[HIGH COURT OF AUSTRALIA.]

THE AUTOMOBILE FIRE AND GENERAL INSURANCE COMPANY OF AUSTRALIA LIMITED . . . . . APPELLANT;

AND

DAVEY . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1936.

MELBOURNE, *Mar.* 4, 5.

SYDNEY, *April* 29.

Latham C.J., Starke, Dixon, and McTiernan JJ.

Insurance—Motor car—Insurance against death or injury of "insured or his wife"—Insured, a married woman—Death of insured's husband in accident to car—Whether insured entitled to recover for death of her husband—Property Law Act 1928 (*Vict.*) (*No.* 3754), *sec.* 61.

The respondent was insured with the appellant under a comprehensive automobile policy one of the terms of which provided that if "the insured or his wife" should, in circumstances defined, sustain any bodily injury the appellant would pay to the "insured or to his legal personal representatives" the compensation specified, which in the case of death was £1,000. The insured was a married woman, which fact was known to the appellant at the time when the policy was issued. During the currency of the policy an accident occurred, in circumstances which were within the definition in the policy, in which the husband of the insured was killed. The insured claimed for the death of her husband under the above clause.

Held that the words "the insured or his wife" in the clause in the policy did not include the case of an "insured or her husband," and therefore the insured was not entitled to recover under the terms of the policy for the death of her husband.

Decision of the Supreme Court of Victoria (*Mann* C.J.) reversed.

APPEAL from the Supreme Court of Victoria.

The Automobile Fire and General Insurance Co. Ltd., the respondent, issued what was called a comprehensive automobile policy to the appellant, A. Victoria Davey, a married woman. The policy was in a printed form, and clause 9 thereof, which was in print and unaltered, provided: "If the insured or his wife shall, whilst under the age of sixty-five years, in direct connection with" the insured's motor car, "or whilst mounting into, dismounting from, or travelling in any motor vehicle (not being a motor cycle) which does not belong to the insured, and which is being used for private purposes and not being used for the carriage of goods or for the conveyance of passengers for hire, fare, or reward, sustain any bodily injury caused by accidental violent external and visible means, the company will pay to the insured or to his legal personal representatives the compensation hereinafter specified, provided such injury shall solely and independently of any other cause (excepting medical or surgical treatment consequent upon such injury) within three calendar months of the accident result in—(1) Death . . . £1,000." When Mrs Davey signed the proposal for the policy it was known to the agent of the company that she was a married woman. On 28th April 1935, during the currency of the policy, the car owned by the insured and insured under the policy skidded and overturned. At the time of the accident the insured, her husband, Thomas Henry Davey, and another passenger were travelling in the car. As a result of the accident, the insured's husband, who was under sixty-five years of age at the time of the accident, was killed.

The insured made a claim on the company, claiming £1,000 under the policy in respect of the death of her husband. The company disputed the claim, contending that the words in clause 9 of the policy relating to "the insured or his wife" were not applicable. The claim was referred to arbitration. The arbitrator found that the policy did not cover the case of a married woman whose husband was killed, but stated a case for the opinion of the Supreme Court of Victoria. The case was heard by *Mann* C.J., who held that, if the company had intended in the case of a woman to limit the benefits under clause 9 to cases of accidents happening to the

H. C. OF A. 1936.

AUTOMOBILE FIRE AND GENERAL INSURANCE CO. OF AUSTRALIA LTD. v. DAVEY.

insured only, it would have struck out the words " or his wife," and that the failure of the company to strike the words out showed that it intended in the case of a married woman being insured that " his wife " should be read as " her husband."

From that decision the company now appealed to the High Court.

O'Bryan, for the appellant. The whole question is, the insured being a married woman, whether the words in clause 9 of the policy " the insured or his wife " include " the insured or her husband." The grammatical and ordinary sense should be given to the words unless such construction leads to an absurdity. Here, that is not so and the words do not cover the loss of the insured's husband. The Court should regard the fact that the document is in a common form. The company has chosen to limit the extent of its risk to wives of persons insured. The plain sense of this document does not demand that " wife " should be read as " husband " (*Hough* v. *Windus* (1); *Glynn* v. *Margetson & Co.* (2)). Wherever in the policy the words " he " or " his " can mean " the insured," then the word should be given that meaning. But the expression " his wife " in the policy can have no application to the insured and is meaningless. Sec. 61 of the *Property Law Act* 1928 (Vict.) provides that " the masculine includes the feminine and vice versa," but the word " wife " is not the feminine of the word " husband," and the section applies only " unless the context otherwise requires." In this case the context does require otherwise, and the section has no application.

Burbank, for the respondent. The provision in sec. 61 of the *Property Law Act* 1928 covers this policy, and " his wife " should be read in clause 9 as " her husband." Every word in the document, so far as possible, should be given some meaning, and where it would be absurd to give a word its ordinary meaning, some other meaning should be given to it (*Rhodes* v. *Rhodes* (3); *Carr* v. *Montefiore* (4); *Morgan* v. *Thomas* (5); *Maye* v. *Colonial Mutual Life Assurance Society Ltd.* (6)). The policy should, if necessary, be read against the company on the doctrine of *contra proferentem*.

(1) (1884) 12 Q.B.D. 224.
(2) (1893) A.C. 351.
(3) (1882) 7 App. Cas. 192, at p. 205.
(4) (1864) 5 B. & S. 408, at p. 428; 122 E.R. 883, at p. 890.
(5) (1882) 9 Q.B.D. 643, at p. 645.
(6) (1924) 35 C.L.R. 14.

O'Bryan, in reply. The doctrine of *contra proferentem* applies only in the case where there is a real ambiguity. Here there is no ambiguity in the ordinary sense, but the policy has not covered the circumstances of the present case (*Norton* on *Deeds*, 2nd ed. (1928), p. 127).

Cur. adv. vult.

April 29.

The following written judgments were delivered :—

LATHAM C.J. In this case the Court is asked to determine the meaning of a clause in an insurance policy which provides that " if the insured or his wife " shall in specified circumstances sustain bodily injury certain sums shall be payable in the events stated in the policy. The policy was issued to a married woman. Her husband received bodily injury in the circumstances set out in the policy and died as a result thereof. The widow, the insured, now claims against the company.

The agent of the company knew that the insured was a married woman when she signed the proposal form on 25th June 1934. In this form her occupation was given as " housewife." On 28th June 1934 a receipt was given to the insured in which she was described as Mrs. A. V. Davey. The policy was issued on 29th June 1934.

The policy consists of a printed form, with particulars of dates and description of car and amount of premium filled in. Throughout the policy the words " he " and " his " are used for the purpose of indicating the insured or persons or property, &c., insured. It is clear that in order to give efficacy to the transaction according to the evident intention of the parties, such words as " he " and " his " must be construed as meaning (as they are obviously meant to mean) " the insured " and " the insured's " respectively.

It is contended that similar reasoning shows that the phrase " the insured or his wife " in the clause of the policy already mentioned must receive a similar interpretation and that it should be read as meaning, in the case of this policy, " the insured or her husband." It is pointed out that unless this construction is adopted the words " or his wife " become meaningless, and reliance is placed upon the

H. C. OF A. 1936.

AUTOMOBILE FIRE AND GENERAL INSURANCE CO. OF AUSTRALIA LTD. v. DAVEY.

Latham C.J.

rule that every endeavour should be made to find a meaning for each word contained in any document evidencing or constituting a legal transaction.

I regret that I find myself unable to accept this reasoning. I agree that it is necessary to interpret the words " he " and " his " in the manner stated. The reason for adopting such an interpretation is that it is clear upon the face of the document that these pronominal words are intended to refer to the insured. Different considerations appear in the case of the phrase " the insured or his wife." They show that when the company was insuring a man they were prepared to give certain protection to him in the event of his wife being injured. It does not appear to me to follow as a matter of course that the company was necessarily prepared, in a case where a woman was insured, to give corresponding protection in respect of her husband. The words in themselves are plain and they have no application in the case of the present policy. To read the word " wife " as including " husband," would really be to alter the words of the policy and not to interpret them.

The *Property Law Act* 1928, sec. 61, provides that " in all deeds, contracts, wills, orders and other instruments executed, made or coming into operation after the commencement of this Act, unless the context otherwise requires . . . (*d*) The masculine includes the feminine and vice versa."

In my opinion sec. 61 is a general provision to be interpreted and applied according to its terms and not to be read down by limiting it to matters affecting property. Sec. 61 (*d*) applies, however, only to words which are simply masculine or feminine and not to words which in their meaning include a masculine or feminine element but also some other element. " He " and " she " are merely words of gender. " Husband " and " wife " include gender as an element, but they also connote a particular relationship to another person. It has, so far as I am aware, never been suggested that legislation requiring a husband to support his wife means that the wife is under an obligation to support her husband. It would be difficult, I think, to contend successfully that an insurance policy giving protection to menservants equally included maidservants. Thus the fact that there is some masculine or feminine content in

the meaning of the word under consideration cannot in itself justify the application of sec. 61 (*d*). For this reason I am unable to take the view that sec. 61 would justify a Court in reading, in this document, the word " wife " so as to include " husband."

The appeal should be allowed.

STARKE J. The appellant company issues what is known as a comprehensive automobile policy. It issued such a policy, on a printed form, to the respondent, who was a married woman. One of the clauses in the policy provided : " If the insured or his wife shall whilst under the age of sixty-five years " (in certain specified circumstances) " sustain any bodily injury caused by accidental violent external and visible means, the company will pay to the insured or his legal personal representatives the compensation " thereinafter " specified, provided that such injury shall solely and independently of any other cause . . . within three calendar months of the accident result in . . . death." The respondent made a claim under the policy in respect of the death of her husband, which was referred to arbitration. It appeared on the facts proved or admitted before the arbitrator that the husband was killed in a motor accident, covered by the terms of the clause set out above if he was within the description of the risk insured. No claim for rectification of the policy was made or suggested. The arbitrator was of opinion that the appellant company was not liable on the policy, but stated a case, upon which *Mann* C.J. held that it was liable.

The only question is whether, on a proper interpretation of the clause, the husband is within the risk insured. He was not the insured, nor was he the " wife " of the insured, in the ordinary and natural meaning of the word. It was said, however, that the subject or the context indicated that the clause could or should not be given its natural meaning, or else that to give it such a meaning involves some inconsistency with the rest of the policy. It is true enough that, as applied to a woman, the word " wife " in the clause is void of meaning. But the policy is a printed one, appropriate enough in the case of males. The fact that the form was carelessly used and applied in the case of a woman does not manifest any intention

H. C. OF A. 1936.

AUTOMOBILE FIRE AND GENERAL INSURANCE CO. OF AUSTRALIA LTD. v. DAVEY.

Starke J.

that the word " wife " should be understood in a sense quite contrary to its natural meaning, nor authorize the Court to deviate from that meaning. Moreover, to depart from the natural meaning of the expression would impose, I should think, quite a different risk upon the appellant. The argument regarding consistency is based upon the use of the pronoun " his " after the word " insured." But this word causes no difficulty, for the context makes it plain that it is only a substitute word, or proxy, for " the insured," who, in the policy before us, was a woman.

The provision of sec. 61 (*d*) of the *Property Law Act* 1928 was also relied upon: " In all deeds, contracts, wills, orders and other instruments executed, made or coming into operation after the commencement of this Act, unless the context otherwise requires . . . (*d*) The masculine includes the feminine and vice versa." Gender or sex may be denoted by a change of word, and " wife " is the feminine of " husband." But the words " husband " and " wife " denote much more than gender or sex, they also import a relationship. In order to ascertain the proper interpretation of the word " wife " in the policy now before the Court, the subject matter of the policy must be considered, as well as its general scope and language (*Chorlton* v. *Lings* (1); *Viscountess Rhondda's Claim* (2)). Here the word " wife " expresses a certain relationship to the insured, and is not merely a mode of denoting gender or sex. The context excludes the application of such a provision as is contained in sec. 61 (*d*) of the *Property Law Act* 1928, even if that section includes commercial contracts and policies of insurance within its terms—a matter upon which for the present I prefer to express no concluded opinion; though it will be observed that the Act purports to consolidate and amend the law relating to conveyancing and real property.

The appeal should be allowed, and effect given to the award of the arbitrator set out in the ninth paragraph of the case stated by him.

DIXON J. The question raised by this appeal is altogether one of interpretation. The authority of the arbitrator may have been wide enough to direct rectification of the policy of insurance, but

(1) (1868) L.R. 4 C.P. 374.

(2) (1922) 2 A.C. 339.

no attempt was made before him to prove the making of an antecedent contract of insurance the true effect of which the policy failed to express.

In terms the policy covers the death or bodily injury of the insured or his wife, and, as the deceased was the insured's husband, his death is not within the description of risk insured against if that description is interpreted according to the natural meaning of the words in which it is expressed.

To give the expressions used a secondary meaning which will include her husband's death, the insured appeals, first, to the rule established by sec. 61 (*d*) of the *Property Law Act* 1928 (Vict.), by which in all instruments, unless the context otherwise requires, the masculine includes the feminine and vice versa, and, secondly, to the general principles of interpretation which require that effect should be given to the intention found in a writing, notwithstanding the use of particular words inappropriate for its correct expression, or the absence of language specifically stating it.

The rule laid down by sec. 61 (*d*) of the *Property Law Act* 1928 relates only to the gender which terms may import. It means that the use of pronouns or generic terms which, prima facie, are of one gender shall not exclude the other of the two genders. But the description "wife" imports a status which differs from the status imported by the word "husband" in much besides gender. It is not the only example of words describing conditions appropriate to one only of the two sexes but having a counterpart in a condition appropriate to the other sex. In the case of such expressions, it may be said that they are used intentionally to designate one sex and so overcome the prima facie application of the statutory rule of interpretation. But I think it is more accurate to say that they are not within the rule because they are not words describing a class or category which, apart from the gender of the words, would include both sexes.

The contention upon which the insured's claim must depend is that from the written instruments constituting the contract of insurance, when considered in their entirety, there sufficiently appears an intention to insure a married woman against various risks attend-

H. C. OF A. 1936.

AUTOMOBILE FIRE AND GENERAL INSURANCE CO. OF AUSTRALIA LTD. v. DAVEY.

Dixon J.

ing her ownership of an automobile, including the risk of the death of her husband. No doubt it is important to give a steady and perhaps liberal application to the principle that the words are not the chief thing in a writing but the intent and design of the makers (cp., per *Willes* C.J., *Smith* v. *Packhurst* (1)).

The common use of printed forms gives a new and more frequent application to the rule of interpretation which authorizes Courts to disregard particular expressions and even provisions and to understand them in a sense varying from that which they exactly express. But an essential condition must be fulfilled before such a course is justified. The document itself, when applied to the circumstances and explained by such evidence as is legitimate, must contain indications of the real meaning of the parties which are sufficient to produce a reasonable certainty as to their intention in reference to the matters that are material.

In the present case, it is true that a printed form appropriate to a comprehensive insurance of a male owner of a motor car has been used to express a contract insuring a married woman. It is true that the comprehensive cover stated in the printed form extends to the death and bodily injury of a wife. But from these facts and from the consequences in detailed textual interpretation to which the use of the masculine leads, it cannot be safely inferred that the insurer intended to cover the risk of a husband's death or bodily injury. The ground is not enough to justify the consequence. The document does not clearly convey to the mind an intention, mistakenly expressed, to include that risk. It may be that the insurer was or would have been content to provide that cover. But a Court cannot say that the insurer has done so. All that appears is that in the case of a male owner it would be content to cover his wife, if he had one.

For these reasons I think the appeal should be allowed and the order of *Mann* C.J. discharged. In lieu thereof it should be ordered and declared that the insured is not entitled to recover from the respondent company the compensation mentioned in the award of the arbitrator.

(1) (1742) 3 Atk. 135, at p. 136; 26 E.R. 880, at pp. 880, 881.

McTIERNAN J. I agree that the appeal should be allowed.

If it were clear that it was the real intention of the contract to cover the risk of accident to the insured's husband, mere inadvertence or inaccuracy in the expression of that intention would not prevent the contract being construed so as to cover that risk. But it is impossible to collect that intention from the intrinsic evidence of the policy and the proposal. The policy is embodied in a printed form, and, while the words " the insured " may refer to a married or unmarried man or woman or a firm or a company if any of these were the party insured, it does not appear on the face of the document that the words " or his wife " in the longer expression " the insured or his wife " were intended to have any operation when the printed form is used, as here, to express the contract between the appellant company and a married woman. There is no ground for the presumption that the words " or his wife " were intended to cover the risk of accident to the husband of the insured. It is impossible to read this expression as " his or her spouse," or to say that its true meaning is to be gathered by expanding it so as to read " or his wife or her husband."

The respondent relied upon sec. 61 (*d*) of the *Property Law Act* 1928, which provides that in the instruments therein mentioned, unless otherwise required by the context, " the masculine includes the feminine and vice versa." The application of sec. 61 (*d*) is not excluded by reason of the nature of the instrument now in question, but it does not enable the word " wife " to be read as " husband." The classifications denoted respectively by the words " the masculine " and " the feminine " are based on the *discrimen* of gender, and the section makes applicable to both classes nouns and pronouns which ordinarily serve the grammatical purpose of distinguishing between them. The words " husband " and " wife " are distinctive of status, although it is true that they signify persons not of the same gender. But neither word is a synonym or an equivalent for a description of a person by reference to gender. " Husband " is not the masculine of " wife," as, for example, the word " he " is the masculine of " she."

H. C. OF A. 1936.

AUTOMOBILE FIRE AND GENERAL INSURANCE CO. OF AUSTRALIA LTD. v. DAVEY.

Appeal allowed. Judgment of the Supreme Court of Victoria dated 17th October 1935 set aside. Declare that upon the proper construction of the policy of insurance in the award in the form of a special case mentioned the company is not liable to the insured. Order that A. V. Davey, the respondent, do pay to the company, the appellant, the costs of and incidental to the reference of the said case to the Supreme Court and also the costs of this appeal.

Solicitors for the appellant, *Mills & Oakley.*
Solicitor for the respondent, *J. B. Plant.*

H. D. W.

[HIGH COURT OF AUSTRALIA.]

CULBERT . . . . . APPELLANT;
INFORMANT,

AND

THE CLYDE ENGINEERING COMPANY LIMITED . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF NEW SOUTH WALES.

H. C. OF A. 1936.

SYDNEY, *April* 23, 30.

Starke, Dixon Evatt and McTiernan JJ.

Industrial Arbitration (Cth.)—Award—Apprentices—Deed of apprenticeship—Prescribed form—Period of apprenticeship—Specified term—Commencement—Prospective, not retrospective—Breach—Minor not bound by the award.

An award of the Commonwealth Court of Conciliation and Arbitration provided that "apprentices shall be apprenticed for a period of five years" in accordance with a prescribed form which imposed an obligation upon the employer properly to instruct apprentices during that period. Under the