caused by their own negligence or illegal acts, and for which they receive from the insured a special premium, and I have no doubt that this was the particular consideration which led the Alberta Legislature to enact the legislation in question.

I construe the section as comprehending not only all degrees of negligence but all acts which the legislature has itself expressly prohibited and declared to be illegal or which any municipality within the province by by-law has prohibited, and hold, therefore, that the Legislature of Alberta has in effect declared that it shall be lawful in that province for an insurer to contract to indemnify a motor vehicle owner against liability to third persons, notwithstanding such liability may be the result of his driving the vehicle while intoxicated.

If I am right in this view it follows as a consequence that no Court can properly declare to be unlawful within the province of Alberta on grounds of public policy, these insurance contracts which the legislature has itself declared shall be lawful. The Legislature has settled, so far as the province of Alberta is concerned, any question of public policy which may be involved in the passage of the enactment referred to.

I only wish to add that I entirely agree with the observations of Harvey, C.J., regarding the finding which the learned trial judge made as to Beattie being intoxicated, viz: that he did not direct his mind to the consideration of whether Beattie was liable criminally, and that on the evidence before him no judge or jury would have felt justified in convicting him of a crime. The trial judge's finding is

based on what he believed to be the weight of evidence, and disregards the fact that the doctor whom the police called to examine Beattie and who examined him less than an hour after the accident, swore that he was sober.

The passage quoted in the majority opinion of this Court from the trial judge's reasons as apparently the principal ground of the finding of intoxication, while it no doubt discloses strong evidence of negligence on the part of Beattie, is by no means conclusive as to the fact of his having been intoxicated.

I would dismiss the appeal with costs.

Appeals allowed with costs.

Solicitors for the appellants: *Wood, Buchanan & Macdonald.*

Solicitors for the respondent Lindal: *Maclean, Short & Kane.*

Solicitors for the respondent Beattie: *Parlee, Freeman, Smith & Massie.*