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*May 2.
*Jun. 11.

NORTHERN ASSURANCE COMPANY LIMITED (*Defendant*) ..... } APPELLANT;

AND

LILLIE BROWN (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Automobile liability policy—Car driven by third person with insured owner's consent—Unsatisfied judgment against driver—Whether action lies against insurer—Whether prescription—Meaning of "insured"—Insurance Act, R.S.O. 1950, c. 183, ss. 197, 211, 214—Statutory Condition 9(3).

An automobile, insured by the appellant under a motor vehicle liability policy and driven by C. with the owner's consent, struck and injured the respondent. The latter obtained judgment against the driver C. but was unable to collect it.

The respondent then brought this action for indemnity against the appellant as insurer. The action was maintained and the appeal by the insurer dismissed by the Court of Appeal. The appellant contended that a judgment against the owner was a condition precedent to any action against the insurer and that the driver C. was not

"the insured" under s. 214 of the *Insurance Act,* R.S.O. 1950, c. 183; and furthermore, that the action was barred by statutory condition 9(3) since it had not been started within one year after the cause of action arose.

Held (Cartwright J. *dissenting*): The appeal should be dismissed.

Per curiam: A judgment in favour of the respondent against the owner to whom the policy was issued was not a condition precedent to the bringing of this action by the respondent against the appellant.

C., the driver of the automobile at the time of the accident, was an "insured" under s. 214 of the *Insurance Act.*

Per Kerwin C.J., Taschereau, Rand and Locke JJ.: Statutory condition 9(3) did not apply to the claim of the respondent which was a substantive right given by statute and did not arise under the contract of insurance.

Per Locke J.: Statutory condition 9(3) applied only to actions brought to enforce the insurance contract by the persons insured by it, whether named or not, and by persons claiming under them by assignment.

Bourgeois v. *Prudential Assurance Co.* (1945), 18 M.P.R. 334 not followed.

Per Cartwright J. (*dissenting*): Statutory condition 9(3) barred the action of the respondent. The right of action conferred on the injured party in s. 214(1) of the *Insurance Act* is a right of action under the contract. Assuming that the condition applies only in the case of actions or proceedings under the contract, the respondent's action was under the contract of insurance issued by the appellant to the owner of the automobile.

APPEAL from the judgment of the Court of Appeal for Ontario (1), affirming the judgment at trial.

F. J. Greenwood for the appellant.

J. D. Arnup, Q.C. for the respondent.

The judgment of Kerwin C.J. and Taschereau J. was delivered by

THE CHIEF JUSTICE:—We are all of opinion that for the reasons stated by the learned Chief Justice of Ontario (1) a judgment by the respondent against William J. Schnurr, who had applied to the appellant for an insurance policy and to whom the policy was issued by it, was not a condition precedent to the bringing of this action by the respondent against the appellant; and that Corbett, the driver of the automobile at the time of the accident, was an "insured" under s. 214 of *The Insurance Act,* R.S.O. 1950, c. 183.

(1) [1955] O.R. 373.

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Kerwin C.J.

There is more difficulty in the remaining ground of appeal that the respondent's action was barred by statutory condition 9(3) since it was not brought until after the expiration of one year after her cause of action arose. Bearing in mind the history of *The Insurance Act,* I am of opinion that condition 9(3) does not apply to the claim of the respondent. That claim is a substantive right given by statute and does not arise under the contract. It was suggested that if this be so there is either no period of limitation applicable, or one of twenty years. Even if that be so, I can see no reason to bar the respondent's claim, unless the legislature has seen fit to do so.

The appeal should be dismissed with costs.

RAND J.:—The first ground of appeal is that a judgment against the owner of the car, the person in whose name the policy was issued, was a condition precedent to the right of the respondent to bring action against the company under the provisions of s. 214 of the *Insurance Act,* R.S.O. 1950, c. 183. For the reasons given by the Chief Justice of Ontario, I agree that this ground is not tenable. Mr. Greenwood emphasizes the use of the words "the insured" in the section as meaning the person named in the policy; but the opening line speaks of a person having a claim against "an insured", and he concedes that a person in the position of the respondent driving the car with the permission of the owner would properly be referred to as "an insured". The subsequent references in the section to "the insured" are obviously to the "insured" first mentioned.

Then it is said that the limitation condition 9(3) applies to the respondent. It reads:—

> Every action or proceeding against an insurer under a contract in respect of loss or damage to the automobile shall be commenced within one year next after the happening of the loss and not afterwards, and in respect of loss or damage to persons or property shall be commenced within one year next after the cause of action arose, and not afterwards.

I think an analysis of s. 214 furnishes the answer to this contention. Subsections (1), (4) and (6) are as follows:—

> (1) Any person having a claim against an insured, for which indemnity is provided by a motor vehicle liability policy, shall, notwithstanding that 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 his judgment and of any other

judgments or claims against the insured covered by the indemnity and may, on behalf of himself and all persons having such judgments or claims, maintain an action against the insurer to have the insurance money so applied.

(4) It shall not be a defence to an action under this section that an instrument issued as a motor vehicle liability policy by a person engaged in the business of an insurer, and alleged by a party to the action to be such a policy, is not a motor vehicle liability policy, and this section shall apply, *mutatis mutandis,* to the instrument.

(6) Subject to subsection 7, where a policy provides, or if more than one policy, the policies provide for coverage in excess of the limits mentioned in section 211 or for extended coverage in pursuance of subsections 1, 2 and 4 of section 212, nothing in this section shall, with respect to such excess coverage or extended coverage, prevent any insurer from availing itself, as against a claimant, of any defence that the insurer is entitled to set up against the insured.

Section 211 referred to in the last subsection reads:—

Every owner's policy and driver's policy shall insure, in case of bodily injury or death, to the limit of at least $5,000 (exclusive of interest and costs) against loss or damage resulting from bodily injury to or the death of any one person, and, subject to such limit, for any one person so injured or killed, of at least $10,000 (exclusive of interest and costs) against loss or damage resulting from bodily injury to or death of two or more persons in any one accident, or, in case of property damage, to the limit of at least $1,000 (exclusive of interest and costs) for damage to property resulting from any one accident.

Is the action in this case brought "under the contract" as the language of the condition puts it? "Under" means "arising out of", and the phrase, that the contract furnishes the substantive title to the action. On the face of the section, that is not the case here: the statute not only gives a right to sue but it creates its substantive basis, a right against the contractual liability as an asset available, in effect, for execution purposes. Subsection (4) speaks of "an action under this section". The right given is a charge upon the insurance money. But the statutory provisions contemplate insurance with a limit of liability in respect of injury to one person and a limit of total liability arising out of one accident. The judgment against the insurer is that the money be applied for the benefit "of all persons having such judgments or claims". The total claims in one accident, apart from successive accidents, may easily exceed the total amount of the insurance or the limits furnished by s. 211 and this fact excludes, except conceivably where there is only one claimant, an ordinary money judgment.

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That total and its distribution cannot be ascertained until all claims have been determined. I do not attempt to define the status of "claims" there intended, the creditors holding which are to be represented in such an action; but by express words judgment for the application of the money applies to all judgments against the insured regardless of when they were recovered.

The liability toward the insured arising out of one accident is single and is fixed only when all the claims have been adjudicated or reduced to a liquidated sum: condition 9(2) requires either a judgment against an insured or an agreement with the written consent of the insurer as to the amount before action can be brought by the insured on the contract. In *Barrett* v. *Indemnity Insurance Company of North America* (1), it was held by the Court of Appeal that only one representative action can be brought, that is, that no action lies by one of several such creditors on his own behalf only. In many cases the proration of the total or limited insurance among the claimants might be suspended for several years pending final adjudications. In the meantime small claims might not have been appealed with the amount to be apportioned to them meanwhile undeterminable. The practical effect of Mr. Greenwood's argument would be that the representative action must be commenced by the person recovering the first judgment against the insured if security to all is to be achieved. These possibilities, in addition to the creation of the cause of action by the section, going to the several rights of the claimants, the time for bringing the representative action, and the amount to which each may ultimately become entitled in a distribution are incompatible with the conception that applies to each creditor the limitation of condition 9(3).

We have been referred to the case of *Bourgeois* v. *Prudential Assurance Company Limited* (2), in which Harrison J., speaking for a majority of the court, held a similar condition of limitation to apply; but in my opinion, the view expressed by Baxter C.J., dissenting, is the sounder.

I would, therefore, dismiss the appeal with costs.

(1) [1935] O.W.N. 321.

(2) (1945), 18 M.P.R. 334.

LOCKE J.:—For the reasons stated by the learned Chief Justice of Ontario in delivering the judgment of the Court of Appeal (1), it is my opinion that Corbett was an insured within the meaning of s. 214(1) of the *Insurance Act*, R.S.O. 1950, c. 183.

It is said for the appellant that the claim is barred by statutory condition 9(3) which provides that every action or proceeding against an insurer under a contract in respect of damage to persons or property shall be commenced within one year next after the cause of action arose. This contention was rejected in the Court of Appeal upon the short ground that the respondent's action is not of the nature referred to in the condition, but one to enforce a statutory cause of action arising under and vested in the respondent by s. 214(1).

In *Bourgeois* v. *Prudential Assurance Company* (2), this question was considered by the Appeal Division of the Supreme Court of New Brunswick. In that case, where the section of the *Insurance Act* and the statutory condition were in the same terms as those in question here, Harrison J. (with whom Grimmer J. agreed) was of the opinion that the right given by the *Insurance Act* was "to sue upon an insurance contract" and that, therefore, the limitation under statutory condition 9(3) applied. It should be said that the learned judge had before dealing with this aspect of the case expressed the view, with which the other members of the court agreed, that as the policy itself had been induced by misrepresentation it was void. Baxter C. J. agreed with Harrison J. upon this issue, while expressing his dissent from the opinion that the action was barred by statute.

Upon this aspect of the matter, I respectfully agree with the opinion of the learned Chief Justice of Ontario. I do not consider that the cause of action vested in the respondent was a right to sue upon the insurance contract issued by the appellant to Schnurr.

In my opinion, some assistance in interpreting the language of statutory condition 9(3) is to be obtained by considering its history and that of s. 214(1) of the *Insurance Act*. Statutory conditions, deemed to be part of every

(1) [1955] O.R. 373.

(2) (1945), 18 M.P.R. 334.

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contract of automobile insurance in force in Ontario, were first made part of the *Insurance Act* of that province by the *Ontario Insurance Amendment Act, 1922,* c. 61, s. 14. The condition which, in so far as we are concerned with the matter, corresponded with the present condition 9(3) was condition 8(3) and read:—

> No action to recover the amount of a claim under this policy shall lie against the insurer unless the foregoing requirements are complied with and such action is brought after the amount of the loss has been ascertained either by a judgment against the insured after trial of the issue or by agreement between the parties with the written consent of the insurer and no such action shall lie in either event unless brought within one year thereafter.

It was in this form that the condition appeared as part of s. 175 in the revision of the statutes of 1927.

There was nothing in the *Insurance Act* of Ontario, enabling a person injured through the negligent operation of an automobile to bring an action against an insurance company insuring the owner or the driver against such liability, until the year 1932. The limitation prescribed by statutory condition 8(3), therefore, obviously applied only to actions brought upon the policy by the named insured.

In 1932, extensive amendments were made to the *Insurance Acts* of Ontario, British Columbia and some other provinces of Canada which, in addition to recasting the statutory conditions made part of every automobile insurance policy, gave to a person insured by such a policy, though not named therein, direct resort to the insuring company to recover indemnity in respect of an accident and gave to persons injured by the negligence of an insured person the right to proceed, after recovering a judgment against the insured which could not be realized upon, directly against the company insuring the risk. This is now incorporated in s. 214(1) of the *Insurance Act* of Ontario.

In the 1932 amendment of the Ontario Act (c. 25), statutory condition 8(3) was recast and appeared as statutory condition 9(3) in the following terms:—

> Every action or proceeding against an insurer under a contract in respect of loss or damage to the automobile shall be commenced within one year next after the happening of the loss and not afterwards, and in respect of loss or damage to persons or property shall be commenced within one year next after the cause of action arose, and not afterwards.

It is to be noted that the right of action of the person having the claim against an insured which was given by s. 183*h*(1) of the amendment to the Act of 1932 and which is reproduced in s. 214(1) is

> to have the insurance money payable under the policy applied in or towards satisfaction of his judgment and of any other judgments or claims against the insured covered by the indemnity.

This is to be compared with the right of action given to a person, insured by, but not named in the policy, in the 1932 amendment by s. 183*a*(2), reproduced as s. 207(3) in the present Act, which in terms says that such person

> for that purpose shall be deemed to be a a party to the contract and to have given consideration therefor.

While the decision of the Judicial Committee in *Vandepitte* v. *Preferred Accident Insurance Company* (1) does not affect the question of limitation, the history of that action may be of some assistance in construing the section under consideration. In British Columbia, where statutory conditions in the same terms as those adopted in Ontario in 1922 had been made part of every such insurance contract in the same year by the *Automobile Insurance Policy Act* (c. 35), when the *Insurance Act* of that province was repealed and re-enacted by c. 20 of the statutes of 1925 it contained as s. 24 a provision 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, the person entitled to the damages might 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.

It was upon this section that the cause of action asserted in *Vandepitte's Case* was based. One Berry was insured against liability in respect of the operation of his automobile by a policy in the form then currently in use in British Columbia which, by its terms, agreed to extend the indemnity to any person driving the car with his permission. Berry's daughter was, by his leave, driving the car when Vandepitte was injured and, when the latter recovered judgment against her and was unable to realize upon it,

(1) [1933] A.C. 70.

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the action was brought against the insuring company. Gregory J., who tried the case, held the plaintiff entitled to recover (1) and this decision was upheld in the Court of Appeal (2). The defendant's appeal to this Court was allowed (3) and the appeal taken to the Judicial Committee was dismissed (4).

The action failed on the ground that Jean Berry, the daughter of the insured named in the policy, was not insured against the liability within the meaning of s. 24, she having no enforceable right against the insuring company, there being no privity of contract between them.

It is a matter of common knowledge among those familiar with insurance matters of this nature at the time that the 1932 legislation was adopted in British Columbia, and it may properly be inferred in Ontario, to remedy the defect in the position of third persons driving with the owner's permission as against the insuring company which had been exposed by the judgment of this Court delivered in October 1931 and to enable persons recovering judgments for damages for negligence against insured persons, named or unnamed, to resort to the insurance moneys to the extent provided. It had been said in this Court, and it was later said in the Judicial Committee, that no person other than the named insured had any right to compel the insuring company to indemnify him, and the 1932 amendment made in the same year, both in British Columbia and Ontario, remedied this situation by the amendment which is now s-s. 3 of s. 207 of the Ontario Act. Having thus provided that the unnamed insured should be deemed to be a party to the contract for the purpose of enforcing its terms, the legislature gave to the person having the claim against the insured, whether named or not, the right not to enforce the contract as if such person were a party to it but to have the insurance money payable under it applied towards satisfaction of his judgment. In addition, the legislation, both in British Columbia and Ontario, provided that no act or default of the insured, before or after the event, in violation of the provisions of the terms of the contract or the provisions of the part of the Act containing these amendments, should prejudice the rights

(1) (1929), 42 B.C.R. 255.
(2) (1930), 43 B.C.R. 161.
(3) [1932] S.C.R. 22.
(4) [1933] A.C. 70.

of the person having the claim against the insured. This, it may be noted, differed from the concluding portion of s. 24 of the British Columbia Act of 1925 which made the rights of such a person subject to the same equities as the insurer would have if the judgment had been satisfied.

The language of the amending section, 183*h*(1), of the 1932 amendment defining the nature of the right given to a person obtaining a judgment against either the named or the unnamed insured was essentially different from that given to an unnamed insured: as to the latter, he might sue upon the contract as a party to it; as to the former, the right given was to resort to the money which would be payable to the insured under the policy in satisfaction of the judgment.

In my opinion, the change in the wording of the former statutory condition 8(3) made by the amendment of 1932 did not affect the matter. The former condition applied to an action "to recover the amount of a claim under this policy": the new condition was made to apply to "every action or proceeding against an insurer under a contract" of the same nature. The former condition, as I have pointed out, applied only to actions by the named insured against the insurer. In my opinion, statutory condition 9(3) applies only to actions brought to enforce the insurance contract by the persons insured by it, whether named or not, and by persons claiming under them by assignment. Had it been intended to extend its application to new causes of action such as that given by s. 183*h*(1), I think the legislation would have said so in terms.

In the *Prudential Assurance Company* case above referred to, Baxter C. J. dissented from the judgment of the majority of the court, his opinion being that the limitation section did not apply, for substantially the same reasons as those which have commended themselves to the Court of Appeal in the present matter. I respectfully agree with these learned judges and would dismiss this appeal with costs.

CARTWRIGHT J. (*dissenting*):—This is an appeal, brought by special leave granted by the Court of Appeal for Ontario, from a judgment of that Court dismissing an appeal from a judgment of Danis J. in favour of the respondent for $1,561.71, with interest and costs.

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On April 4, 1949, the respondent, a pedestrian on a highway was struck and injured by an automobile owned by William J. Schnurr and driven by Louis Corbett with Schnurr's consent. The respondent brought action in the Supreme Court of Ontario against Corbett who defended the action. On November 15, 1951, Wells J. awarded the respondent $1,087.25 damages and costs which were taxed on February 21, 1952, at $474.46, making up the total of $1,561.71 mentioned above. The respondent issued execution but was unable to collect anything on account of her judgment.

The appellant had insured Schnurr under an "owner's policy", as defined in s. 192(*g*) of the *Insurance Act*, R.S.O. 1950 c. 183, in respect of the automobile and such policy was in force at the time the respondent was injured. The policy provided in part:—

> The Insurer agrees to indemnify the Insured, his executors or administrators, and, in the same manner and to the same extent as if named herein as the Insured, every other person who with the Insured's consent uses the automombile, against the liability imposed by law upon the Insured or upon any such other person for loss or damage arising from the ownership, use or operation of the automobile within Canada . . . and resulting from . . . bodily injury to . . . any person.

The limit of the insurer's liability was stated in the policy to be $200,000.

On March 3, 1953, the respondent commenced this action against the appellant pursuant to s. 214 of the *Insurance Act*.

The appeal is based on the following two grounds:—

> (i) that a judgment in favour of the respondent against Schnurr, the insured named in the policy, was a condition precedent to any action by the respondent against the appellant; and that Corbett was not "the insured" under s. 214 of the Insurance Act.
>
> (ii) that the respondent's action was in any event, barred by Statutory Condition 9(3) as such action was not begun against the appellant until 3rd March, 1953, which was more than one year after the respondent's cause of action, if any, arose.

For the reasons given by the learned Chief Justice of Ontario I agree with his conclusion that the first of these grounds should be rejected.

In rejecting the second ground, Danis J. followed the decision of LeBel J. in *Harrison* v. *The Ocean Accident and Guarantee Corporation Ltd.* (1) (reversed on other grounds (2)). In the reasons of the Court of Appeal in the case at bar the matter was dealt with as follows (3):—

> The second ground of appeal is that statutory condition 9(3) bars the respondent's claim in this action because the action by the respondent against the insurer was not brought within one year after the cause of action arose. I agree with counsel for the appellant that the cause of action arose, so far as the insurance of the driver was concerned, when the liability of the driver was established and that the action was not brought within one year thereafter, but, in my opinion, statutory condition 9(3) applies only to an action brought *by a person insured against the insurer,* being a cause of action under the policy of insurance. It does not apply to a cause of action arising under s. 214 (1), which cause of action is statutory and is not a cause of action arising under the contract.

Section 197 of the *Insurance Act* provides that, subject to certain exceptions none of which is applicable in the case at bar,

> (*a*) the conditions set forth in this section shall be statutory conditions and deemed to be part of every contract of automobile insurance and shall be printed on every policy with the heading "Statutory Conditions";
>
> (*b*) no variation or omission of a statutory condition shall be valid nor shall anything contained in any addition to a statutory condition or in the description of the subject matter of the insurance be effective in so far as it is inconsistent with, varies or avoids any such condition.

The statutory conditions were printed in the policy issued to Schnurr. Condition 9(3) is as follows:—

> (3) Every action or proceeding against an insurer under a contract in respect of loss or damage to the automobile shall be commenced within one year next after the happening of the loss and not afterwards, and in respect of loss or damage to persons or property shall be commenced within one year next after the cause of action arose, and not afterwards.

The provisions of s. 214 of the *Insurance Act,* so far as relevant to the question under consideration, are as follows:—

> 214 (1) Any person having a claim against an insured, for which indemnity is provided by a motor vehicle liability policy, shall notwithstanding that 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 his

(1) [1947] O.R. 889 at 906. (2) [1948] O.R. 499.
(3) [1955] O.R. at 379.

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judgment and of any other judgments or claims against the insured covered by the indemnity and may, on behalf of himself and all persons having such judgments or claims, maintain an action against the insurer to have the insurance money so applied.

(2) No creditor of the insured shall be entitled to share in the insurance money payable under any such policy in respect of any claim for which indemnity is not provided by the policy.

(3) (i) No assignment, waiver, surrender, cancellation or discharge of the policy, or of any interest therein or of the proceeds thereof, made by the insured after the happening of the event giving rise to a claim under the policy, and

(ii) no act or default of the insured before or after such event in violation of the provisions of this Part or of the terms of the contract, and

(iii) no violation of the *Criminal Code* (Canada) or of any law or statute of any province, state or country, by the owner or driver of the automobile,

shall prejudice the right of any person, entitled under subsection 1, to have the insurance money applied upon his judgment or claim, or be available to the insurer as a defence to such action.

* * *

(6) . . . where a policy provides . . . for coverage in excess of the limits mentioned in section 211 . . . nothing in this section shall, with respect to such excess coverage . . . prevent any insurer from availing itself, as against a claimant, of any defence that the insurer is entitled to set up against the insured.

Section 211, referred to in s. 214(6), reads as follows:—

Every owner's policy and driver's policy shall insure, in case of bodily injury or death, to the limit of at least $5,000 (exclusive of interest and costs) against loss or damage resulting from bodily injury to or the death of any one person, and, subject to such limit, for any one person so injured or killed, of at least $10,000 (exclusive of interest and costs) against loss or damage resulting from bodily injury to or death of two or more persons in any one accident, or, in case of property damage, to the limit of at least $1,000 (exclusive of interest and costs) for damage to property resulting from any one accident.

Counsel were able to refer us to only two reported cases in which the question under consideration has come up for decision. These are the judgment of LeBel J. in *Harrison* v. *Ocean Accident and Guarantee Corporation Ltd., supra,* and that of the Appeal Division of the Supreme Court of New Brunswick in *Bourgeois et al.* v. *Prudential Assurance Company Limited* (1).

In the *Harrison* case, LeBel J. in dealing with statutory condition 9(3) says at pages 906 and 907:—

The limitation of action therein imposed is confined to an action brought against an insurer "under a contract in respect of loss or damage to the automobile . . . and in respect of loss or damage to persons or property . . .", that is to say, the limitation is with respect to an action

(1) (1945), 18 M.P.R. 334.

brought against an insurer in the assertion of some contractual right. In my view, statutory condition 9(3) is of no application in a case of this kind, where the plaintiff sues in the assertion of a substantive right created by s. 205(1) [now 214(1)] of The Insurance Act: see *The Continental Casualty Company* v. *Yorke,* [1930] S.C.R. 180 at 184, [1930] 1 D.L.R. 609, and *Dokuchia* v. *St. Paul Fire & Marine Insurance Company* (2), at p. 423.

I am unable to find support for the view expressed in this passage in the judgment of this Court in *Continental Casualty Company* v. *Yorke* (1). In that case the right asserted by the respondent arose under s. 85(1) of *The Insurance Act,* R.S.O. 1927, c. 222, reading as follows:—

85 (1) In any case in which a person insured against liability for injury or damage to persons or property of others has failed to satisfy a judgment obtained by a claimant for such injury or damage and an execution against the insured in respect thereof is returned unsatisfied, such execution creditor shall have a right of action against the insurer to recover an amount not exceeding the face amount of the policy or the amount of the judgment in the same manner and subject to the same equities as the insured would have if the said judgment had been satisfied.

At pages 184 and 185 Lamont J., delivering the unanimous judgment of the Court, said:—

Section 85 gives the respondent a right of action against the appellant in the same manner and subject to the same equities as the insured would have if she herself had satisfied the judgment. What is the "right of action" here given? In my opinion it is simply a right to sue. The statute gives the respondent a right to sue the appellant on its policy in the place and stead of the insured, which right she would not have had but for the statute. The right to sue may be exercised by the respondent in the same manner as if the insured had paid the judgment and brought the action. This, I take it, refers to procedure. It is also to be exercised subject to equities which would prevail between the appellant and the insured. This, in my opinion, means that the respondent must establish liability on the policy against the appellant to the same extent as if the action had been brought by the insured, and that whatever defences the appellant would have been entitled to raise against the insured it may raise against the respondent.

In *Dokuchia* v. *St. Paul Fire & Marine Insurance Company* (2), Roach J.A., commenting on the judgment in *Continental Casualty* v. *Yorke,* said at page 423:—

In my opinion, the effect of the present section is to give a claimant, who has recovered a judgment for damages, more than a mere "right to sue". That is to say, the present statute does more than merely authorize procedure. It creates a substantive right in such judgment creditor enforceable by action against the insurer, all, of course, depending upon the claim, which becomes merged in the judgment, being one for which indemnity is provided by the policy.

(1) [1930] S.C.R. 180. (2) [1947] O.R. 417.

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I do not find anything in this passage which is necessarily inconsistent with the view that, under the legislation in its present form, what is given to the injured person is "a right to sue the appellant on its policy".

In *Trans-Canada Insurance Company* v. *Winter* (1), the insurer pleaded statutory condition 9(3) but in that case the action by the injured party against the insurance company had been commenced within less than one year from the date on which he had obtained judgment against the insured so that the statutory condition did not afford a defence. In his reasons Hughes J., who gave the judgment of the majority of the Court, seems to have assumed the applicability of condition 9(3) and discusses only the question as to when the cause of action arose; but this is not determinative of the matter as the question whether the condition applied to such an action was not raised in the factums and does not appear to have been argued.

In the *Bourgeois* case the trial judge, Richards J., and the majority of the Appeal Division, Harrison and Grimmer JJ., held, in circumstances indistinguishable from those in the case at bar, that statutory condition 9(3) in the *Insurance Act* of New Brunswick barred the right of action of the plaintiff. That condition and the relevant sections of the New Brunswick Act are identically worded with those of the Ontario Act which I have quoted above. Baxter C.J., while he agreed on another ground with the disposition of the appeal made by the majority, took an opposite view as to the applicability of the limitation. I find the reasons of Harrison J. on this point convincing and I agree with his conclusion. It should be mentioned that the judgment in the *Bourgeois* case was not referred to by LeBel J. in his reasons in the *Harrison* case, nor is it referred to in those of the courts below in the case at bar.

It is a possible view that the words in condition 9(3), "under a contract" qualify the word "insurer" rather than the words "action or proceeding"; but, assuming that the condition applies only in the case of actions or proceedings under a contract, it is my opinion that the respondent's action is under the contract of insurance issued by the appellant to Schnurr.

(1) [1935] S.C.R. 184.

Section 214(1) gives the respondent the right to maintain an action against the insurer to have the insurance money applied in satisfaction of his judgment. As is pointed out by Harrison J., unless the right so given is a right to sue under the contract the words in the subsection "notwithstanding that such person is not a party to the contract" would appear to be unnecessary. Subsections (3) and (6) of s. 214 read together appear to me to make it clear that the right of action is on the contract. In so far as the injured person's claim against the insured does not exceed $5,000 most of the defences available to the insurer under the terms of the contract as against the insured are taken away as against the injured person; but, wide though the words of s-s. (3) are, they do not touch the provisions of statutory condition 9(3). It is only on the basis that the action of the injured party is under the contract that it can be necessary to provide that contractual defences set out in the policy are not to avail against him. Turning to s-s. (6) it is found that where the injured party's claim exceeds $5,000 nothing in the section shall with respect to such excess coverage prevent the insurer from availing itself of any defence that the insurer is entitled to set up against the insured. The form of wording used is significant. The Legislature does not say that the insurer shall be given the right to set up such contractual defences; it assumes the continuing existence of such right except in so far as, elsewhere in the section, it is expressly taken away. This appears to me to be consistent only with the view that the right of action conferred on the injured party in s. 214(1) is a right of action under the contract.

Were the proper construction doubtful, I would have thought that the doubt should be resolved against the view that, while throughout the *Insurance Act* the Legislature has consistently prescribed periods of limitation as to actions brought against insurers which are much shorter than that applicable to actions on simple contracts, it should in this isolated case permit an action to be brought against an insurer within twenty years after the cause of action arose.

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NORTHERN ASSURANCE CO. LTD. v. BROWN

Cartwright J.

For the reasons given by Harrison J. in the *Bourgeois* case, and for those set out above, I am of opinion that effect must be given to the second ground of appeal. I would allow the appeal and dismiss the action with costs throughout, if demanded.

Appeal dismissed with costs.

Solicitors for the appellant: *Erichsen-Brown & Leal.*

Solicitors for the respondent: *Dufresne & Dufresne.*

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*PRESENT: Rand, Locke, Cartwright, Fauteux and Abbott JJ.