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Oct. 29.

THE TRAVELERS INDEMNITY COMPANY AND THE TRAVELERS FIRE INSURANCE COMPANY (GARNISHEES) ..... APPELLANTS;

AND

HILDA POWERS (PLAINTIFF)..... RESPONDENT;

AND

FRANK DEAN (DEFENDANT).

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Insurance (Automobile)—Accident—Injury to passenger—Policy issued to automobile company—Use of a motor car by an official—"Omnibus" clause eliminated from policy—Endorsement clause providing for liability in case of "pleasure use"—Liability of the insurer—Whether company only person "insured" under policy.

The appellant companies issued an indemnity policy to an incorporated company doing business as "garage and automobile sales agency". One Dean, an official of the latter company, invited the respondent for a drive in an automobile belonging to that company and met with an accident. The respondent was severely injured, obtained a judgment against Dean for $2,532.50 damages and seized in the hands of the appellant companies all sums of money which they might owe to Dean as being his insurer. The appellant companies declared that they had issued a policy to the automobile company and that no insurance by the terms of the policy extended to the defendant Dean. A clause of the policy provided that the insurer agreed to pay on behalf of the "insured" all sums which the insured would be by law obligated to pay, and another clause, known as the "omnibus" clause, had been by consent eliminated from the policy; but an endorsement clause provided that the policy would apply *inter alia* to any damages caused by "the ownership, maintenance or use of any automobile * * * and also for pleasure use". The respondent contended that, even if the defendant Dean was not protected as the result of the elimination of the omnibus clause, he was nevertheless entitled to the benefits of the policy on the ground that the user of the automobile "for pleasure" not connected with the business of the automobile company was covered by the terms of the endorsement clause. The trial judge and the appellate court held that the policy extended to the defendant Dean. On appeal to this Court

Held, reversing the judgment appeal from ([1943] K.B. 479), that under the policy the only person insured was the automobile company and that it was only on behalf of the latter that the obligation to indemnify would arise. In this case, it was not the "insured", but the defendant Dean who had been obligated to pay damages to the respondent: the judgment was against Dean personally and, as he was not the "insured", the appellant companies were not liable.—The endorsement clause attached to the policy did not change the

*PRESENT:—Duff C.J. and Rinfret, Kerwin, Taschereau and Rand JJ.

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"insured", which remained the automobile company; it merely described the risk. The words "for pleasure use" cannot have the effect of re-establishing the "omnibus" clause which had been eliminated. The policy, as amended, did not provide that all persons driving an automobile belonging to the insured company for "pleasure use" would be protected by its terms; but the proper construction of the endorsement clause was that the insured automobile company was entitled to be indemnified when one of its automobiles would be used for "pleasure" in such a way that its liability would be involved.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the trial judge, Verret J., maintaining a seizure by way of garnishment in the hands of the appellant companies and condemning the latter to pay to the plaintiff respondent the sum of $2,532.50. The appeal was allowed.

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

John T. Hackett K.C. for the appellants.

R. F. Stockwell K.C. and *W. A. Merrill K.C.* for the respondent.

The judgment of Rinfret, Kerwin, Taschereau and Rand JJ. (2) was delivered by

TASCHEREAU J.—This is an appeal from a judgment rendered on the 28th May, 1943, by the Court of King's Bench, appeal side, province of Quebec, sitting at Montreal. The appellants were condemned to pay to the plaintiff respondent Hilda Powers $2,532.50 with interests and costs, and this judgment was unanimously confirmed by the court of appeal.

The appellants are insurance companies, and in November, 1939, they issued an indemnity policy to Hibbard Motor Sales Limited, whose business is described as "garage and automobile sales agency". In September, 1940, an employee of the insured invited the respondent Hilda Powers for a drive in an automobile belonging to

(1) Q.R. [1943] K.B. 479.

(2) Reporter's note:—Sir Lyman P. Duff, then Chief Justice of Canada, participated in the judgment rendered on the 29th of October, 1943; but, at the date of the delivery of the reasons for judgment, i.e. on the 1st of February, 1944, Sir Lyman P. Duff had ceased to be a member of the Supreme Court of Canada.

the insured. He met with an accident with the result that the respondent was severely injured. She brought action against Dean and recovered judgment for $2,532.50.

Later, in October, 1941, the respondent seized in the hands of the appellants all sums of money which they might owe to Dean, as being his insurer. The appellants then declared that they had issued a policy to Hibbard Motor Sales Limited, and that no insurance by the terms of that policy extended to defendant Dean. The respondent contested this declaration of the garnishees, and the contention is briefly that Dean, who was driving the automobile for "pleasure" is an insured entitled to be indemnified for all damages that he may be obligated to pay, and that he is a person contemplated by the terms of the policy. The trial judge and the court of appeal held that the policy extended to Dean, and maintained the contestation.

The following clause of the policy (section A) defines the obligations of the appellants:

> The insurer agrees to pay on behalf of the insured all sums which the insured should become obligated to pay by reason of the liability imposed upon him by law for damages because of bodily injury, etc.

By the terms of the policy, the insured is the Hibbard Motor Sales Limited, and the insurer is bound to pay when the insured is by law obligated to pay. It happens frequently in these indemnity policies that their protection extends to third parties driving automobiles and who are held liable for damages, but, in the present case, what has been called the "omnibus" clause, covering such third parties, has been, by consent, eliminated from the policy. This clause thus struck off, reads as follows:

> The company agrees with the insured to extend this insurance if the actual and stated uses of the automobile are "Private Purposes Only" as defined in Item 5 of the Declarations, and then only, in the same manner and under the same conditions as this insurance is afforded the insured, to any person or persons while riding in or legally operating the automobile, and to any person, firm or corporation legally responsible for the operation thereof; but upon condition that such use or operation is with the permission of the insured; or if the insured is an individual, with the permission of an adult member of the insured's household other than a chauffeur or domestic servant; provided that the insurance payable hereunder shall be applied first, to the protection of the insured and the remainder, if any, to the protection of the other persons entitled to insurance under the terms of this section as the insured shall in writing direct. The provisions of this paragraph (5) shall not be available (*a*) to any person, firm or corporation engaged in the business of garaging, repairing, servicing, storing or dealing in automobiles or to the agents

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or employees of such person, firm or corporation, if such injury or destruction arises out of such business; or (*b*) to any person, firm or corporation in respect of a claim arising out of damage to the person or property of the insured or of any person operating the automobile.

The only person insured is, therefore, the applicant, the Hibbard Motor Sales Limited; and it is only on behalf of this person that the obligation to indemnify arises. No other person, in charge of the automobile, whether employee or not, legally obligated to pay damages personally, may claim to be indemnified; only the liability of the company is insured, and the driver's is not. But, the respondent submits, and the courts below held that she was right, that Dean was made an "insured" under the policy by a "Canadian garage endorsement" attached thereto, and reading as follows:

> This policy is hereby amended from and after its effective date in the following particulars:
>
> Insuring agreements:—Section A (Legal liability for bodily injuries or death) and section B (Legal liability for damage to property of others) of this policy shall apply as herein stated in lieu of as stated in the policy.
>
> To such bodily injuries or death, or damage to property of others caused by:
>
> (*a*) The ownership, maintenance, occupation or use of the premises herein disclosed, including the public ways immediately adjoining, for the purposes of an automobile sales agency, public garage, service station, or repair shop, and all operations either on the premises or elsewhere which are necessary and incidental thereto, including mechanical or structural repairs to automobiles or their parts, and ordinary repairs of buildings on the premises and the mechanical equipment thereof.
>
> (*b*) The ownership, maintenance or use of any automobile for all purposes in connection with the above-described operations, and also for pleasure use, but excluding the renting or livery use of any automobile or the carrying of passengers or property for a consideration.
>
> Paragraphs (1), (2), (3) and (4) of the agreements of the policy in respect to sections A and B shall apply thereto.
>
> Paragraph (5) of the agreements of the policy in respect to sections A and B is eliminated in its entirety.

It is the contention of the respondent that if Dean is not protected as a result of the elimination of the "omnibus" clause, he is entitled to the benefits of the policy, and that the user of the automobile "for pleasure" not connected with the business of the company is covered by the terms of the endorsement.

With great deference, I cannot agree with these views. The amendment to the policy did not change the insured, which remained the Hibbard Motor Sales Limited. It

merely states that section A dealing with legal liability for bodily injury or death, and section B, dealing with legal liability for damage to property, found in the policy, shall apply in the way mentioned in the endorsement. That is to say, that the appellants will indemnify the insured for bodily injuries caused by the

> ownership, maintenance or use of any automobile for all purposes in connection with the above described operations, and also for "pleasure use."

The extent of the liability of the insurer is defined and ascertained in a more detailed manner, but the definition of "insured" is in no way enlarged, and the words "pleasure use" cannot have the effect of re-establishing the "omnibus" clause which is eliminated. The policy as amended does not say that all persons driving an automobile belonging to the insured for "pleasure use" are protected by its terms. It says that the insured, the Hibbard Motor Sales Limited, are entitled to be indemnified when one of their automobiles is used for "pleasure", in such a way that their liability is involved.

And it is far from impossible to imagine a case, where the insured would be held liable, as a consequence of an accident while one of their automobiles is used for "pleasure", in the same way as it would, if the automobile were being operated for purposes connected with the business of the company. But in both cases, the insured must have been obligated to pay by reason of the liability imposed by law for damages because of bodily injury or damage to property of others.

In the present case, it is not the insured, but Dean, who has been obligated to pay. The judgment is against him personally, and as he is not the insured, the appellants are not liable.

The appeal should be allowed with costs throughout.

Appeal allowed with costs.

Solicitors for the appellants: *Hackett, Mulvena, Foster, Hackett & Hannen.*

Solicitor for the respondent: *R. F. Stockwell.*