IN THE

SUPREME COURT OF APPEALS OF VIRGINIA

AT RICHMOND

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, CO-DEFENDANT,
PLAINTIFF IN ERROR,

vs.

RUTH TAYLOR,
DEFENDANT IN ERROR.

BRIEF FOR THE DEFENDANT IN ERROR.

Lawyers Publishing Co., Inc., 1333 E. Franklin St., Richmond, Va.

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To the Honorable Justices of the Supreme Court of Appeals of Virginia:

STATEMENT OF FACTS

As will be seen the evidence in this case was not certified and the facts set forth in the plaintiff in error's petition cover only a part and these so interposed with argument as to leave something to be desired in the interest of complete clarity, a further statement, therefore, may be helpful.

As alleged in the pleadings of this case, one Calvin Taylor, an infant of tender years, on the 11th day of August, 1931, was severely injured by an automobile operated by the principal defendant herein, Richard S. Bushnell. An action at law was instituted in the Law and Equity Court of the City of Richmond, Virginia, on behalf of the said infant by his mother and next friend, Ruth Taylor, who is the defendant in error herein, to recover damages for the injuries received and also medical, hospital and doctors' bills. A defense was made by the principal defendant herein under the supervision of the co-defendant, Employers' Liability Assurance Corporation, Limited, who carried an automobile insurance liability policy to indemnify the assured against loss by damages due to personal injuries, etc. At the trial of the case the trial court instructed the jury that they could not consider the expenses incurred for the cure of the injuries of the infant upon the ground that the parent of said child was liable therefor. The jury rendered a verdict for $2,000.00 and the court gave judgment for the said sum. The judgment order recited that no part of the said $2,000.00 was to be paid for the hospital, medical and doctors' expenses or accounts. This judgment was later paid by the Employers' Liability Assurance Company, Limited. Upon the refusal of the Insurance Company and the said defendant, Richard S. Bushnell, to pay said expenses, Ruth Taylor, the mother of said infant, then filed her petition for an attachment alleging that the verdict of the jury established the negligence of the said Richard S. Bushnell, and that such expenses were a part of the damages sustained, and named the plaintiff in error herein as a co-defendant. The grounds upon which the attachment was issued were that

the principal defendant was a non-resident and had property belonging to him in the City of Richmond, Virginia, and especially in the possession or under the control of the co-defendant. The attachment was served upon the Secretary of the Commonwealth as statutory agent of the said co-defendant and was served upon the principal defendant in the State of Massachusetts as provided by statute. Upon the return day of the attachment, which was on the 10th day of March, 1933, no appearance was made by the principal defendant, but the co-defendant filed its answer denying that it was indebted to or had in its possession or under its control any property, goods, chattels, securities or other effects belonging to the said principal defendant. At the calling of the April term of the docket of said trial court, the case was set for hearing as of July 14, 1933, on which day no appearance being made by either the principal defendant or the co-defendant, and the plaintiff not demanding a jury, the whole matter of law and fact was heard and determined by the court. At the trial the plaintiff introduced evidence to show that the doctors', medical and hospital bills were expended for cure and treatment of Calvin Taylor, her infant son; that the $2,000.00 judgment recovered by him was paid by the co-defendant and that the co-defendant carried an automobile liability policy; that the court gave instructions that no part of the $2,000.00 was to be paid out for such expenses, and upon the establishing of said claim, the court directed that the co-defendant appear before the court on the 16th day of October, 1933, and further disclose or to be examined as to whether it had in its possession any effects belonging to the said principal defendant. On the 16th day of October, 1933, the co-defendant moved the

court to set aside the judgment entered on the 14th day of July, 1933, upon the ground that same was void and that the court should first determine whether the co-defendant was indebted to or had in its possession any effects belonging to the principal defendant. The determination of this motion was continued until a later day when a copy of the insurance policy in question was introduced in evidence. The trial court determined that the order entered as of July 14, 1933, should not operate as a personal judgment but as establishing the claim of the plaintiff and determined that the co-defendant was liable under the insurance policy and directed payment by it of the amount established. A motion was made to set aside the order or judgment of the court upon several grounds which were to be put in writing and filed with the record.

The only questions raised by the co-defendant, as recalled by counsel for Ruth Taylor, were as follows: That the court had no right to give judgment or establish the claim of the plaintiff, as it had no jurisdiction over the principal defendant; that the insurance policy in question had never been in Virginia and therefore there was no property or effects of the principal defendant in the hands of the co-defendant over which the court had jurisdiction and that all proceedings were null and void. The grounds for said motion were never made a part of the record, as will be seen from an inspection of record and the certificate of exception.

Before proceeding to answer the argument of counsel for plaintiff in error, counsel for the defendant in error, respectfully submits whether Rule 22 of this Honorable Court has been complied with. From a reading of the Certificate of Exception it will be seen that no grounds are

stated for the exceptions noted to the ruling of the court by the co-defendant, and none are stated in the order appealed from. The question raised by the petition (page 18) asserting that there is no liability under the policy because Ruth Taylor, the mother of the infant, received no bodily injuries is here raised for the first time. As we understand the rule all grounds of exceptions must be stated and all defenses must be asserted so as to give the trial court the opportunity to correct any error committed and to render a judgment according to the legal rights of all parties.

ARGUMENT

First Assignment of Error

This assignment deals entirely with the jurisdiction of the court over the principal defendant, Richard S. Bushnell.

The law as stated regarding jurisdiction over non-residents is well stated. It is well settled that before jurisdiction can be had over a non-resident there must be either a personal service or some property, property right, liability or indebtedness in the State which the non-resident is entitled and which the court can reach by the proper pleading or procedure.

In attachment proceedings when the cause has matured in the manner provided by statute, which is either a personal service on the non-resident or by order of publication or personal service as provided by Section 6071, the cause is set for hearing and the first question to be determined by the court is the liability of the principal defend-

ant to the plaintiff, and when this is established, the court then determines whether the co-defendant has in its possession or control any goods, chatttels, money, securities or other effects belonging to the principal defendant. If the court determines that there is property, then it proceeds to give judgment therefor, but if it should find there were no effects then the whole proceeding is dismissed.

Counsel for plaintiff in error states that the court ignored the answer of the co-defendant because it refused to accept the answer as final. If the court should accept answers denying any liability in all cases the plaintiff would be denied a right to determine the question. In this case the court proceeded in the manner provided by the attachment statutes, and ordered the co-defendant to further disclose its liability as provided by Section 6400. Section 6401 provides that where personal services cannot be had, then an order of publication shall be directed, and Section 6405 provides that if the plaintiff's claim be established, *judgment* shall be rendered for the amount so established, and the necessary procedure to dispose of the property. If the law should be that in all cases of attachments against non-residents or foreign corporations upon claims due in this State that a personal judgment should first be had, in its strict legal sense, before the property belonging to the principal defendant determined, then it would be impossible to ever subject the property of non-residents or foreign corporations to the payment of just claims in this State. The attachment statutes provide the manner in which such property can be reached and that procedure has been followed in this case. On page 18 of the petition it is stated that the trial court should have proceeded in the manner provided by statute. Upon an examination of the pleadings in this case it will be seen

that the very letter of the statute was followed. Section 6405 provides that when the plaintiff has established his claim against the principal defendant, the court shall give him judgment, and then proceed to dispose of the property attached. In this case the claim was established and the court so ordered and then determined the question of liability under the insurance policy in question. The procedure in this case has been followed by the courts long before the present attachment statutes were enacted. If the contention of the plaintiff in error be correct, then the statutes providing for attachments against non-residents who have property or effects in this State is of no avail to our citizens. We respectfully submit that if the contention of the plaintiff in error be correct, then only claims which had been produced to judgment against non-residents could be enforced and this would defeat the very purpose of the statute giving us a remedy to recover unliquidated claims.

SECOND

The remaining assignments of error will be taken up together.

The sole question, it seems to us, is whether there is any liability under the insurance policy.

The court's attention is called to the fact that this policy does not contain what is called the "NO ACTION CLAUSE." The late Judge Crump in his opinions in the cases of *Combs* v. *Hunt*, 140 Va. at page 627, and in *Fentress* v. *Rutledge*, 140 Va., page 685, fully covered the two general forms of automobile liability insurance policies. It will be seen from the record in this case or from the facts stated, that the judgment of $2,000.00 recovered by the

infant Calvin Taylor was paid by the Insurance Company and the suit was defended by the company, and the only reason this matter is now before this court is because the law makes parents responsible for the maintenance and support of their children, and are therefore responsible for medical, hospital and doctors' bills. These expenses and obliagtions were incurred as a result of treatment and cure of the injuries inflicted upon the infant (Calvin Taylor) by the negligence of the principal defendant and were a part of the damages sustained, whether they are payable by the infant or the parent. The jury by its verdict established the negligence of the principal defendant for the injury and fixed the damages at $2,000.00, exclusive of the expenses incident thereto and the refusal of the Insurance Company to pay this claim is based entirely upon technical grounds. The attachment in this case was served upon the principal defendant, and while it only has the effect of an order of publication, it was served on him personally and he has made no attempt to deny the liability asserted, and the Insurance Company under its contract is bound to defend all such claims. It has seen fit not to defend this case upon its merits, but has asserted the claim that we cannot proceed because we have no jurisdiction over the assured, and because the plaintiff in the attachment case did not receive any bodily injury there is no liability upon it. The contention of the plaintiff in error simply means this: That in all cases where an infant is injured, regardless of the amount, the expenses incurred by its parents to cure the injury sustained, no recovery can be had against the Insurance Company because the parent did not receive the bodily injury. This would mean a limited protection to automobile owners who pay for complete protection under their contracts. Damages resulting from a wrong in-

clude all expenses incident to the injury, and to argue that because the victim is an infant such expenses cannot be recovered under the policy seems too absurd to continue. It might be added, however, that this question is raised here for the first time.

The policy of insurance in the instant case is clearly an insurance contract to indemnify the assured against liability arising out of claims for damages, and not merely an agreement to indemnify against loss sustained and actually paid by him. The company is bound by the terms of the policy to indemnify the assured by paying any loss sustained by him *"by reason of the liability imposed by law"* (quoting from policy) in case of injury, etc., and is also bound to defend any claim by suit or otherwise. Medical, hospital and doctors' bills or expenses for treatment of injuries inflicted is certainly a liability imposed by law.

The whole question of law regarding the liability of the Insurance Company has been well settled in Virginia by Judge Crump in the *Comb* v. *Hunt* and *Fentress* v. *Rutledge* cases cited above.

As to the law governing jurisdiction of the trial court in such cases is so well settled that it seems useless to quote authorities on the subject and there is no argument between your respondent and the appellant except as to the proper interpretation of same. As heretofore stated the sole question to be determined in this case is whether or not the co-defendant, Employers' Liability Assurance Corporation, was in any way indebted to the principal defendant, and this question is determined by the terms of the contract as stated in the insurance policy. If there is no liability under said policy the trial court was without jurisdiction and the judgment entered by it is void. The

attachment statutes determine the jurisdiction of the court in such cases and prescribe the procedure to be followed, and we respectfully submit that in this case the very letter of the statutes was followed.

CONCLUSION

We respectfully submit that the procedure followed in this case is in conformity to the long established practice in this State. There are thousands of judgments upon the court records where attachment proceedings were matured by foreign service or order of publication and the claim of the plaintiff established and the property attached disposed of. If the contention of the plaintiff in error be correct then all of such judgments are void.

The claim asserted herein is a just and legal claim growing out of injuries inflicted by the negligence of the principal defendant. The judgment of the court of $2,000.00, mentioned herein, was paid by the Insurance Company and the company defended the suit on behalf of the assured, and it is now trying to defeat the payment of expenses incident to the treatment of such injuries because the assured is a non-resident and cannot be reached by personal service.

We further call the court's attention to the fact that under the contract as stated in the policy of insurance the co-defendant herein is required to appear and defend all suits or claims growing out of injuries inflicted by the assured. The co-defendant in pursuance to that requirement appeared before the trial court in this case and defended the same and technically speaking it was an appearance on behalf of the principal defendant.

We respectfully submit, therefore, that the contention of the appellant is without merit and that the action of the Law and Equity Court of the City of Richmond in entering up judgment in behalf of the respondent was plainly right.

Respectfully submitted,

B. H. TURNBULL,
Counsel for Ruth Taylor.