In the Privy Council.

No. 11 of 1932.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

ALICE MARIE VANDEPITTE (Married Woman, Wife of E. J. VANDEPITTE) - - - - - - (*Plaintiff*) *Appellant*

AND

THE PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK - - - - - - (*Defendants*) *Respondents.*

CASE FOR THE APPELLANT.

1. This is an appeal by Special Leave granted the 7th December 1931 from a decision of the Supreme Court of Canada whereby the Supreme Court set aside the decisions in the Appellant's favour of the Court of Appeal for British Columbia dated the 30th June 1930 and of the Supreme Court of British Columbia dated the 24th December 1929 and ordered the Appellant's action to be dismissed with costs. RECORD.

2. This Appeal is concerned with the construction of section 24 of the Insurance Act of British Columbia (Chapter 20 of 1925), which runs as follows :— p. 43.

10 " 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 in " respect of such liability, and an execution against him in respect " thereof is returned unsatisfied, the person entitled to the damages " may 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."

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RECORD.

3. The main question for decision is whether the above-quoted section gives to the Appellant (the injured third party) a right of recourse against the Respondents (the insurers) in a case where the injury to the Appellant was caused by a girl driving her father's motor car with his permission, and the policy of insurance granted by the Respondents in the name of the father expressly provides indemnity, in the same manner and under the same conditions as to the named insured, to all persons driving the car with his permission for private or pleasure purposes.

There are also questions whether the Respondents did not by their conduct impliedly agree with the girl to hold her covered on the terms of the policy, and whether they are not, in the events which have happened, estopped from alleging that they are not liable as insurers within the section.

p. 15, *ll.* 34 –37. *p.* 14, *l.* 3.

4. The Appellant was on the 5th March 1928 a passenger in a motor car driven by her husband and sustained injuries through a collision between that car and another car owned by one R. E. Berry and driven with his permission by his daughter Jean Berry.

p. 27, *ll.* 10 –12.

5. R. E. Berry at a time when the motor car in question was being used by his daughter daily, took out a combined policy of insurance issued by the Respondents and another Company, which policy was in force at the time of the accident. By the terms of this policy the Respondents covered liability in respect of bodily injuries and death resulting from an accident, all liability for material damage being borne by its co-insurers.

6. The more material provisions of the policy were :—

" Section E.—Legal Liability for Bodily Injuries or Death :—

" (1) To indemnify the Insured against loss from the liability " imposed by law upon the Insured for damages on account of " bodily injuries . . ., accidentally suffered or alleged to have " been suffered by any person or persons . . . as a result of " the ownership, maintenance or use of the automobile; provided " that on account of bodily injuries to . . . one person the " Insurer's liability under this section shall not exceed the sum of " Five thousand Dollars ($5,000.00), and subject to the same limit " for each person the Insurer's liability on account of bodily " injuries to . . . more than one person as the result of one " accident shall not exceed the sum of Ten thousand Dollars " ($10,000.00).

" (2) To serve the Insured in the investigation of every accident " covered by this policy and in the adjustment, or negotiations " therefor, of any claim resulting therefrom.

" (3) To defend in the name and on behalf of the Insured " any civil actions which may at any time be brought against the " Insured on account of such injuries, including actions alleging " such injuries and demanding damages therefor, although such

" actions are wholly groundless, false or fraudulent, unless the " Insurer shall elect to settle such actions.

" (4) To pay all costs taxed against the Insured in any legal " proceeding defended by the Insurer, and all interest accruing " after entry of judgment upon such part of same as is not in excess " of the Insurer's limit of liability, as hereinbefore expressed.

" The foregoing indemnity . . . shall be available in the " same manner and under the same conditions as it is available " to the Insured to any person or persons while riding in or legally " operating the automobile for private or pleasure purposes, with " the permission of the Insured . . .; provided that the " indemnity payable hereunder shall be applied, first, to the protec- " tion of the named Insured, and the remainder, if any, to the " protection of the other persons entitled to indemnity under the " terms of this section as the named Insured shall in writing " direct."

7. In the statutory conditions annexed to the policy it was provided *inter alia* :—

" Accidents to the Persons and Property of Others :—

" 8.—(1) Upon the occurrence of an accident involving bodily " injuries or death, or damage to property of others, the Insured " shall promptly give written notice thereof to the Insurer, with " the fullest information obtainable at the time. The Insured " shall give like notice, with full particulars of any claim made " on account of such accident, and every writ, letter, document or " advice received by the Insured from or on behalf of any claimant " shall be immediately forwarded to the Insurer.

" (2) The Insured shall not voluntarily assume any liability or " settle any claim, except at his own cost. The Insured shall not " interfere in any negotiations for settlement or in any legal " proceedings, but, whenever requested by the Insurer, shall aid " in securing information and evidence and the attendance of any " witnesses, and shall co-operate with the Insurer, except in a " pecuniary way, in all matters which the Insurer deems necessary " in the defence of any action or proceeding or in the prosecution " of any appeal.

" Who may give Notice and Proofs of Claim :—

" 10. Notice of claim may be given and proofs of claim may " be made by the agent of the Insured, in case of the absence of " the Insured or in case of inability of the Insured to give the " notice or make the proof, such absence or inability being satis- " factorily accounted for, or in the like case or if the Insured " refuses to do so by a person to whom any part of the Insurance " money is payable."

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p. 106. p. 17, l. 37. p. 18, l. 2. 8. After the accident, formal notice thereof was given by R. E. Berry as required by the Policy, and the said Jean Berry, as the person driving the car, furnished a written report to the Respondents wherein she stated that she was driving with the permission of R. E. Berry.

p. 18, l. 20. 9. After giving such written notice, R. E. Berry, against whom no claim was or has been made, " had nothing to do with it," as he expressed it in his evidence. No claim was made by him nor did he request the Respondents to take any action under the policy.

p. 94, ll. 19-20. p. 91. p. 92. 10. The Appellant, not knowing that Jean Berry was a minor, brought against her personally an action for damages for negligence and secured a judgment for $4,600 and costs, whilst upon third party proceedings instituted, as hereinafter set out, by Jean Berry against the Appellant's husband, alleging that he had contributed to the accident by his negligence, Jean Berry recovered judgment for $2,300 with costs. No other claim arose out of the accident.

p. 105. 11. Subsequently, having found that Jean Berry was a minor, the Appellant in view of certain legislation of British Columbia imposing liability in certain cases upon parents for the torts of their minor children, applied to have the judgment set aside, but unsuccessfully.

p. 9, l. 25. p. 95, ll. 8-11. p. 9, l. 20. p. 42. p. 43, l. 20. p. 39, ll. 11-20. p. 108, ll. 7-10. p. 108, ll. 17-19. p. 9, ll. 31-32. 12. The whole of this defence and third party proceedings were conducted by the Respondents. On receiving notice of the accident and without any claim having been made against them by R. E. Berry, they instructed insurance assessors, through such assessors, instructed solicitors, who received instructions throughout from such assessors, through such solicitors, accepted service and entered appearance for Jean Berry, through such solicitors, instituted the said Third Party proceedings and carried on the same to judgment, through such solicitors, resisted the Appellant's motion to set aside the judgment against Jean Berry, by their said solicitors, offered themselves to pay to the Appellant the amount of the judgment less the amount of the Third Party Judgment, pointing out that " they " (the Respondents) " would probably find it impossible to collect the Judgment " from the husband." Paid the account of the solicitors.

p. 86, ll. 46-47. p. 85, ll. 22-23. p. 87, ll. 29-30. 13. R. E. Berry gave the solicitors no instructions and was in no way connected with the action. Jean Berry did not pay the solicitors " one cent," she knew the car was insured, and she knew that the action was defended on behalf of the Insurance Company: it was never contended that she had retained solicitors or that the solicitors acted otherwise than on the instructions of the insurance assessors. Indeed the defence was carried on " on behalf of the Insurance Company," as was expressly provided by the conditions of the policy.

p. 108, l. 28. 14. The Respondents, though conducting the defence through their assessors and solicitors, sedulously concealed their identity, and their solicitors refused to reveal their identity except on conditions laid down by

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them. Various proceedings were taken by the Appellant to enforce disclosure and, in the words of the learned Trial Judge, the Respondents did " Everything in its power to prevent the Plaintiff (Appellant) from " ascertaining its name and launching these proceedings." p. 109, l. 11. p. 111. pp. 30, 34–37.

15. The Appellant's Solicitors and Counsel had known that the car in question was insured. p. 95, ll. 31–41.

16. The Appellant issued an execution against the said Jean Berry. Such execution was returned unsatisfied and the Appellant thereupon, on the 20th May, 1929, brought the present action in the Supreme Court of British Columbia against the Respondents claiming to recover $5,648·71, the amount of the said Judgment and costs by virtue of S. 24 of the Insurance Act. R. E. Berry, having refused to be joined as a Plaintiff, was joined on terms as a Defendant by Order of the Supreme Court of British Columbia. p. 80. p. 81, l. 5. p. 6, No. 4.

17. By their Defence the Respondents, besides denying liability under the Insurance Act, pleaded (*inter alia*) that by the terms of the policy no action would lie against them until Judgment had been recovered thereon against R. E. Berry, and that it was a condition precedent to Jean Berry's right to indemnity, if any, that R. E. Berry should give a direction in writing as provided by the last sentence of the clause of the policy quoted in paragraph 6 hereof, and that he had not done so. p. 3.

18. In reply the Appellant pleaded, *inter alia*, that by their conduct in defending the prior action the Respondents were estopped from denying liability under the Insurance Policy. p. 5.

19. The action was heard before Mr. Justice Gregory who, on the 24th December, 1929, adjudged that the Appellant should recover from the Respondents the sum of $5,000, the amount mentioned in the policy, and costs. p. 29.

20. By his reasons for Judgment the learned Judge, after pointing out that there was nothing unusual in the form of the policy and that the amount of the premium was " measurably increased " by reason of the ostensible liability to others than the named insured, went on to hold that Jean Berry was insured within the meaning of S. 24 of the Insurance Act, and further that the conduct of the Company " was a representation by " acts that it would assume any Judgment obtained within the limits " of the Policy," and an admission of liability to Jean Berry. p. 30, ll. 10–20. p. 32, ll. 13–14.

21. The Respondents appealed to the Court of Appeal for British Columbia and the Appellant cross-appealed against the limitation of the Judgment to $5,000. The Court of Appeal, by Judgment dated the 30th June 1930, dismissed the Respondents' appeal with costs and allowed the Appellant's cross-appeal, ordering judgment to be entered for her for the sum of $5,648.71 and costs. p. 34. p. 36. p. 37.

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p. 38, ll. 21-31. p. 30, ll. 24-32. p. 42, ll. 5-7.

22. By his reasons for Judgment, in which Mr. Justice Martin concurred, Mr. Justice Galliher held that Jean Berry was insured within the meaning of S. 24 of the Insurance Act. Mr. Justice McPhillips concurred in dismissing the appeal but handed down no reasons for Judgment.

23. The Respondents thereupon appealed to the Supreme Court of Canada, (Duff, Newcombe, Rinfret, Lamont and Cannon, JJ.), which, by Judgment dated the 6th October 1931, allowed the appeal and ordered Judgment to be entered for the Respondents with costs.

p. 64.

24. Mr. Justice Newcombe, with whom Mr. Justice Rinfret, Mr. Justice Lamont and Mr. Justice Cannon concurred, said that S. 24 was "obviously "a provision in aid of execution, and in the nature of a garnishee pro- "ceeding" and therefore interpreted the section as being applicable "only if the judgment debtor, in this case Jean Berry, is insured or, as I "interpret it, has a right to recover indemnity from an insurer." He held that the policy conferred no right of action upon her against the insurer nor any right to compel the policy-holder to exercise his remedies on her behalf. He further held that the Company's acts in defending the action against Miss Berry did not "cut any figure in determining liability in this "case."

p. 70, ll. 11 -15.

p. 72, ll. 20 -23.

25. Mr. Justice Duff thought that the insurance contemplated by S. 24 was one which confers a right of indemnity which the person incurring the liability has the legal means, direct or indirect, of enforcing, for two reasons:

p. 66, ll. 2 -4.

(1) That unless it is so restricted in its operation it is difficult to assign any certain limits to the section.

(2) That the section does provide for a method by which the liability of the insurance company to the person responsible for the injuries may be made available for the benefit of the person injured.

p. 66, ll. 6 -10.

He further stated that "It would, I repeat, be a monstrous injustice "to impose upon the insurance company, by statute, a liability to the "daughter or to persons injured by the act of the daughter, which the "daughter could not enforce directly, or indirectly, in the absence of "some such enactment, and a construction leading to that result ought "not to be accepted unless the language employed is so clear as to leave "no reasonable way of escape."

p. 66, ll. 29 -34.

26. The Appellant humbly submits that the Judgment of the Supreme Court of Canada should be reversed and that the Judgment of the Court of Appeal for British Columbia should be restored for the following, amongst other

REASONS.

1. That section 24 gives a right of recourse in all cases where an insurer has agreed that it will indemnify the party liable.

2. That Jean Berry was "insured" within the meaning of the section.

3. That Jean Berry had a direct right to indemnity under the policy.
4. That R. E. Berry entered into the policy on behalf of all persons named or designated in the policy.
5. That Jean Berry adopted and ratified the policy.
6. That Jean Berry had a right to indemnity without any written direction by her father, the provision in the policy as to such direction not being a condition precedent and, in any case, not applying where the named insured requires no protection and there are no competing claims against a limited fund.
7. That, in any case, by their conduct after the date of the accident, the Respondents impliedly agreed with Jean Berry to hold her covered on the terms of the policy.
8. That the Respondents are estopped from alleging that they have not insured Jean Berry or that she has not adopted and ratified the policy.
9. Because the judgment of the Court of Appeal and of the Supreme Court of British Columbia are right and the judgment of the Supreme Court of Canada is wrong.

D. N. PRITT.

WILFRI D BARTON.

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CASE FOR THE APPELLANT.

WHITE & LEONARD,
Bank Buildings,
Ludgate Circus,
E.C.4,
Agents for Appellant.

EYRE AND SPOTTISWOODE LIMITED, EAST HARDING STREET, E.C. 4.