68/1932

In the Privy Council.

No. 11 of 1932.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

ALICE MARIE VANDEPITTE, MARRIED WOMAN, THE WIFE OF E. J. VANDEPITTE (Plaintiff) - - - *Appellant*

AND

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

RECORD OF PROCEEDINGS.

INDEX OF REFERENCE.

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EXHIBITS.

* In pursuance of rule 18 of the Statutory Rules and Orders 1925, the printing of this document is objected to by White & Leonard, Solicitors for the Appellant.

In the Privy Council.

No. 11 of 1932.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

ALICE MARIE VANDEPITTE, MARRIED WOMAN, THE WIFE OF E. J. VANDEPITTE (Plaintiff) - - - *Appellant*

AND

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

RECORD OF PROCEEDINGS.

In the Supreme Court of British Columbia.

No. 1. Statement of Claim, 20th May 1929.

No. 1.

Statement of Claim.

On or about the 13th day of June, 1928, the Plaintiff obtained a judgment against one, Jean Berry, for damages to the person or property of the Plaintiff in the sum of $4600.00 and taxed costs amounting to the sum of $780.25, which said judgment and costs still remain due, owing and unsatisfied.

The Plaintiff did on the 7th day of July, 1928, issue a Writ of Fieri Facias against the said Jean Berry in respect of the said judgment and costs and a return of nulla bona has been made thereto.

The said Jean Berry was at all times material, insured by the Defendant Company against liability for such injury or damage to the person or property of the Plaintiff.

Under and by virtue of the "Insurance Act," being Chapter 20 of the Statutes of British Columbia 1925, and amending Acts, the Plaintiff claims judgment against the Defendant for the sum of $5380.25 and interest thereon from the 13th day of June, 1928.

In the Supreme Court of British Columbia.

No. 1. Statement of Claim, 20th May 1929—*continued.*

PARTICULARS.

June 13th, 1928—

To amount of judgment obtained by the Plaintiff against Jean Berry	$4600.00
To taxed costs pursuant to judgment	780.25
	$5380.25
To interest on the sum of $5380.25 from June 13th, 1928, to May 20th, 1929, at 5 per cent. per annum by Statute	269.01
Total amount	$5649.26

There is still due and owing the sum of $5649.26. Wherefore the Plaintiff claims the sum of $5649.26, and the costs of this action to be taxed and also interest on the said sum at the rate of 5 per cent. per annum by statute from the 28th day of January, 1929, to the date of payment or judgment.

AMENDMENT.

1.—(*a*) The Defendant, R. E. Berry, is the father of Jean Berry and was requested in or about the month of September, 1929, on behalf of the Plaintiff to join this action as a party Plaintiff but refused so to do, and the said Defendant, R. E. Berry, is sued as Trustee for the said Jean Berry.

2.—(*a*) All conditions precedent required under the Insurance Policy of the Defendant Company have been performed and complied with.

3.—(*a*) The said Jean Berry was at all times material to this action legally operating motor vehicle of R. E. Berry, B.C. License, 1928, Number 10–525, for private use or pleasure purposes with the permission of the said R. E. Berry or of an adult member of the household of the said R. E. Berry other than a chauffeur or domestic servant.

Place of Trial: Vancouver, B.C.

Delivered this 20th day of May, A.D. 1929.

W. H. CAMPBELL,
Plaintiff's Solicitor.

Amended this 21st day of October, 1929, pursuant to the Order of the Hon. Mr. Justice W. A. Macdonald, dated the 18th day of October, 1929.

In the Supreme Court of British Columbia.

No. 2. Statement of Defence, 11th July 1929

No. 2.

Statement of Defence.

1. The Defendant denies each and every allegation of fact contained in the Statement of Claim herein, and specifically denies that Jean Berry was on the 13th day of June, 1928, or at any other time, insured by the Defendant Company as alleged, or at all, and denies that the Defendant is indebted to the Plaintiff in the sum of $5649.26 or at all, either under and by virtue of the Insurance Act or at all.

2. In answer to the whole of the Statement of Claim the Defendant says that at the time the Plaintiff's alleged cause of action arose against Jean Berry for damages to the person or property of the Plaintiff, the said Jean Berry was not insured with this Defendant against liability to the Plaintiff, or at all, and the Defendant says that it is not, nor has it ever been, an insurer of the said Jean Berry either within the meaning of the Insurance Act, S.B.C. 1925, Chapter 20, Section 24, or at all.

3. The Defendant says that by virtue of a combination automobile policy issued by the Defendant and the New Jersey Insurance Company of Newark, New Jersey, the Defendant did insure R. E. Berry from the 14th day of April, 1927, to noon on the 14th day of April, 1928, against legal liability for bodily injuries or death and in the said policy the said R. E. Berry was the insured and was so named therein as provided by the Insurance Act, S.B.C. 1925, Chapter 20, Section 13, and that the said R. E. Berry was the only person insured by the said policy, and the Defendant says that it was a condition of the said policy that no action to recover the amount of a claim under the policy should be brought against the insurer until, inter alia, the amount of the loss had been ascertained by a judgment against the insured after the trial of an issue, or by agreement between the parties, with the written consent of the insurer, and the Defendant says that such condition has not been fulfilled, and the Defendant relies on Statutory Condition No. 8 (3), forming part of the said policy.

4. The Defendant says that the said Jean Berry was not insured against legal liability for bodily injuries or death, or at all, by the policy referred to in Paragraph 3 hereof, and particularly the Defendant says—

(*a*) That on the occasion on which the Plaintiff suffered damages to her person or property as alleged, the said Jean Berry was not legally operating the automobile referred to and described in the said policy of insurance for private or pleasure purposes with the permission of the said R. E. Berry or of any adult member of the household of the said R. E. Berry, other than a chauffeur or domestic servant, within the meaning of the provisions of the said policy;

(*b*) That the said Jean Berry was a minor, and was not the holder of a driver's licence, as required by the Motor Vehicles Act, R.S.B.C. 1924, Chapter 177, and amending Acts.

In the Supreme Court of British Columbia.

No. 2. Statement of Defence, 11th July 1929—*continued.*

5. In the alternative and in further answer to the Plaintiff's claim herein the Defendant says that if the said Jean Berry was insured by the Defendant against liability to the person or property of the Plaintiff (which is not admitted but denied) the Plaintiff's claim under the Insurance Act, S.B.C. 1925, Chapter 20, Section 24, is subject to the same equities as the Defendant would have if the judgment of the Plaintiff had been satisfied by the said Jean Berry and the Defendant says that the Plaintiff's claim is subject to the following equities :—

(*a*) The said Jean Berry did not give the Defendant prompt written notice of the alleged accident to the Plaintiff, as required by the Statutory Condition 8 endorsed on the said Policy;

(*b*) In point of law the said Jean Berry could not have maintained an action in her own name against the Defendant.

6. In the further alternative the Defendant says that if the said Jean Berry was or is a person entitled to indemnity under the terms of the said policy (which is not admitted but denied) it is a condition precedent to her right to such indemnity that the insured R. E. Berry should in writing so direct, and the Defendant says that the said insured R. E. Berry has not in writing so directed, nor at all.

7. In the further alternative and in answer to the whole Statement of Claim the Defendant says that the said Jean Berry at no time had any interest in the subject matter of the policy of insurance referred to in paragraph 3 hereof, and if the said policy is a contract of indemnity to the said Jean Berry (which is not admitted but denied) the same is a gaming or wagering contract and is wholly void, and the Defendant relies on the Insurance Act, S.B.C. 1925, Chapter 20, Section 10.

8. In the further alternative the Defendant says that the said policy of insurance did not contain the name and address of the said Jean Berry as an insured, and the Defendant relies on the Insurance Act, S.B.C. 1925, Chapter 20, Section 13.

9. The Defendant says that the Statement of Claim herein discloses no cause of action against the Defendant.

Delivered at Vancouver, B.C., this.....day of July, 1929, by

W. W. WALSH,

whose place of business and address for service is c/o Walsh, Bull, Housser, Tupper, McKim & Molson, 410 Seymour Street, Vancouver, B.C., Solicitors for the Defendant.

No. 3.

Plaintiff's Reply.

1. As to Paragraphs 1, 2, 3 and 4 of the Statement of Defence herein the Plaintiff joins issue save as to the admissions therein contained.

2. The Plaintiff denies each and every allegation of fact contained in Paragraph 5 of the Statement of Defence herein and denies that prompt written notice of the accident to the Plaintiff was not given by Jean Berry.

3. And the Plaintiff further says that if prompt written notice of the accident to the Plaintiff was not given by Jean Berry, which is not admitted but denied, that prompt written notice was given by R. E. Berry or some one on behalf of Jean Berry or R. E. Berry.

4. And in the alternative and in further answer to Paragraph 5 of the Statement of Defence herein the Plaintiff says that if prompt written notice of the accident to the Plaintiff was not given to the Defendant, that the Defendant waived the giving of such notice and by its conduct in defending on behalf of the said Jean Berry the Supreme Court action brought in respect to this accident, which said Supreme Court action is numbered V334/1928, and was between Alice Marie Vandepitte as Plaintiff and Jean Berry as Defendant and the Defendant is estopped from denying that it did not receive prompt written notice of the accident to the Plaintiff.

5. The Plaintiff denies each and every allegation of fact contained in Paragraph 6 of the Statement of Defence herein and specifically denies that R. E. Berry did not direct the Defendant to pay the Plaintiff's claim.

6. In further answer to Paragraph 6 of the Statement of Defence herein, the Plaintiff says that if the said R. E. Berry did not direct the Defendant to pay the Plaintiff's claim, which is not admitted but denied, that the said R. E. Berry wrongfully refused to so direct and did so with the knowledge and connivance and at the implied and/or express request of the Defendant, its servants or agents and for the purpose of preventing the Plaintiff from recovering the amount of the judgment awarded in the Supreme Court action referred to in the preceding paragraph.

7. And in further answer to Paragraphs 5 and 6 of the Statement of Defence herein, the Plaintiff says that all the conditions therein set out were impliedly or expressly waived by the Defendant, its servants or agents by its not requiring the said conditions to be performed and the said Defendant is estopped from denying that there was any breach of the Statutory Conditions or conditions precedent as set out in Paragraphs 5 and 6 of the Statement of Defence herein.

8. As to Paragraph 7 of the Statement of Defence herein the Plaintiff joins issue.

9. As to Paragraph 8 of the Statement of Defence herein the Plaintiff joins issue.

In the Supreme Court of British Columbia.

No. 3. Plaintiff's Reply, 6th September 1929 —*continued.*

10. And in answer to the whole of the Statement of Defence herein the Plaintiff says that the Defendant by its conduct in defending the Supreme Court action number V334/1928, in which Alice Marie Vandepitte was Plaintiff and Jean Berry was Defendant is estopped from denying liability under the Insurance Policy referred to in the Statement of Claim herein.

DATED at Vancouver, B.C., this 6th day of September, 1929.

W. H. CAMPBELL,
Solicitor for the Plaintiff.

To the Defendant

And to Messrs. Walsh, Bull, Housser, Tupper, McKim & Molson, Its Solicitors.

This Reply was filed and delivered by W. H. Campbell, whose place of business and address for service is 470 Granville Street, Vancouver, B.C.

No. 4. Order of Gregory, J., adding R. E. Berry as party Defendant, 7th October 1929.

No. 4.

Order of Gregory, J., adding R. E. Berry as party Defendant.

Before the Honourable Mr. JUSTICE GREGORY in Chambers.

Monday the 7th day of October 1929.

UPON APPLICATION on behalf of the above-named Plaintiff Upon reading the affidavit of W. H. Campbell, sworn the 1st day of October 1929, and filed herein, and upon reading the pleadings and proceedings in this action, Upon hearing Mr. C. L. McAlpine of Counsel for the Plaintiff and Mr. Alfred Bull of Counsel for the Defendant:

IT IS ORDERED that the Plaintiff be at liberty to amend the Writ of Summons and all subsequent pleadings and proceedings in this action by adding R. E. Berry as a Party Defendant in this action.

> " Provided that the Joinder of the said R. E. Berry as a party defendant shall not in itself entitle the Plaintiff to any relief which she could not have claimed if the action had commenced at the time of such joinder."

AND IT IS FURTHER ORDERED that the Plaintiff be at liberty to serve the said R. E. Berry with a copy of the Writ of Summons as amended without filing an amended copy of the said Writ of Summons and without suing out a Writ of Summons.

IT IS FURTHER ORDERED that the costs of and incidental to this application be costs in the cause.

F. B. GREGORY, J.

No. 5.

Examination for Discovery of R. E. Berry.

Vancouver, B.C., November 6th, 1929.

C. L. McAlpine, Esq., appearing for the Plaintiff. G. Roy Long, Esq., appearing for the Defendant Berry. Alfred Bull, Esq., appearing for the Defendant Company.

ROLAND ELTON BERRY, Sworn.

EXAMINED BY MR. MCALPINE.

1. *Q.* Mr. Berry, you have been sworn?—*A.* Yes.

2. *Q.* You are one of the defendants in this action. You are the defendant R. E. Berry?—*A.* Yes.

3. *Q.* You are the father of Jean Berry?—*A.* Yes.

4. *Q.* Now, on June 13th, 1928, the plaintiff Vandepitte recovered a judgment against your daughter Jean Berry for $4,600 and costs. That is correct, is it not?—*A.* I believe so.

5. *Q.* The automobile in question in the action against your daughter was your McLaughlin car, was it not?—*A.* Yes.

15. *Q.* This motor car 10-525 was insured with the Preferred Accident Insurance Company of New York? Is that correct?—*A.* Well, I cannot give you the name of the company, because I don't know. They got the name of it and I imagine they would put it on there correctly. I never looked it up.

16. *Q.* You have no doubt that is the company?—*A.* No, I have not.

22. *Q.* When this accident happened, the subject matter of the action against your daughter, you notified Mr. Housser, the solicitor of the company, of the accident?—*A.* I notified the agent.

23. *Q.* Yes, and you know the agent then instructed—you know that the lawsuit was carried on on behalf of the insurance company by Mr. Housser?—*A.* Yes.

24. *Q.* The defence of your daughter was carried on by Mr. Housser?—*A.* Yes.

25. *Q.* On behalf of the insurance company?—*A.* Yes.

26. *Q.* You did not pay for any legal services in connection with that lawsuit?—*A.* No.

27. *Q.* Nor did your daughter?—*A.* No.

28. *Q.* Were you asked to supply any particulars by the insurance company?—*A.* They got all the information from my daughter. They did not ask me for anything.

31. *Q.* As a matter of fact, do you know who the adjusters were? Do you know that Perraton & McLaren were the adjusters for the insurance company?—*A.* I think they were. I am not positive.

In the Supreme Court of British Columbia.

No. 5. Examination for Discovery of R. E. Berry, 6th November 1929 —*continued.*

32. *Q.* As a matter of fact, they took the whole matter over, did they not?—*A.* Yes.

33. *Q.* Anything they wished done by your daughter was done, so far as you know?—*A.* Yes.

34. *Q.* And anything they asked you to do was done?—*A.* They did not ask me. I did not enter it.

35. *Q.* Now, this insurance policy of yours was in force at the time of the accident, the subject matter of the other action? That is correct, isn't it?—*A.* It was in force at the time of the accident. I don't know when it expired and the other was renewed. I don't know.

36. *Q.* Now, you were asked to join in this action by Mr. Campbell, were you not, as a party plaintiff?—*A.* Yes, I got a letter from him.

37. *Q.* You refused or did not do anything about it?—*A.* I did not do anything about it.

38. *Q.* That meant a refusal?—*A.* No.

39. *Q.* You had no intention of entering as a party plaintiff?—*A.* No, I did not see why I should.

49. *Q.* Did you answer that?—*A.* No, I did not. I have been trying to think back to remember just what happened. I think he did ask me if I did tell you the name of the insurance company, and I think I told him I did not give it, and I think his exact answer, as I remember it, was the one word "Good." I think that is all that happened. I did not ask him if I would give it. I told him I had not, because I did not know, and I think that is the word he used.

55. *Q.* This is the letter you got from Mr. Campbell?—*A.* Yes.

(*Document Marked No. 1 for Identification.*)

56. *Q.* And to which you did not answer?—*A.* No.

No. 6. Examination for Discovery of H. A. Robertson, 14th November 1929.

No. 6.

Examination for Discovery of H. A. Robertson.

November 14, 1929.

EXAMINATION OF H. A. ROBERTSON, AN OFFICER OF THE DEFENDANT COMPANY, FOR DISCOVERY, pursuant to appointment herein.

C. L. McAlpine, Esq., appearing for the Plaintiff. Alfred Bull, Esq., appearing for the Defendant Company.

HARRY ALFRED ROBERTSON, Sworn.

EXAMINED BY MR. MCALPINE.

1. *Q.* You are the attorney for the Preferred Accident Insurance Company of New York?—*A.* Yes.

2. *Q.* The defendant in this action, and you have been sworn?—*A.* Yes.

3. *Q.* I show you a daily report and a specimen policy. On that daily report a policy of insurance was issued to R. E. Berry, was it not?—*A.* Yes.

4. *Q.* By the defendant insurance company?—*A.* Yes.

5. *Q.* And that insurance was in force in the month of March, 1928?—*A.* Yes.

(*Daily Report Marked No.* 1 *for Identification*) (*Specimen Policy Marked No.* 2 *for Identification.*)

10. *Q.* This is a copy of Miss Berry's report of the accident?—*A.* Yes.

Mr. BULL: I do not want you to misname that. It is not a report of the accident; it is the statement of the person driving the car.

Mr. MCALPINE: All right.

(*Document Marked No.* 3 *for Identification.*)

11. *Q.* Now, a policy was issued to R. E. Berry by the Preferred Accident Insurance Company identical with Exhibit 2? That is correct?—*A.* Yes.

15. *Q.* The license for the motor car Miss Berry was driving was 10-525?—*A.* I don't know that.

16. *Q.* Look at the report?—*A.* Yes, that is what she shows.

17. *Q.* You know, do you not, that was a motor car of R. E. Berry's?—*A.* The serial number is the same.

18. *Q.* Now, after the accident, Mr. Robertson, what was the first knowledge you got of the accident?—*A.* I have forgotten now, but I presume it would be by telephone call.

19. *Q.* From whom?—*A.* Mr. Mitchell, the broker.

20. *Q.* And you then instructed your insurance adjusters to take up the matter?—*A.* Yes.

21. *Q.* Your insurance adjusters were Perraton & McLaren?—*A.* Yes.

22. *Q.* And they did take it up?—*A.* Yes.

23. *Q.* And a solicitor was employed to defend the action on behalf of the Preferred Accident Insurance Company?—*A.* Yes.

24. *Q.* And those solicitors were—well, George Housser?—*A.* Yes.

25. *Q.* And they defended the action, and the Preferred Accident paid their account?—*A.* Yes.

26. *Q.* Did you personally place the matter in Perraton & McLaren's hands?—*A.* I cannot remember now.

27. *Q.* You or somebody in your office duly authorized?—*A.* Yes.

28. *Q.* What other titles have you besides attorney of the Preferred Accident?—*A.* In connection with the Preferred Accident?

29. *Q.* Yes?—*A.* I am manager of the company that acts as general agents for them.

30. *Q.* Now, when the matter was handed over to Perraton & McLaren, and to the solicitors, they took charge of everything?—*A.* Yes.

In the Supreme Court of British Columbia.

No. 6. Examination for Discovery of H. A. Robertson, 14th November 1929 —*continued.*

31. *Q.* And you had no further connection with it; that is correct?—*A.* Yes.

32. *Q.* Was there anything Miss Berry omitted to do that she should have done, or R. E. Berry?—*A.* Miss Berry, of course, we would not look to at all for anything to be done. R. E. Berry was our assured.

33. *Q.* Did R. E. Berry omit to do anything?—*A.* I don't think so.

34. *Q.* You would know?—*A.* Yes. I don't know of anything he omitted.

35. *Q.* You were given notice of the accident?—*A.* Yes.

36. *Q.* And this written statement, which I call a report, Exhibit 3, was supplied; this form was supplied by you and filled out by Miss Jean Berry?—*A.* Yes.

Mr. BULL: This is a double document. The original produced will show that it is signed on the first page by the assured, R. E. Berry, and this is merely a statement on the back by Jean Berry. The original will be here for the trial.

Mr. MCALPINE: I can take it this is a true copy with the exception of the signatures?

Mr. BULL: With the exception of the signatures, that is a true copy.

Mr. MCALPINE: Very good.

48. *Q.* You know, do you not, that she was driving the car with the permission of R. E. Berry?—*A.* I don't know definitely, no.

48. *Q.* You were never told that Miss Jean Berry was driving that car with her father's permission?—*A.* I am quite sure that we have no report of it.

54. *Q.* Do you say she was not legally operating the car at the time of the accident?—*A.* No, I would not say that.

55. *Q.* So far as you know she was legally operating the car?—*A.* Yes.

66. *Q.* Now, then, in paragraph 3 of the Statement of Defence, you say it was a condition of the policy that no action to recover the amount of a claim under the policy should be brought against the insurer until, inter alia, the amount of the loss has been ascertained by a judgment. That has been done?

Mr. BULL: Have you read the whole of that; judgment against the assured after the trial of an issue.

Mr. MCALPINE: 67. *Q.* Your distinction is that it is not against the assured but against his daughter?—*A.* Yes.

72. *Q.* What conditions in paragraph 8 or in Statutory Condition 8, sub-section 3, have not been complied with. Come on, Mr. Robertson, you know what it is, if there are any.

Mr. BULL: You need not hurry. If you want to think out the question and take time with the answer, you may do so.

Mr. MCALPINE: 73. *Q.* Well, don't you know. Oh, come, Mr. Robertson, let us have an answer?—*A.* I would say there was no notice given by Miss Berry.

74. *Q.* You say that there was no notice by Miss Berry?—*A.* Yes.

75. *Q.* A moment ago you said that she was not the assured?—*A.* She is not.

76. *Q.* Do you say that you require any notice?—*A.* To defend any action against her?

77. *Q.* You did defend an action against her?—*A.* Yes.

78. *Q.* Without requiring notice, you defended an action against her?—*A.* Yes.

79. *Q.* So, don't you think you have waived that condition?

Mr. BULL: You need not answer that.

Mr. MCALPINE: 80. *Q.* Did you get notice from R. E. Berry?—*A.* Yes.

100. *Q.* Answer me this: What was required. What is set out to be required in Sections 8 and 9 of the Statutory Conditions that were not done by R. E. Berry?—*A.* That were not done by R. E. Berry?

101. *Q.* Yes?—*A.* I don't know whether there was anything that was not done by R. E. Berry.

102. *Q.* You ought to know. Can you say there was anything not done by R. E. Berry that should have been done?—*A.* No.

103. *Q.* Can you say there is anything not done by Jean Berry that should have been done?—*A.* Isn't that the same question that you asked before?

104. *Q.* I don't know. I am asking it again if it is. Let me have an answer, please?—*A.* I make the same answer as before, that there was no notice.

105. *Q.* No notice by Miss Jean Berry. Isn't that a notice, Exhibit 3?—*A.* This is a part of the statement of R. E. Berry.

106. *Q.* It is signed by Jean Berry?—*A.* As the driver of the car.

107. *Q.* What more would you require?—*A.* Notice, I suppose, that she would be claiming indemnity under the policy.

108. *Q.* Claiming indemnity. You got that notice, however, and then instructed your solicitor to defend the action.

Mr. BULL: You need not answer it. He has already answered it.

Mr. MCALPINE: 109. *Q.* After you got that notice you instructed your solicitor to defend the action?—*A.* Yes.

110. *Q.* And you took no objection to the notice then?—*A.* No.

111. *Q.* And the only time that it occurred to you to take notice of this objection was after judgment was taken against Miss Jean Berry and this action was started?—*A.* Yes.

112. *Q.* You never repudiated liability to R. E. Berry?—*A.* No.

113. *Q.* No, nor you never repudiated liability to Jean Berry so far as she is concerned, or to R. E. Berry. That is right?—*A.* Yes, that is right.

120. *Q.* Now you say in paragraph 4 that Jean Berry was not insured against legal liability?—*A.* No.

121. *Q.* Why do you say that?

In the Supreme Court of British Columbia.

No. 6. Examination for Discovery of H. A. Robertson, 14th November 1929 —*continued.*

Mr. BULL: Referring to paragraph 4 of the Statement of Defence which you are at liberty to look at. You need not answer that. That is purely a question of law.

Mr. MCALPINE: 122. *Q.* Have you any reason to think she is not insured, and if so, what is it?—*A.* The only reason is that she is not our insured.

129. *Q.* You swear the defendant Jean Berry did not give the defendant prompt notice of the alleged accident, is that so?—*A.* I said she did not.

130. *Q.* I know you did. Is it so, is it the truth?—*A.* It is the truth.

131. *Q.* Look at the date of that notice. It is dated March 8th, isn't it? —*A.* This one here?

132. *Q.* Yes, that one, Exhibit 3. The accident happened on March 5th. Do you say three days is not prompt written notice?

Mr. BULL: That document speaks for itself.

Mr. MCALPINE: I am not concerned with that.

Mr. BULL: Just a minute. now until I make my objection. That document referred to speaks for itself, and I instruct the witness not to answer any questions arising on that document.

Mr. MCALPINE: 133. *Q.* Do you think three days' notice is not sufficient notice, is not prompt notice?—*A.* No, I would think it was.

134. *Q.* You would think it was prompt notice?—*A.* Yes.

135. *Q.* Were you prejudiced in any way in not getting the notice before the 8th?—*A.* No.

136. *Q.* Now, you say in paragraph 6 that it was a condition precedent to Jean Berry's right to indemnity that the assured should, in writing, direct that she should be indemnified. Did the assured direct that she should be indemnified?—*A.* No.

137. *Q.* Why didn't he?—*A.* I don't know.

138. *Q.* Was it because the matter was placed in your solicitors' hand? —*A.* I could not tell.

139. *Q.* Did you ever require him to give you it?—*A.* No.

147. *Q.* If the adjusters Perraton & McLaren or George Housser, or any member of his firm, took the matter out of Miss Berry's hands, that was perfectly all right so far as you are concerned?—*A.* Yes.

154. *Q.* But so far as you know no instructions were given by the insurance company not to supply the plaintiff or her solicitors with the name of the insurance company?—*A.* Not so far as I know.

No. 7.

Evidence of Mrs. E. J. Vandepitte.

IN THE SUPREME COURT OF BRITISH COLUMBIA
(Before the Honourable Mr. JUSTICE GREGORY)
VANCOUVER, B.C. November 25, 1929.

Between

ALICE MARIE VANDEPITTE, A Married Woman, the Wife of E. J. Vandepitte - - - - - - - - - *Plaintiff.*

And

THE PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK and R. E. BERRY - - - - - *Defendants.*

C. L. McAlpine, Esq., appearing for the Plaintiff.
A. Bull, Esq., and H. Ray, Esq., appearing for the Defendant Company.
G. Roy Long, Esq., appearing for the Defendant Berry.

Mr. MCALPINE: I appear for the Plaintiff, my Lord.

Mr. BULL: I appear, my Lord, for the Defendant; Mr. Ray is with me.

THE COURT: Are you appearing for both Defendants, Mr. Bull?

MR. BULL: No, my Lord; for the Defendant Preferred Accident Insurance Company.

THE COURT: Anybody appearing for Mr. Berry.

MR. MCALPINE: Yes, my Lord. Mr. Long is appearing for the Defendant R. E. Berry, but he is for the moment in the court downstairs, and he will be up immediately, I understand.

This action arises, my Lord, in respect of an insurance policy. In June, 1928, the plaintiff, the present plaintiff, Mrs. Vandepitte, obtained a judgment for personal injuries from Miss Jean Berry. The judgment was for $4,600 and costs. The writ of execution was issued and served, nulla bona was had, and then an examination in aid of execution. It came to the knowledge of the plaintiff that there was an insurance policy on the motor car driven by Miss Berry, and this action is for a judgment against the insurance company by virtue of Section 24 of the "Insurance Act," which gives a judgment creditor the right to sue an insurance company directly.

I will call Mrs. Vandepitte.

ALICE MARIE VANDEPITTE, the plaintiff herein, being first duly sworn, testified in her own behalf as follows:—

DIRECT EXAMINATION BY MR. MCALPINE.

Q. Mrs. Vandepitte, you are the plaintiff in this action?—*A.* Yes, sir.

Q. And you were the plaintiff in an action against Miss Jean Berry for personal injuries received by you, by her driving. Is that correct?—*A.* Yes, sir.

In the Supreme Court of British Columbia.

Plaintiff's Evidence.

No. 7.
Mrs. E. J. Vandepitte.
Examination—*continued.*

Q. That was March 5th, 1928?—*A.* Yes, sir.

Q. When the accident occurred the car was driven by Miss Berry?—*A.* Yes, sir.

Q. Do you know the license number of the car?—*A.* 1928, 10-525.

Q. That accident took place in the City of Vancouver, Province of British Columbia?—*A.* Yes, sir.

Q. And you recovered judgment for $4,600 and costs?—*A.* Yes.

Q. And you have not been paid?—*A.* No, sir.

Mr. McALPINE: Your witness.

Mr. BULL: Have you the judgment there?

Mr. McALPINE: Yes. I was going to put it in. Do you want it now?

Mr. BULL: Yes, I would like to ask this witness a question.

THE COURT: You are going to put in the formal judgment, are you?

Mr. McALPINE: Yes, my Lord, I am going to put it in.

Mr. LONG: I apologize, my Lord. I was tied up in another case. I am appearing for Mr. Berry.

Mr. McALPINE: My Lord, I suggested to Mr. Bull that I put in all these documents in the previous action, and he has no objection. I have got the file here. The original writ of summons; notice of appearance; statement of claim; statement of defence; judgment; allocatur for costs; writ of fi. fa——

THE COURT: Return on it?

Mr. McALPINE: Yes, the return is endorsed on the back. Examination in aid of execution; order of the Honourable the Chief Justice; a further allocatur dated 21st November; order of Your Lordship dated the 7th October.

THE COURT: What did I do?

Mr. McALPINE: You just ordered costs.

THE COURT: Are you putting them all in as one exhibit?

Mr. McALPINE: I am putting them all in as one exhibit, my Lord, yes. I might as well complete it. Then, my Lord, there was a notice to set aside, an application made to set aside the judgment of Mrs. Vandepitte against Miss Jean Berry, which was made by the plaintiff. I want to put in that notice of motion, and the appeal book. The motion was dismissed; I appealed to the Court of Appeal, and the appeal was dismissed. That will go in as Exhibit 2.

(*File in previous action marked Exhibit No.* 1.)
(*Appeal Book and Documents marked Exhibit No.* 2.)

Mr. BULL: Is the judgment going to be put in?

THE COURT: Is it to set aside the judgment you have already referred to?

Mr. McALPINE: Yes. I don't know that I have the judgment, but the motion and the appeal were dismissed. Now, then, I may as well get all my documents in. I would ask my friend for the insurance policy covering the motor car.

Mr. BULL: My friend means the daily report and the specimen policy?

Mr. McALPINE: Yes. I had better explain that. There is only one policy. The insured lost his policy, and my friend is producing the original day sheet or daily report from which the policy is made up, and a specimen copy of the policy in question.

Mr. BULL: It is conceded that that makes a complete policy.

Mr. McALPINE: Yes, makes a complete policy. That will go in as one exhibit, my Lord.

(*Policy and Report marked Exhibit No.* 3.)

Mr. McALPINE: Then there is the report of the accident, in my learned friend's possession.

Mr. BULL: Yes (producing).

THE COURT: Have I got anything to do with that accident? That is all settled.

Mr. McALPINE: The report of the accident is against the insurance company.

THE COURT: Report of accident by whom?

Mr. McALPINE: By R. E. Berry, and another one by Jean Berry. It is one document, my Lord. One is on the back.

THE COURT: You are putting that in as a separate document, are you?

Mr. McALPINE: Yes, my Lord.

(*Document marked Exhibit No.* 4.)

Mr. McALPINE: All right; your witness.

CROSS-EXAMINATION BY MR. BULL.

Cross-examination.

Q. Mrs. Vandepitte, according to this judgment which is put in, you recovered $4,600 against Jean Berry?—*A.* Yes.

Q. For damages?—*A.* Yes.

Q. That arose out of a motor accident, and on that occasion you were driving with your husband, were you not?—*A.* I was sitting——

Q. Your husband was driving the car?—*A.* Yes, sir.

Q. And your husband was joined as third party in that action, do you remember?—*A.* Yes.

Q. And in Exhibit 2 there appears a judgment——

THE COURT: The husband was driving?

Mr. BULL: Yes, my Lord.

In the Supreme Court of British Columbia.

Plaintiff's Evidence.

No. 7. Mrs. E. J. Vandepitte. Cross-examination—*continued.*

Q. And on the trial your husband was held to be negligent, too?

Mr. McAlpine: Well, my Lord, of course it is rather unusual. I don't know—this evidence cannot possibly be to a matter of credibility, but what my learned friend is seeking to do, I take is—there was in this action of *Vandepitte* vs. *Miss Jean Berry* a judgment in favour of the defendant against the husband of the plaintiff, but I submit that has nothing whatsoever to do with this action, and my learned friend is not entitled to bring anything of that kind out. What possible good is it for the court to know in adjudicating this action as to whether or not Miss Berry has a judgment against this witness' husband? What has it got to do with this action? It cannot possibly have any, I should say. If my friend insists in getting that, I don't know that I can stop him, but I just want to point that it is cluttering up the record and it is absolutely irrelevant to any question at issue in this action.

Mr. Bull: I am not going to do very much cluttering. I have just a question to ask, and as a matter of fact my friend put in the evidence himself. It is in Exhibit 2.

Q. I just draw your attention to this, that there were two judgments in that action, one of which my friend has referred to for $4,600 in your favour against Miss Berry. Is that correct?—*A.* That is correct.

Q. And there was also a judgment on third party proceedings——

The Court: Not two judgments in this witness' favour?

Mr. Bull: Oh, no.

Q. The other judgment that I have referred to is a judgment in favour of the defendant Jean Berry against your husband for $2,300. That is correct, is it not?—*A.* Yes, sir.

The Court: That is on third-party proceedings?

Mr. Bull: That is on third-party proceedings, My Lord.

Q. Now, Mrs. Vandepitte—

The Court: Wait a minute; I want to get this.

Mr. Bull: *Q.* And your action is to recover the full sum of $4,600 from the insurance company?—*A.* Yes.

Q. In your examination for discovery I put these questions to you. I just want you to listen to them; Numbers 47 to 50:

> "*Q.* In plain English, that that action of yours against Miss Berry was defended by an insurance company—"
>
> Now I must go back to Questions 45:
>
> "Now, in your reply, that is one of the documents I mention in the pleadings, you allege through your solicitor—*A.* What is allege?
>
> "You state.—*A.* Yes—in plain English.
>
> "Yes, in plain English that that action of yours against Miss Berry was defended by an insurance company, in fact by the Preferred

Accident Insurance Company? Do you understand my question?—*A.* Absolutely.

"I am asking you, and do not answer until your counsel has an opportunity of telling you not to. In view of that statement I am asking you, Mrs. Vandepitte, when you first knew that that action was being defended by an insurance company; do you understand the question?—*A.* No.

"(Question read by stenographer.—*A.* When I first knew?

"*Q.* Yes?—*A.* Well, only when Mr. Campbell, when I went to see my solicitor, and after he told me—not until after the trial.

"*Q.* How long after the trial?—*A.* Oh, I don't know; I could not recollect."

Are those answers correct?—*A.* Yes.

(Witness aside.)

No. 8.

Evidence of R. E. Berry.

ROLAND E. BERRY, one of the defendants herein, being first duly sworn, testified on behalf of the plaintiff as follows:—

DIRECT EXAMINATION BY MR. MCALPINE.

Q. Mr. Berry, you are one of the defendants in this action?—*A.* Yes.

Q. And on the 5th March, 1928, you were owner of car B. C. license 1928 10-525?—*A.* Yes, sir.

Q. And that car was driven with your permission by your daughter Jean Berry, was it not, at that time?—*A.* Yes.

Q. At that time, your daughter was living at home with you?—*A.* Yes.

Q. She had a driver's license, had she not, Mr. Berry?—*A.* Yes.

Q. How old was your daughter at that time—19, I think it was?—*A.* 19.

THE COURT: *Q.* What is the license?—*A.* I am not positive of that old license.

Mr. MCALPINE: *Q.* But your daughter had a driver's license?—*A.* She had a driver's license.

Q. That car at the time of the accident was insured with the Preferred Accident Insurance Company of New York?—*A.* Yes.

THE COURT: That is the defendant company here?

Mr. MCALPINE: Yes, My Lord.

Q. You did everything that was required of you by the insurance company, Mr. Berry?—*A.* I notified the insurance company.

Q. You notified the insurance company of the accident?—*A.* Yes.

In the Supreme Court of British Columbia.

Plaintiff's Evidence.

No. 8.
R. E. Berry.
Examination—*continued.*

Q. That is Exhibit 4, I think. And your daughter did likewise, did she not. She gave a report of the accident?

Mr. BULL: Well, that is a very leading question.

Mr. MCALPINE: That is right; it is leading.

Q. Did your daughter make a report?—*A.* You, mean to the police station or do you mean to the insurance company?

Q. No, to the insurance company.—*A.* No, I notified the insurance company. I don't know that she did.

Q. I show you this document, Exhibit 4. Do you know that signature?—*A.* Yes.

Q. That is your daughter's signature?—*A.* Yes.

Q. Now, you were requested by the plaintiff in this action to join as party plaintiff, were you not?—*A.* Yes.

Q. And you refused?—*A.* Yes.

Q. After notification had been given to the insurance company, what did you do?—*A.* I did not do anything.

Q. What happened, Mr. Berry?

THE COURT: After what?

Mr. MCALPINE: *Q.* After the notification of the accident had been given to the insurance company?—*A.* Well, I had nothing to do with it.

Q. You had nothing more to do with it. Do you know what happened? Who defended the action?—*A.* The insurance company.

Q. The insurance company defended the action. And were there any adjusters in it?—*A.* Yes, there were adjusters.

Q. There were Messrs. Perraton & McLaren?—*A.* Perraton & McLaren, yes.

Mr. MCALPINE: That is all.

Cross-examination.

CROSS-EXAMINATION BY MR. BULL.

Q. Mr. Berry, through whom did you insure your car?—*A.* Mitchell.

Q. What was the firm name?—*A.* I think at that time it was the Slater Company.

Q. Did you ever have the policy in your possession?—*A.* Yes.

Q. Have you got it now?—*A.* No.

Q. You don't know where it is, I suppose?—*A.* No. At the expiration of each policy, at the expiration of an insurance policy this man comes up and takes the policy to pass any renewal; at that time he changed the policy, when that policy was expired, and gave me another company.

Q. Well, in short, he looked after your insurance?—*A.* Yes.

THE COURT: *Q.* What is that name?—*A.* Albert Mitchell.

Mr. BULL: Of Slater & Company, it was then.

THE COURT: Does anything arise on that?

Mr. BULL: Just possible.

Q. When this accident was reported to you by your daughter what did you do?—*A.* I went up to the accident.

Q. To the scene of the accident?—*A.* Yes.

Q. What did you do as far as insurance was concerned? Whom did you communicate with, if anyone?—*A.* Mitchell.

Q. Did you do that by telephone?—*A.* Yes.

Q. And you told him that your daughter had been in an accident, did you?—*A.* Yes.

Q. And subsequently you signed Exhibit 4, did you not, which is a notice?—*A.* Yes.

Q. That is your signature?—*A.* Yes.

Q. Now, my friend drew your attention to your daughter's signature on the back, which you said was your daughter's signature?—*A.* Yes.

Q. Now, you notice that that document on the back is a separate document. It is headed "Statement of Person Driving the Car at the Time of the Accident." You see that, don't you?—*A.* Yes.

Q. So that when you said that your daughter did not give notice to the insurance company you mean that you had given the notice by signing this?—*A.* Yes, I gave the notice to the insurance company.

Q. And your daughter merely signed a statement as the person who was driving the car, as it is so headed?—*A.* Yes.

Mr. BULL: Thank you.

(Witness aside.)

(*This witness was recalled,* see *p.* 27.)

No. 9.

Evidence of W. H. Campbell.

Mr. MCALPINE: There is no need of my calling the bailiff to prove that nulla bona?

Mr. BULL: No.

WILLIAM H. CAMPBELL, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:—

DIRECT EXAMINATION BY MR. MCALPINE.

Q. Mr. Campbell, you are a barrister and solicitor practising in the City of Vancouver?—*A.* Yes.

Q. You were solicitor engaged by the plaintiff in the action against Miss Jean Berry?—*A.* I was.

Q. You issued the writ on her behalf?—*A.* I did.

Q. Whom did you serve?—*A.* Service was accepted by the firm of Walsh & Company on behalf of Miss Berry.

In the Supreme Court of British Columbia.

Plaintiff's Evidence.

No. 9.
W. H. Campbell. Examination—*continued.*

THE COURT: *Q.* Is that service of the summons?—*A.* Yes.

Mr. MCALPINE: *Q.* After judgment what did you do?—*A.* After judgment I applied to the firm of Walsh & Company, Mr. Housser, for payment of the amount of the judgment, and after waiting a month and a half or so while he communicated with the Eastern offices of the insurance company, not being paid, I issued execution.

Q. And then what happened?—*A.* That was returned nulla bona. About that time we commenced a motion to set aside our own judgment, and that went on into the fall.

Q. What happened to Miss Berry in the meantime?—*A.* In the meantime, Miss Berry went away to school in the east, in Eastern Canada, and did not return until the following spring.

Q. Yes?—*A.* In the spring, I moved to—I applied for leave to examine her in aid of execution.

Q. Yes?—*A.* And did so.

Q. And you finally got the name of the insurance company?—*A.* I then applied again to have Miss Berry inform herself so that she could answer the question as to the name of the insurance company, and an order was made by the Honourable the Chief Justice to that effect, and then the firm of Walsh & Company gave me the name of the insurance company.

Q. Gave you the name of the insurance company insuring car B.C. 10-525?—*A.* Yes.

Q. On the 5th March, 1928?—*A.* 1928.

Q. Now, you had some correspondence. There are a number of letters that I want to put in. Up to that time, you had been unable to get the name?—*A.* That is right.

Q. They refused to disclose it?—*A.* That is right.

Mr. BULL: My friend must not lead.

Mr. MCALPINE: It is common ground; it does not do any harm.

Mr. BULL: It is not common ground at all.

Mr. MCALPINE: I want to put in three letters from the firm of Walsh, McKim, Housser & Molson, dated July 5th, 1928, August 23rd, 1928, and August 27th, 1928.

THE COURT: Those are all from Walsh & Company?

Mr. MCALPINE: Yes, my Lord.

THE COURT: Who to?

Mr. MCALPINE: To W. H. Campbell, and I think one to myself. I was counsel on the trial in the original action.

THE COURT: You will put them all in?

Mr. MCALPINE: Yes, my Lord.

Mr. BULL: I am objecting to them going in. I would like to read them through first. My Lord, these are objectionable. They all relate to a compromise, a settlement. Now, it is true they are not stated to be without prejudice, but I think your Lordship will agree with me that whether

that is so or not, correspondence leading up to settlement, whether that settlement goes through or not, they are without prejudice anyway, apart from whether or not they are marked " Without Prejudice." And that is on the ground of public policy and have always been protected. I submit it would be a most dangerous thing to break through that. I mean, a solicitor would never be free to discuss a settlement if there was the risk that a letter in which he might make an admission for the purpose of settlement would be used against him. Now, I am taken in a way by surprise. I did not think my friend would tender these, and I cannot give your Lordship chapter and verse for what I say, but I think possibly your Lordship's recollection of the law will agree with mine, that on the ground of public policy and apart from any rule, correspondence like that is protected. And these letters, I find, all deal with a compromise of this judgment after trial. I don't think they should go in.

Mr. McALPINE: My Lord, in the first place, it is to be noticed that the so-called letters, the letters are written after judgment. Now, they are not without prejudice. In the first place, there is no compromise possible, I submit; we are trying to collect our judgment. My learned friend's firm can write me letters if they like, but even if they are marked " Without Prejudice," I submit they are not without prejudice and they are admissible, because the matter to be adjudicated on has been adjudicated. Now the law is, I think, clear. I have Phipson with me. The Fifth Edition, at pages 217 and 218, which deal with letters that are marked " Without Prejudice."

> " Offers of compromise made expressly or impliedly without prejudice cannot be given in evidence against a party as admissions; the law, on grounds of public policy, protecting negotiations entered into for the settlement of disputes."

Let me deal with that for a moment. These letters are not at all in settlement of disputes. They are an answer to our endeavour to obtain the name of the insurance company after judgment so that we can proceed against the insurance company. The letters in response are that they refuse unless we comply with certain conditions. As I say, they are not bona fide settlement of anything at all; they are merely a refusal to give us the name of the insurance company unless we do certain things, and we were not discussing settlement. We had a judgment and we wanted our money.

THE COURT: You did your best to get rid of the judgment apparently, and failed.

Mr. McALPINE: Well, we had an object in that.

THE COURT: You changed your mind. Every lady is entitled to do that, and you are acting for a lady.

Mr. McALPINE: Then further on in the page :—

> " Such letters, however, are only protected when there was a dispute or negotiation depending between the parties, and the letters were bona fide written with a view to its compromise."

In the Supreme Court of British Columbia.

Plaintiff's Evidence.

No. 9. W. H. Campbell. Examination—*continued.*

Mr. BULL: Well, my Lord, if I may interrupt my friend for a moment, with regard to this first letter I withdraw any objection at all. The second letter is stated to be without prejudice and certainly cannot go in.

Mr. MCALPINE: What about the third one?

Mr. BULL: The third is a continuation of the August 23rd one, and therefore, of course, the rule would apply. If one letter is written without prejudice, then of course all the following letters on the same subject are without prejudice.

Mr. MCALPINE: My friend cannot write me letter without prejudice unless there is negotiation pending for settlement. He can try all he likes, but the authorities are clear that he cannot do it. There must be bona fide negotiation for settlement pending. Now, the letters show that there was no such thing. There was no endeavour by anybody except to obtain our judgment. If he wants to write letters saying he would give us the name of the insurance company if we did certain things, and marks the letters "Without Prejudice" they are not without prejudice. If they were without prejudice a letter could be written libelling me or libelling anybody else, and there would be no action; all I would have to do would be to mark without prejudice on the letters, which is absurd. Now, the letters themselves show that there is a refusal. I must refer to the letter, and of course they won't affect your Lordship if they are not before you.

Mr. BULL: I object to them being referred to unless there is a ruling.

Mr. MCALPINE: Well, I don't know how his Lordship can decide this unless they are before him.

Mr. BULL: I think the rule is that your Lordship can look at them to determine whether they are privileged or not. But I think on the face of it, if they are written without prejudice that is the end of it.

Mr. MCALPINE: There is no such thing as a without prejudice letter unless there is negotiation pending. That is perfectly clear in Phipson, and if my friend wants to take the risk of writing letters, it is his risk, it is not mine. They are important, My Lord, because they show the attitude——

THE COURT: Just read me what Phipson says. Mr. Bull is objecting.

Mr. BULL: The one is marked "Without Prejudice," and the other one is a continuation of that, and if the limitation of that one is good it would follow that the other is.

Mr. MCALPINE: (Re-reads passages from Phipson.) Now, as I say, and I am perfectly safe in stating it, there was no negotiation pending, or compromise, bona fide or otherwise; there was no negotiation whatsoever, except negotiation on our part to find out the name of the insurance company, which was refused us. And then these letters were written, saying, "if you do certain things and give up certain of your rights, we will

give you the name of the insurance company, but only on that condition." Now, it goes on, My Lord :

> "Thus, a letter without prejudice which contains a threat against the recipient if the offer be not accepted, is admissible to prove such threat . . . . and not between them and the third person."

So that, in addition to that, the name of the insurance company was the matter in issue, and it was in an action of Mrs. Vandepitte against Jean Berry, and now we are in an action of Mrs. Vandepitte against the Preferred Accident Insurance Company. So that in any event, even if there was any contention that they were written while bona fide negotiations were pending, they would be admissible.

THE COURT : I am inclined to think they are admissible.

Mr. BULL : My Lord, I would like, before you definitely rule on that——

THE COURT : I don't intend to give my ruling before hearing you, Mr. Bull.

Mr. BULL : I really have not had an opportunity of saying very much about that one of July 5th. As I have withdrawn my objection to that, there is no reason why that should not go in.

(*Letter marked Exhibit No.* 5.)

Now, in order to see whether there is any dispute pending at the time, I would ask my learned friend to produce his reply to that letter which has just gone in.

THE COURT : You would have the reply.

Mr. BULL : No, My Lord, I wrote the first one.

Mr. MCALPINE : Then you would have the reply.

Mr. BULL : Well, have you the first one ?

Mr. MCALPINE : I suppose Mr. Campbell could find such a letter if he has one. But before it is produced I want to object in any event.

Mr. BULL : *Q.* Have you got your file here, Mr. Campbell ?—*A.* Yes.

Mr. MCALPINE : That is, in answer to July 5th ?

Mr. BULL : Yes, the 21st August. It is addressed to McAlpine & McAlpine.

Mr. MCALPINE : Well, Mr. Campbell will have it.

THE WITNESS : You are asking for our letter to you ?

Mr. MCALPINE : I have the letter here of August 21st.

Mr. BULL : That is the one.

Mr. MCALPINE : It does not mention your letter, though. What is the next letter, the 23rd ?

Mr. BULL : The 23rd.

Mr. MCALPINE : I have a letter of the 21st August.

In the Supreme Court of British Columbia.

Plaintiff's Evidence.

No. 9. W. H. Campbell. Examination—*continued.*

Mr. BULL: May I look at that?

Mr. MCALPINE: And I have one of the 23rd. That seems to be an answer to something.

Mr. BULL: If I may have a look at both of them. Now, My Lord, the letter of July 5th, which my learned friend has put in, I would like to read. It must be read some time, so that I can discuss this question of these other letters (reading Exhibit 5). Now, that shows, My Lord, that after judgment against Miss Berry, Mr. Housser, acting for Miss Berry, was discussing what he thought was a fair and equitable settlement. Now, you have to read that to lay the foundation of these other letters, which are written for an entirely different client. The letter Mr. Campbell wrote on the 21st August——

Mr. MCALPINE: Before my friend goes into that I would like to know if he intends to put in the reply, because it is his document; it is not mine.

Mr. BULL: I am not putting this in.

Mr. MCALPINE: Then my friend cannot refer to it whatsoever.

Mr. BULL: This was fully threshed out in a case of vs. Holmes, before His Lordship Mr. Justice D. A. Macdonald, some three or four years ago, and it is trite law, that when the question of privilege comes up the judge is entitled to look at the documents to see whether or not they are admissible. But before I read this, or attempt to read this, I may say there that Mr. Housser was acting for Miss Berry, and then the letter of August 21st deals with another matter; that is, the claim against the insurance company.

Mr. MCALPINE: Unknown insurance company.

Mr. BULL: Whether it is unknown or not, they were writing to the solicitor of a certain insurance company, claiming against that insurance company a sum of $4,600, and there was no judgment against that company. Now, how can my learned friend say that there was no dispute between these parties—nothing to compromise—when the letter of August 21st shows clearly that Mr. Campbell wishes to get the name of the insurance company so that he can bring action under Section 24 of the "Insurance Act"? Now, there is that letter putting that proposal to Mr. Housser, that the company's name should be given to him, and then Mr. Housser's reply without prejudice on behalf of a client against whom Mrs. Vandepitte had no judgment at all, claiming this sum. Surely, if there was ever a matter in dispute, it was that. Then Mr. Housser very carefully, when he is acting for that insurance company and writing for that insurance company, writes the letter without prejudice, and throughout the letter the language of it shows that it must never be used, because he is making certain admissions which might be used against him. For instance, to quote:

> "This is in the nature of an ex gratia offer of settlement and must not be taken as in any way an admission of liability."

And then he goes on to say what the company will do, and he sets out in a number of paragraphs, one, two and three, an offer of what that company

will do. The company was a stranger to this record, and surely the ordinary rule applies. If I write a letter for a client against whom a demand has been made, that letter is without prejudice, and I submit my friend has no right to put that in, or even to attempt to put that in. This letter is sacred as far as the insurance company is concerned. I cannot say any more. It is certainly against all my ideas of privilege to allow that to go in, and would be an infringement of the rule.

THE COURT: I think it is admissible. No doubt this will go to another court, and they will correct my ruling in the matter if I am wrong.

Mr. BULL: Then only for the purpose of explaining my point, I think the one of August 21st should go in. That is a copy of their letter to us, of which the one of August 23rd is the reply. It should be connected up.

THE COURT: Well, I think if you insist on that going in—

Mr. BULL: Yes, I think my friend should put that in.

Mr. MCALPINE: No, I am not putting it in.

THE COURT: No; you are taking the responsibility of putting it in.

Mr. BULL: Why I wish to do that is to make it clear that I am only asking that the letter of August 21st should go in to make good my point that the one of August 23rd is privileged.

THE COURT: For that purpose it can go in, but it goes in at your request.

Mr. MCALPINE: In that case, I would ask that the copy of my letter of August 23rd, which is in answer to one of their letters, go in also.

THE COURT: There is a letter from you and a letter from them? It all goes in in the same way? Let us deal with this August 23rd from Walsh & Company to McAlpine. Are they going in under one number?

The Registrar: Yes, My Lord; Exhibit 6.

(*Letters August 23rd and 27th marked Exhibit No.* 6.)

THE COURT: Then August 21st. Who is it from?

Mr. MCALPINE: From me, Mr. McAlpine, to Walsh & Company.

(*Copy Letter marked Exhibit No.* 7.)

(*Copy Letter August 23rd marked Exhibit No.* 8.)

Mr. MCALPINE: *Q.* Mr. Campbell, from the date of the judgment until the date you got the name of the insurance company, you were attempting to get the name of the insurance company?—*A.* Until May 20th, 1929.

Q. And that is the day on which you issued the writ in this action?—*A.* I did.

Q. As soon as you obtained it?—*A.* Yes.

Q. The name was refused you?—*A.* It was.

Mr. MCALPINE: Your witness.

Mr. BULL: No questions.

(Witness aside.)

Mr. McALPINE : Then, my Lord, I want to put in the examination for discovery of H. A. Robertson, attorney of the defendant insurance company, and I would like to read the questions if I may, first, or read the numbers first and the questions afterwards. Questions 1 to 5; 10; 11; 15 to 28; 30 to 36; 48; 54; 55; 66; 67; 72 to 76; 77 to 80; 100 to 113; 120 to 122; 129 to 135; 136 to 139; 147 and 154. I might at the same time, although I don't intend to read it, because I think I have covered it in the examination, in direct, of Mr. Berry, but I would like to put in the following questions in Mr. Berry's examination for discovery. Questions 1 to 5; 9 to 12; 15; 16; 22 to 28; 31 to 39; 49; 55 and 56.

(Counsel reads questions and answers as above on examination of H. A. Robertson.)

I am not reading the questions against R. E. Berry, my Lord.

THE COURT : You say you have already covered them ?

Mr. BULL : They are not evidence against Preferred Accident Insurance in any way.

My Lord, I am not calling any evidence.

(Argument by Mr. Bull.)

THE COURT : Mr. McAlpine has moved for leave to recall the defendant R. E. Berry, with a view of showing that his daughter at the time the policy in dispute was issued, had the right, the permission, I should say, to use the car, and it was practically conceded was the only person who was driving it. Mr. Bull objects on the ground that this suggestion arises from the fact that he in his argument has shown that, or argued that the evidence as to her right is confined solely to the right existing on the day of the accident. I would like very much to grant permission to recall the defendant on that ground, but I do not think I can, for this reason : the Court of Appeal—I have forgotten the name of the case—expressed a very strong opinion some time ago as to recalling a witness after that witness knew what was required, and it is quite clear the father—I think I can assume the father will do what he can to help his daughter, and that he knows now what is necessary to swear to, and it is dangerous. The Court of Appeal would consider it that way, I am satisfied. One of the judges was severely criticised for doing that. I do not wish to place myself in that position. I will have to refuse the motion.

(Mr. BULL continued his argument.)

(Mr. McALPINE renewed his application to re-call Mr. Berry.)

(Mr. BULL objected.)

(Mr. LONG addressed the court.)

THE COURT : If the case should in any way turn on this evidence about to be received of course it would be a very serious matter in considering the matter of costs, because it certainly should not be held to carry costs after taking this evidence at this stage.

No. 10.

In the Supreme Court of British Columbia.

Plaintiff's Evidence.

No. 10.
R. E. Berry (recalled). Examination.

Further evidence of R. E. Berry.

ROLAND E. BERRY, Recalled.

THE COURT: *Q.* Mr. Berry, you have been sworn, have you not?—Yes.

Q. You are still under oath?—*A.* Yes.

THE COURT: Now, Mr. McAlpine, take him right straight to the point and speak up so I can hear you.

DIRECT EXAMINATION BY MR. MCALPINE.

Q. At the time you effected this insurance in June, 1927, who was using the car in question?—*A.* My daughter.

Q. For what purpose?—*A.* Anything she wanted.

Q. She was at that time going to the University of British Columbia, 1927? *A.*—No, I think '28 she was going to University, in '27 she was going to High School.

Q. Did she use the car to go to High School?—*A.* She didn't use it to go to High School; but she used it.

Q. You did not use that car yourself?—*A.* Very little.

Q. Did anyone else ever use the car?—*A.* Her mother may have used it occasionally.

Q. So is this true, Mr. Berry, to all intent and purposes——

Mr. BULL: I object to that.

THE COURT: You cannot put words into his mouth.

Mr. MCALPINE: *Q.* How often a week did she use it, Mr. Berry, have you any idea?—*A.* Every day.

THE COURT: Whom do you mean, the daughter?—*A.* Yes.

Mr. MCALPINE: Do I understand I am confined to that question entirely?

THE COURT: I think so. I do not know of anything else you could do to strengthen it now after all the argument.

Mr. MCALPINE: All right. Thank you, Mr. Berry.

CROSS-EXAMINATION BY MR. BULL.

Cross-examination.

Q. Mr. Berry, you are living on Connaught Drive, and have been for some years?—*A.* Yes, sir.

Q. You have two cars?—*A.* Three.

Q. You are rather a fancier of motor cars?

THE COURT: What is that?

In the Supreme Court of British Columbia.

Plaintiff's Evidence.

No. 10.
R. E. Berry (recalled).
Cross-examination—*continued.*

Mr. BULL: A motor car fancier. He has three cars. And you have more than one child, have you?—*A.* Yes.

Q. More than one grown up child?—*A.* Yes, two.

Q. They both drove the car?—*A.* Yes.

Q. And Mrs. Berry drove the car?—*A.* Yes.

Q. All these cars were your own property personally?—*A.* Yes.

Q. And in your name?—*A.* Yes, I think the one my wife drives is insured in her name, but I am not positive of that.

Q. But apart from that you were the owner of the cars, and the sole owner?—*A.* Yes.

Q. And you simply allowed the members of your family to use your cars as any other good-natured man might do, you gave them permission?—*A.* Yes.

Q. There was no particular permission given, they were simply there to be used, is that it?—*A.* Yes.

Q. They did not ask you if they could use them on a certain date or not?—*A.* No.

THE COURT: What is that last question?

Mr. BULL: I asked him—they did not ask if they could use them on a certain date and the witness says no.

Q. There is no agreement between you and any member of your family for the use of your cars?—*A.* No; just understood.

Q. Just understood they could use them as they wanted?—*A.* Yes.

Mr. BULL: Thank you.

Re-examination.

RE-DIRECT EXAMINATION BY MR. MCALPINE.

Q. Number 10-525, did your other daughter use this car in 1927?—*A.* My other daughter was in Victoria at school at the time.

Q. And how old was she in 1927, Mr. Berry?—*A.* 17.

Q. That is the daughter in Victoria?—*A.* Yes.

Q. But she was not using this car?—*A.* Except at odd times when she happened to be home.

Mr. MCALPINE: Very good.

(Witness aside.)

THE COURT: We did not get much further, I do not think.

Mr. BULL: No, I do not think so.

(Argument by Mr. McAlpine.)

November 26th, 1929.

(*Proceedings Resumed pursuant to Adjournment.*)

THE COURT: With reference to the matter of recalling Mr. Berry, I came to the conclusion last night that that should be permitted, and his evidence should be allowed to go on the record. I discussed the matter this morning with the Chief Justice and my brother Fisher together, and they both expressed the same opinion. It seems in a case of this kind,

where there is no suggestion that the case might be tainted, that all the facts should be gotten out and anything that has been omitted should be put on the record. The Court of Appeal can deal with it if it reaches there, as I presume it will.

Mr. BULL: Well, the evidence was not very startling anyway.

(Argument by Mr. McAlpine.)

(Argument in reply by Mr. Bull.)

THE COURT: I hope you do not expect me to give judgment right now. I do not know what I am going to do now. I will take the matter under advisement and deal with it as well as I can.

(C.A.V.)

I hereby certify the foregoing to be a true and accurate report of the said proceeding.

W. E. G. JOHNSON,
D. LANGFIELD.
Deputy Official Stenographers.

No. 11.

Formal Judgment.

No. 11. Formal Judgment, 24th December 1929.

Tuesday, the 24th day of December, 1929.

THIS ACTION having come on for trial before the Honourable Mr. Justice Gregory on the 25th and 26th days of November, 1929, in the presence of Mr. C. L. McAlpine of Counsel for the Plaintiff and Mr. Alfred Bull and Mr. A. Hugo Ray of Counsel for the Defendant, Preferred Accident Insurance Company of New York, and Mr. G. Roy Long of Counsel for the Defendant R. E. Berry, UPON HEARING the evidence adduced and what was alleged by Counsel aforesaid, and Judgment having been reserved until this day.

THIS COURT DOTH ORDER AND ADJUDGE that the Plaintiff do recover against the Defendant The Preferred Accident Insurance Company of New York the sum of $5,000.00 and her costs of this action payable forthwith after taxation thereof.

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Plaintiff do recover against the Defendant R. E. Berry, her costs so far as the same have been increased by adding him as a Defendant payable forthwith after taxation thereof.

By the Court,

J. F. MATHER,
District Registrar.

In the Supreme Court of British Columbia.

No. 12.
Reasons for Judgment (Gregory, J.).

No. 12.

Reasons for Judgment (Gregory, J.).

IN THE SUPREME COURT OF BRITISH COLUMBIA.

ALICE MARIE VANDEPITTE

vs.

THE PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK

and

R. E. BERRY.

This action is brought against the Insurance Company under Section 24 of the Insurance Act, being Chap. 20, B. C. Stats. 1925. There is nothing unusual about the form of the policy, it is like many thousands of others and by its terms purports to insure not only the owner of the motor car in question, but any person or persons while riding in or legally operating the automobile for private or pleasure purposes, with the permission of the insured, or of an adult member of the insured's household. There can be no doubt that the amount of the insurance premium is measurably increased by reason of the ostensible liability to others than the actual owner of the motor car named in the policy, viz., the defendant R. E. Berry, who is made a defendant because he refused, no doubt at the request of the Insurance Company, to allow his name to be used as a party plaintiff.

Miss Jean Berry, the daughter of defendant Berry was with his permission, legally driving the car when the accident occurred, and the plaintiff has recovered judgment against her for negligent driving.

The defendant company now defends the action chiefly on the grounds that Miss Jean Berry's loss was not covered by the insurance policy or if it was, it was a gaming contract within the meaning of Sec. 10 of the Insurance Act and so not enforceable by her or any one claiming through her. Such a defence, if good, would be a great surprise to many people driving motor cars and it is the first time in my experience that an insurance company has raised the question in our Courts. If the defence is good the benefit of section 24 of the Insurance Act is mythical in a great majority of cases apparently falling within it. This defence has no merit and the attitude of the company throughout is exceedingly difficult to understand. Every judge who has sat in chambers during the past year knows that the company has done everything in its power to prevent the plaintiff from ascertaining its name and launching these proceedings.

I am afraid I have not fully appreciated the argument of counsel for the defendant company with reference to the non-compliance by the assured of certain statutory conditions. The only one he has pleaded is that part of condition 8 (3) which prohibits the action being brought against the insurer to recover the amount of a claim under the policy until after the

amount of the loss had been ascertained by judgment against the insured. If Miss Jean Berry was insured under the policy, as I think she was, and as the policy itself states (though without naming her) then the plea is disproved for a judgment was recovered against her by the plaintiff for the loss sustained. Non-compliance with any other condition precedent would have to be pleaded. See S.C.R. Marginal Rule 210.

In any case if there has been any technical failure to comply with statutory conditions this is pre-eminently a case I think for granting relief under sec. 158 of the Act. The Company had immediate knowledge of the accident out of which this and the other action against Miss Berry arose; it immediately took charge of the defence of the action against Miss Berry; it has hindered and delayed the plaintiff in every conceivable way and it is clear beyond dispute that the policy purports to cover the driver of the car (Miss Berry) at the time of the accident. Counsel has referred me to a recent decision of the Court of Appeal in *Barlow* v. *Merchants Casualty Co.* and says that that case decided that sec. 158 only applies where there has been an imperfect compliance with proof of loss.

That case has not yet been reported and the facts of the case are not set out in the reasons for judgment, so that I am unable to tell whether it has any resemblance to the present case; certainly there is no statement to the effect that sec. 158 has the limited application above stated, and I do not read the section in that limited sense:

> "158. Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the assured or *other matter* or thing required to be done or omitted by the insured with respect to the loss, etc."

The word "other matter" surely refer to something other than imperfect proof of loss.

As to the defence that the policy is a gaming contract within sec. 10 of the Insurance Act. The English Statute of 1774, 14 Geo. III., c. 48, contains in this respect provisions very similar to our Act, and the objection was fully considered by Roche, J., in *Williams* v. *Baltic Ass. Assn.* (1924) 2 K.B. 282, and decided against the company in confirmation of the award of a board of arbitration consisting of three well-known King's Counsel. That case is very similar to the one before me and the full text of the judgment is most interesting. Mr. Justice Roche refers to the case of *Howard* v. *Lancashire Insurance Co.*, 11 S.C.R. 92, so strongly pressed upon me by defendant's counsel and his remarks hereon seem to fully explain the actual decision, which was very short, only occupying six lines in that report. In answer to the claim that Miss Berry is not named in the policy as required by sec. 13 of the Act, it was the business of the Insurance Company to insert the name of the insured in the policy, no one else had any power to do so, and section 8 of the Act provides that:

> "No contract shall be rendered void or voidable as against the insured or a *beneficiary* by reason of any failure on the part of the insurer to comply with any provision of the Act."

In the Supreme Court of British Columbia.

No. 12. Reasons for Judgment (Gregory, J.)—*continued.*

It is stated that Miss Jean Berry could not sue upon the policy in her own name and therefore the plaintiff who claims through her cannot sue. I am not at all sure that Miss Berry could not so sue, in fact I am inclined to think she could, but whether she could or not the plaintiff's right to sue is not entirely dependent upon the wording of the policy or Miss Berry's right to bring an action in her own name. The plaintiff's right to sue is given to her by section 24 of the Insurance Act, and all she has to do is to bring herself within the provisions of that section and show that she has an unsatisfied judgment against Miss Berry, that Miss Berry is insured, etc. True, plaintiff's claim will be subject to the equities which the company would have if the judgment against Miss Berry had been satisfied, but the company by defending the plaintiff's action against Miss Berry has admitted its liability to her. Such defence was " a representation by acts that it would assume any judgment obtained within the limits of the policy." See *Cadeddu* v. *Mount Royal Assurance Co.*, 41 B.C.R. 110. It had no right to defend that action except on the assumption that Miss Berry had a good claim against it under the policy of insurance issued by it. By defending that action it has, I think, deprived itself of the right to avail itself of the defences set up herein.

There will be judgment for the plaintiff.

F. B. GREGORY, J.

Victoria, 24th December, 1929.

No. 13. Subsequent Reasons for Judgment as to Costs (Gregory, J.), 24th January 1930.

No. 13.

Subsequent Reasons for Judgment as to Costs (Gregory, J.).

IN THE SUPREME COURT OF BRITISH COLUMBIA.

VANDEPITTE

vs.

PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK.

This is an application by the Plaintiff to have the costs taxed under column 3 or 4 of Appendix " N."

It is admitted that without an order the costs must be taxed under column 2, as the amount sued for is a liquidated sum in excess of $3000, but does not exceed $10,000. The application is made under the proviso, being the last clause of the letterpress in Appendix " N " on p. 245 of the Rules of the Court; the difficulty arises through the interpretation of that proviso. The defendant contends that the proviso is limited in its application to actions and proceedings other than those for liquidated amounts, etc., as set out in the opening paragraph of Appendix " N," while the Plaintiff contends that it has a general application to all actions. In

my opinion the Defendant's interpretation is the correct one. The proviso is a clause only of the final paragraph, and not a separate paragraph, as one would expect if it was to have a general application to all actions.

It is well known that when Appendix " N " was made in its present form it was with the intention of enabling litigants to form some idea of the costs of any proposed action and to reduce to a reasonable sum the costs of all actions and proceedings. This object would to a large extent be nullified, if in every case the trial judge would direct that the costs should be taxed on a higher scale than that prescribed by the rules. In order to effect the object aimed at the framers of the Appendix " N " divided all actions and proceedings into two classes. First those described in the opening paragraph, and second, " all other actions " and proceedings not included in the first division. In actions falling within the first division the governing column was ascertained by the amount involved; and in the second division, column 2 applied irrespective of the amount involved, but subject to the proviso already mentioned and this, no doubt, was done because of the difficulty of doing justice in the matter of costs in such actions as would fall in the second division.

To give the clause the interpretation contended for by the Plaintiff there would be this anomaly that if the present Plaintiff's action had fallen within column 1, there would be no provision for taxing the costs under column 2, but it could be advanced to columns 3 or 4, while on the other hand though falling within column 2 it could, for special causes, be directed by the judge to be taxed under column 1.

It helps one to interpret the rule, I think, when it is realized that column 2 is not only the appropriate column for actions in the second division, but is also the appropriate column for actions in the first division when the amount involved is between $3000 and $10,000.

The face value of the policy is $5000, and the Plaintiff's judgment must be limited to that amount together with costs of the action.

The Plaintiff is entitled to her costs too against the Defendant Berry, so far as the same have been increased by adding him as a defendant and such costs will also be taxed under column 2 of Appendix " N."

F. B. GREGORY, J.

Victoria,
24th January, 1930.

In the Supreme Court of British Columbia.

No. 14. Notice of Appeal, 7th February 1930.

No. 14.

Notice of Appeal.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

Between

ALICE MARIE VANDEPITTE, Married Woman, the Wife of E. J. Vandepitte - - - - - - - - *Plaintiff.*

And

THE PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK and R. E. BERRY - - - - - *Defendants.*

TAKE NOTICE that the Defendant, The Preferred Accident Insurance Company of New York, intends to appeal, and does hereby appeal from the whole of the Judgment pronounced herein by the Honourable Mr. Justice Gregory on the 24th day of December, A.D. 1929, whereby he adjudged that the Plaintiff recover against the Defendant The Preferred Accident Insurance Company of New York, the sum of $5000·00 and the costs of the action.

AND FURTHER TAKE NOTICE that a Motion will be made to the Court of Appeal at the Court House in the City of Vancouver in the Province of British Columbia, on Tuesday, the 4th day of March, A.D. 1930, at the hour of 11 o'clock in the forenoon, or so soon thereafter as Counsel may be heard, on behalf of the said Defendant, The Preferred Accident Insurance Company of New York, that the said Judgment be reversed and set aside, and that the Plaintiff's action be dismissed on the following amongst other grounds:

(1) That the said Judgment is against law;

(2) That the said Judgment is against the evidence;

(3) That the said Judgment is against the law and the evidence;

(4) That the learned Judge erred in deciding that the Plaintiff had any cause of action against the Defendant under the Insurance Act, Statutes of British Columbia, 1925, Chapter 20, Section 24, or otherwise;

(5) That the learned Judge erred in deciding that Jean Berry was insured against liability for injury or damage to the person or property of another, within the meaning of Section 24 of the said Insurance Act;

(6) The learned Judge erred in deciding that the said Jean Berry was insured by the policy of insurance referred to in the Statement of Defence in this action;

(7) The learned Judge should have held that the Plaintiff in this action has no higher rights in respect of the policy of insurance referred to in the Statement of Defence herein than Jean Berry would have had if the Judgment against her had been satisfied;

(8) The learned Judge should have held that even if the said Jean Berry was entitled to any benefits under the said policy of insurance, she

could not have taken any action against this Defendant on the said policy because the said Jean Berry is not a party to the contract contained in the said policy;

(9) The learned Judge erred in deciding that the said Jean Berry had any interest in the subject matter of the contract contained in the said policy of insurance, within the meaning of Section 10 of the Insurance Act, and the learned Judge should have held that the interest referred to in the said Section 10, means an interest at the time of the making of the contract as well as at the time that the claim to indemnity arises, and the learned Judge should have held that insofar as the said Jean Berry is concerned the said contract contained in the said policy of insurance is void by the said Section 10;

(10) The learned Judge erred in holding that the Defendant by defending the Plaintiff's action against Jean Berry has admitted its liability to the said Jean Berry;

(11) The learned Judge erred in holding that such defence was a representation by acts that it would assume any Judgment obtained within the limits of the policy; and erred in holding that by defending that action it has deprived itself of the right to set up the defences contained in the Statement of Defence herein; and the learned Judge should have decided that if there was any estoppel created by the defence of the said action of this Plaintiff against the said Jean Berry such estoppel would operate only in favour of the insured R. E. Berry, and could not extend to the said Jean Berry who was not a party to the transaction relating to the defence of the said action; in any event the learned Judge should have held that the Plaintiff herein has shown no prejudice upon which an estoppel could arise;

AND on other grounds.

DATED at Vancouver, in the Province of British Columbia, this 7th day of February, A.D. 1930.

W. W. WALSH,
Solicitor for the Defendant
The Preferred Accident Insurance Company
of New York.

To the Defendant, Alice Marie Vandepitte,
And to her solicitor, W. H. Campbell, Esq.

This Notice is filed by Walter William Walsh, of the firm of Walsh, Bull, Housser, Tupper, McKim & Molson, whose place of business and address for service is 410 Seymour Street, Vancouver, B.C.

In the Supreme Court of British Columbia.

No. 15. Notice of Cross-Appeal, 27th February 1930.

No. 15.

Notice of Cross-Appeal.

COURT OF APPEAL.

Between

ALICE MARIE VANDEPITTE, Married Woman, the wife of E. J. Vandepitte - - - *Plaintiff (Respondent)*

And

THE PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK - - - - - *Defendant (Appellant).*

TAKE NOTICE that the Plaintiff (Respondent), Alice Marie Vandepitte, intends to cross-appeal and does hereby cross-appeal from a part of the judgment pronounced herein by the Honourable Mr. Justice Gregory on the 24th day of December, 1929, whereby he adjudged that the Plaintiff (Respondent) recover against the Defendant (Appellant) the sum of $5,000.00 and the costs of the action.

AND FURTHER TAKE NOTICE that a motion will be made to the Court of Appeal at the Court House in the City of Vancouver, Province of British Columbia, on Tuesday, the 4th day of March, 1930, at the hour of 11 o'clock in the forenoon or as soon thereafter as Counsel may be heard on behalf of the said Plaintiff (Respondent) that the amount of the said judgment be varied from the sum of $5,000.00 to the sum of $5,648.70 on the following among other grounds :—

(1) THAT the learned Judge erred in deciding that the face value of the Insurance Policy in question in this action was $5,000.00.

(2) THAT the learned Judge should have found that the Plaintiff was entitled to the sum of $5,648.70 and not the sum of $5,000.00.

DATED at Vancouver, B.C., this 27th day of February, A.D. 1930.

W. H. CAMPBELL,
Solicitor for the Plaintiff (Respondent)

To the Defendant (Appellant)
And to : W. W. Walsh, Esq., Its Solicitor.

This Notice is filed by W. H. Campbell, Solicitor for the Plaintiff (Respondent), whose place of business and address for service is 470 Granville Street, Vancouver, B.C.

In the Court of Appeal for British Columbia.

No. 16.
Formal Judgment, 30th June 1930.

No. 16.

Formal Judgment.

COURT OF APPEAL.

Between

ALICE MARIE VANDEPITTE - - *Plaintiff (Respondent)*

And

THE PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK - - - - *Defendant (Appellant).*

Coram—

The Honourable Mr. JUSTICE MARTIN.
The Honourable Mr. JUSTICE GALLIHER.
The Honourable Mr. JUSTICE MCPHILLIPS.

Victoria, B.C., Monday, the 30th day of June, A.D. 1930.

THIS APPEAL AND CROSS-APPEAL from the judgment of the Honourable Mr. Justice Gregory pronounced on the 24th day of December, 1929, coming on for hearing at Vancouver, B.C., on the 3rd, 4th and 7th days of April, A.D. 1930, AND UPON HEARING Mr. Alfred Bull of Counsel for the Appellant and Mr. C. L. McAlpine and Mr. W. H. Campbell of Counsel for the Respondent and judgment being reserved thereupon :

THIS COURT DOTH ORDER AND ADJUDGE that the said appeal be and the same is hereby dismissed with costs to be paid by the Appellant to the Respondent forthwith after taxation thereof :

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Respondent's cross-appeal be and the same is hereby allowed and that the said judgment in the Plaintiff's favour for the sum of five thousand dollars ($5,000.00) be increased to the sum of five thousand six hundred and forty-eight dollars and seventy-one cents ($5,648.71) and that the costs of the cross-appeal be paid by the Defendant to the Plaintiff forthwith after taxation thereof.

By the Court,

H. BROWN,
Dep. Registrar.

In the Court of Appeal for British Columbia.

No. 17.
Reasons for Judgment.
(*a*) Galliher, J.A.

No. 17.

Reasons for Judgment.

(*a*) GALLIHER, J.A.

This is an appeal from the judgment of Gregory, J., awarding the plaintiff judgment in the sum of $5,000, and costs.

The material facts are set out in his reasons for judgment.

Four main grounds of appeal were argued before us, viz. :—

1. Jean Berry was not insured under the policy.

2. So far as Jean Berry is concerned the contract is void under the B.C. Insurance Act, cap. 20, Sec. 10 (1925).

3. As Jean Berry could not recover plaintiff could not.

4. Under the terms of the policy it is a condition precedent in order to recover under Sec. E. that the named Insured shall in writing direct to whom the indemnity payable to unnamed persons thereunder shall be applied.

It was further argued that this case is not distinguishable from *Continental Casualty Company* v. *Yorke*, decided by the Supreme Court of Canada (1930) S.C.R. 180.

I do not think there is any merit in the contention that as regards Jean Berry the transaction was one of gaming or wagering under Sec. 10 of the Insurance Act.

As to the contention that she was not insured under the policy—while it is true that she was not specifically named therein yet she answers the description of parties interested and to whom indemnity is available under Section E thereof and would I think be entitled to bring an action and maintain it on proof that she came within that section.

The plaintiff (respondent) acquires her right to sue the Company by virtue of Sec. 24 of the Insurance Act, Cap. 20 of 1925, providing the person causing the injury is insured against liability and the plaintiff has brought herself (which in this case she has) within the other conditions of the Section.

If I am right in holding that Jean Berry was insured against liability then that section is fully complied with and the plaintiff's right to sue is established.

I do not regard the last line of Section E of the policy " as the named insured shall in writing direct " as a condition precedent. If it were so R. E. Berry by refusing to so direct could defeat the benefit of the provision.

I regard it more in the nature of a protection to the Company in the application of its indemnity after the final ascertainment of its extent in a case where the named insured is entitled to a portion thereof and some other person is also entitled to indemnity in order that the Company may not be called upon to pay twice over or in different amounts.

Here there is no claim by R. E. Berry to indemnity and in such a case as this " direction " would have no application for no protection of the other persons entitled to indemnity is necessary.

But Mr. Bull argues that assuming all these points found against him he is still within the decision of the Supreme Court of Canada in the said case of *Continental Casualty Company* v. *Yorke supra* on the corresponding section 85 of the Ontario Insurance Act, R.S.O. 1927, cap. 222, which is in present essentials identical with our section 24, hence if this case cannot be distinguished from that decision of the Supreme Court plaintiff cannot succeed.

But there is this distinction and I think it is a material one—that in the *Continental* case the Company at no time took any part in the proceedings instituted against the insured while here the Company from the inception of the proceedings against Jean Berry took over her defence as obligated by said Sec. E., and conducted the action on her behalf, pleading on her behalf to the claim with full opportunity of raising all defences which she might have to the claim, conducted the trial on her behalf, examined the witnesses and had the benefit of all advantages to be gained from a judgment in her favour which would accrue to them in freeing her from liability and hence itself as well.

Mr. Justice Lamont, who delivered the judgment of the Court says at p. 186 :—

> " If the judgment was evidence as against the appellant of the existence of the injury insured against and of the liability of the insured therefor, the appellant would be liable on the policy if the insured having a good defence to the claim for damages failed to set it up in her pleadings and prove it at the trial and judgment went against her on that account.
>
> " This would be to expose the appellant to the obligation of indemnifying the insured not only where it had agreed to do so but also where it had not agreed to do so but judgment had been obtained against the insured through failure on her part to set up or establish an available defence."

This cannot I think be said of the case at bar for everything was in the hands of the Company who conducted the defence as was its liability to do so under said Sec. E., and all defences were available to it to set up, and to say that under such circumstances the question of liability would have to be tried out anew in an action against the Company would be equivalent to giving it a second opportunity to dispute the subject matter of the action where it had already full opportunity to do so and did so in the action against Jean Berry where the defence in that action if successful would have relieved it from all liability.

It was in effect under its delegation trying out its own liability at the same time as that of Jean Berry though it was not named a party to the action—and the result under the present circumstances is that there are no equities here reserved by said Sec. 25 which prevent the plaintiff from recovering damages under that section.

In the Court of Appeal for British Columbia.

No. 17. Reasons for Judgment. (*a*) Galliher, J.A.—*continued.*

To this extent therefore as regards the defendant's liability the judgment for $5,000 appealed from should be affirmed without however adopting the reasons given by the learned Judge below and so the appeal of the Defendant should be dismissed.

But there is a cross-appeal by which the plaintiff seeks to increase the judgment in her favour to $5,649.26, being made up of $4,600 for the amount of the judgment originally obtained by the plaintiff against Jean Berry plus the amount of $780.25 for costs then awarded amounting to $5,380.25 as the total of the judgment on 13th June, 1929, together with interest on that sum at 5% from that date.

The learned Judge below gave judgment only for a total of $5,000, as the suggested limit of the indemnity under the policy but this would appear to ignore the further liability for costs and interest imposed by Section E 4, which provides that the Company shall

> "pay all costs taxed against the insured in any legal proceedings 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."

After careful consideration of sections 25 and E, there does not appear to be any warrant for awarding the plaintiff only so much of the costs and interest as would added to the damages keep her whole claim within $5,000 and therefore the cross-appeal should be allowed, so as to include them in her judgment that she is otherwise entitled to bearing in mind that her counsel informed us he did not claim interest on more than $5,000, which would be defendant's limit of liability in this respect.

No Canadian or English decisions have been cited to us on the point, but the reasoning in general of the Federal Circuit Court of Appeal in *New Amsterdam Casualty Company* v. *Cumberland Telephone and Telegraph Company* (1907) 152 Federal Reporter 961, is in accord with our view with the Justice of the case.

(Signed) W. A. GALLIHER, J.A.

Victoria, B.C.,
10 June, 1930.

(*b*) Martin, J.A.

(*b*) MARTIN, J.A.

VANDEPITTE

vs.

PREFERRED ACCIDENT INSURANCE CO. of NEW YORK.

This case has, in view of its importance, engaged our very careful attention with the result that I am so much in accord with the very lucid and succinct judgment of our Brother Galliher that I feel it would be superfluous to add anything to the reasons that he is handing down for our disposition of the appeal and cross-appeal.

(Signed) ARCHER MARTIN, J.A.

Victoria, B.C.,
30th June, 1930.

No. 18.

In the Court of Appeal for British Columbia.

No. 18.

Bond of National Surety Company, 19th August, 1930.

(*Not printed.*)

No. 19.

No. 19.

Notice of Appeal to Supreme Court of Canada, 21st August, 1930.

(*Not printed.*)

No. 20.

No. 20.

Order approving Security for Costs, 28th August, 1930.

(*Not printed.*)

No. 21.

In the Supreme Court of Canada.

No. 21.

Consent as to Case, 30th September, 1930.

(*Not printed.*)

No. 22.

No. 22.

Certificate of Solicitor as to Case, 30th September, 1930.

(*Not printed.*)

In the Supreme Court of Canada.

No. 23. Certificate of Registrar (extract), 30th September 1930.

No. 23.

Certificate of Registrar (extract).

* * * * * *

AND I DO FURTHER CERTIFY that the said Case on Appeal contains the reasons for judgment of all the members of the Court of Appeal for British Columbia who were present at the hearing of this appeal, with the exception of the reasons for judgment of the Honourable Mr. Justice McPhillips, who handed down judgment dismissing the appeal but gave no reasons for judgment.

AND I DO FURTHER CERTIFY that I have applied to the Judges of the Court of Appeal for British Columbia for their opinions or reasons for judgment in this case, and the only reasons delivered to me by the said Judges are those of the Honourable Mr. Justice Martin and the Honourable Mr. Justice Galliher.

AND I DO FURTHER CERTIFY that I have received a Certificate from the Clerk of the Court of Appeal, Victoria Registry, to the effect that he had applied to the Judges of the said Court for their opinions or reasons for judgment, and that the only reasons delivered to him were those of the Honourable Mr. Justice Martin and the Honourable Mr. Justice Galliher.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and affixed the sale of the said Court of Appeal of British Columbia, this 30th day of September, A.D. 1930.

J. F. MATHER,
Registrar.

No. 24. Factum of the Preferred Accident Insurance Company of New York.

No. 24.

Factum of the Preferred Accident Insurance Company of New York.

Between

THE PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK - - - - - - (*Defendant*) *Appellant*

and

ALICE MARIE VANDEPITTE, Married Woman, the wife of E. J. Vandepitte - - - - - (*Plaintiff*) *Respondent*

and

R. E. BERRY - - - - - - - *Defendant.*

APPELLANT'S FACTUM.

PART I.—STATEMENT OF FACTS.

This is an appeal from a judgment of the Court of Appeal for British Columbia dismissing an appeal from the judgment of the Trial Judge, the Hon. Mr. Justice Gregory, and allowing the Respondent's cross-appeal.

The action was brought under Section 24 of the Insurance Act, 1925, of British Columbia (cap. 20) which reads as follows:

> "24. 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."

The Respondent was injured in a motor accident, a car in which she was a passenger driven by her husband having collided with a car owned by the Defendant, R. E. Berry, and driven by his daughter, Jean Berry. The Respondent in an action against Jean Berry recovered judgment on 13th June, 1928, for $4,600 damages and costs taxed at $780.25, and in third party proceedings her husband was held liable to contribute to Jean Berry $2,300 and costs to be taxed, the finding being that the drivers of the two cars were guilty of negligence in the same degree.

Jean Berry was the sole Defendant in the former action and she was defended by solicitors appointed by this Appellant, the father, R. E. Berry, having given notice of the accident pursuant to the policy (Exhibit 4). The solicitors for Jean Berry contending that there ought in fairness, if not in law, to be a set-off in respect of the two judgments, offered to pay the difference between the damages and costs to which the respondent was entitled and those for which her husband was liable but the offer was refused.

After the entry of the judgments, the Respondent applied to the Trial Judge to strike out the appearance of Jean Berry and all subsequent proceedings in the action including those taken under the third party notice on the ground that at the time the appearance was entered Jean Berry was an infant and no guardian *ad litem* had been appointed for her. The application was dismissed for reasons given in writing and the dismissal was affirmed by the Court of Appeal.

This action was commenced on 20th May, 1929, against this Appellant as the Sole Defendant. R. E. Berry was added by an order dated 7th October, 1929, containing the following proviso:

> "Provided that the joinder of the said R. E. Berry as a party defendant shall not in itself entitle the plaintiff to any relief which she could not have claimed if the action had commenced at the time of such joinder."

The Respondent was called as a witness at the trial. She said that she was the Plaintiff in the action against Jean Berry for personal injuries, that the license number of the car was 1928, 10-525; that the accident took place in Vancouver; and that she recovered judgment for $4,600 and costs which had not been paid. Formal proceedings in the former action

In the Supreme Court of Canada.

No. 24. Factum of the Preferred Accident Insurance Company of New York —*continued.*

were also filed but no other evidence was adduced to establish that Jean Berry was liable in damages to the Respondent for the injuries received by her.

The policy of insurance (Exhibit 3) insures R. E. Berry against many perils. Section E which covers loss from liability imposed by law for damages on account of bodily injuries, limits the indemnity to $5,000 on account of injury to any one person. The clause in the policy making this indemnity available to others reads as follows:

> " The foregoing indemnity provided by Sections D and/or E 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, or of an adult member of the Insured's household other than a chauffeur or domestic servant; provided that the indemnity payable hereunder shall be applied, first, to the protection 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."

By statutory condition 8 (3) endorsed on the policy, no action shall lie against the insurer unless brought within one year after the amount of the loss has been ascertained by judgment or by agreement.

The Trial Judge gave judgment in favour of the Respondent limiting the amount to $5,000. The appeal to the Court of Appeal was heard by Martin, Galliher and McPhillips, JJ.A. The Court dismissed the Appellant's appeal and on the Respondent's cross-appeal increased the judgment to $5,648.70. Mr. Justice Galliher, who delivered the judgment of the Court, was of the opinion that when considering what was " the face value of the policy " regard must be had not only to the indemnity clause as to damages but to the provision imposing liability for costs and interest.

Part II.—Points of Error.

The Appellant submits that the Courts below erred in deciding that Jean Berry was insured by the policy; that the Respondent could recover against the Appellant even though Jean Berry herself could not have sued on the policy; that a case of liability under the policy had been established in evidence; that it was not a condition precedent that the assured, R. E. Berry, should in writing direct that the indemnity should be applied for the protection of Jean Berry; and that as far as Jean Berry was concerned the contract was not void by Section 10 of the Insurance Act, 1925, cap. 20.

The Appellant further submits that in any event the Court of Appeal took the wrong view as to what is meant by " the face value of the policy." The Appellant submits that the reference is to the amount of indemnity in respect of damages allowed by the policy and that the judgment should be limited to $4,600, or at most $5,000.

PART III.—ARGUMENT.

The " insured " under the policy is R. E. Berry. The fact that Berry in certain events stipulated for benefits to a person other than himself does not make the third party " a person insured " within the meaning of Section 24. A third party cannot sue on such a policy. The Insurance Act (B.C.) 1925, cap. 20, sec. 13, requires the name and address of the insured to be inserted in the policy. R. E. Berry was the person so named and he alone could claim the indemnity. Section E maintains throughout a clear distinction between the insured and the other persons to whom the indemnity may be made available by direction of the assured.

The Respondent can have no higher rights against the Appellant than Jean Berry would have had if she had paid the judgment recovered against her and had then sued the Appellant for indemnity. She could not have maintained the action in her own name, certainly not without obtaining from her father a written direction that the indemnity should be available to her.

A somewhat parallel case is found in contracts of Marine Insurance which usually contain a clause following the name of the insured which reads somewhat as follows :

> " As well in their own names as for and in the name and names of all and every other person or persons to whom the same doth, may or shall appertain in part or in all."

An action cannot be brought by a stranger to the contract on a policy containing such a clause.

Watson v. *Swann* (1862) 11 C.B. (N.S.) 756; 142 E.R. 993; *Keighley Maxsted & Co.*, v. *Durant* (1901) A.C. 240; *Boston Fruit Company* v. *British & Foreign Marine Insurance Co.* (1906) A.C. 336.

The insured had no intention when he effected the policy of providing insurance which others could claim as of right. He expressly reserved the right to claim the whole indemnity for himself or to direct that it should be available to others as he pleased after the event. Nor is there any evidence of ratification or adoption of the contract (if that is material) by Jean Berry either before or after the accident; on the contrary, she knew nothing about the policy. The " anomalous rule " permitting ratification after loss exists only in connection with Marine Insurance. *Grover & Grover Ltd.* v. *Matthews*, 1910, 2 K.B., 401, referring to *Williams* v. *North China Insurance Co.*, 1876, 1 C.P.D. 757.

In *Williams* v. *Baltic Assurance Association of London, Ltd.* (1924) 2 K.B., 282, where the policy was on behalf of the owner and others driving the car with his consent, a sister of the named insurer was held entitled to protection and indemnity. It is important, however, to note that the named insurer joined as plaintiff with his sister and it was found as a fact that the sister was informed of the terms of the policy that had been effected and so far as it was insurance on her behalf ratified and approved it (p. 284).

The Respondent's case is not improved by joining R. E. Berry as a party defendant on October 7th, 1929. He made no attempt to enforce

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No. 24. Factum of the Preferred Accident Insurance Company of New York —*continued.*

the Policy for the benefit of Jean Berry. In addition the order adding him expressly provided by the clause already quoted that the joinder should not in itself entitle the Plaintiff to any relief which she could not have claimed if the action had then been commenced. At that date the claim was barred by statutory condition 8 (3) endorsed on the policy which limited the time for commencing an action to one year after the judgment.

But even if the Respondent can maintain the action she has failed to establish in evidence that she is entitled to judgment. The principle expressed by Lamont J. for the Supreme Court of Canada in *Continental Casualty Company* v. *Yorke* (1930) S.C.R., 180, a case under the Ontario Act applies.

The Ontario Section reads :

> " 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."

In the present case, as in the *Yorke* case, the Respondent filed the formal judgment she had recovered against the person alleged to be insured. In the *Yorke* case the Plaintiff then closed her case, and in this case the Respondent adduced other evidence which, however, does not touch the point now under consideration.

Mr. Justice Lamont in the *Yorke* case said (p. 185) that in his opinion in an action brought under the Ontario section the Plaintiff must establish (1) the agreement to indemnify; (2) that the bodily injury to another insured against had been inflicted by her automobile; and (3) that she was legally liable in damages to the Respondent for the injuries received by her. He thought that neither the injury nor the liability could be established by the production of the judgment in the prior action.

Such differences as there are between the British Columbia section and the Ontario section make the case stronger as against the present Respondent. The British Columbia section applies only " where a person incurs liability, etc." It is essential that the liability shall be established in an action taken under that section in precisely the same way that Jean Berry would have had to establish it had she paid the damages and then sued the appellant.

In the Court of Appeal a distinction was made between the two cases based on the fact that in this case the Appellant defended the action brought against Jean Berry. It is submitted that this distinction is not sound. Section E comprises five several obligations of the Company to the insured, of which No. 3 provides for the defence in the name and on behalf of the

insured of any civil actions brought against him. The defence was undertaken solely because R. E. Berry had given notice of the accident in accordance with the terms of his policy.

Each of the sub-divisions of Section E imposes a separate obligation and the Company might elect to undertake the obligation under one head and disclaim liability under another. In addition, it is to be observed that when describing what is to be available to others than the assured, the expression used is " the foregoing indemnity " which is a reference to the obligation imposed by clause 1 of Section E rather than to the obligations imposed by clauses 2–5 inclusive of that section.

Another ground of defence is relied on. As to Jean Berry the contract would be void under the British Columbia Insurance Act, 1925, cap. 20, sec. 10, as follows :

> " 10.—(1) Every contract by way of gaming or wagering is void. (2) A contract is deemed to be a gaming or wagering contract where the insured has no interest in the subject matter of the contract."

The motor car belonged to R. E. Berry. He had several cars which were driven by members of his family, including his daughter Jean Berry. There was no special permission given to the family to use the cars and there was no agreement between the father and any member of his family for such use. It was merely understood that they could use them as they wished. The insurable interest must exist at the time the policy is taken out as well as at the time of the loss.

Porter on Insurance, 6th Edition, p. 40; *Howard* v. *Lancashire Insurance Co.* (1885) 11 S.C.R. 92; *Sadlers Company* v. *Badcock* (1743) 2 Atk. 554; *Lucena* v. *Craufurd* (1806) 2 B. & P. (N.R.) 302.

In any event, the judgment is for too large a sum. Section 24 applies where a person incurs " liability for injury " 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, and it gives a right of action to recover " the amount of the judgment " up to the face value of the policy. The Appellant submits that the section authorizes an action for the damages for injury and not for costs and that the limit in this case is $4,600 or at most $5,000 and not $5,648.70 awarded by the Court of Appeal. The expression " the face value of the policy " as usually understood is the amount that may be recovered in respect of the happening of the event insured against and it is not to be augmented by incidental provisions as to costs. Moreover, the word " insured " as used in Section E (4) must have reference to R. E. Berry personally and is not to be extended to other beneficiaries referred to in the final clause of that section.

W. N. TILLEY,
of Counsel for the Appellant.

In the Supreme Court of Canada.

No. 25. Factum of A. M. Vandepitte.

No. 25.

Factum of A. M. Vandepitte.

Between

THE PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK - - - - - - *Defendant (Appellant)*

And

ALICE MARIE VANDEPITTE, Married Woman, the wife of E. J. Vandepitte - - - - - *Plaintiff (Respondent)*

And

R. E. BERRY - - - - - - - - - - *Defendant.*

RESPONDENT'S FACTUM.

PART I.—STATEMENT OF FACTS.

This is an appeal by the Defendant, The Preferred Accident Insurance Company of New York, from the Judgment of the Court of Appeal for British Columbia dated the 30th day of June, 1930, dismissing an appeal from the Judgment of the Honourable Mr. Justice Gregory, dated the 24th day of December, 1929.

This action was begun on the 20th day of May, 1929, by the Respondent as Judgment Creditor of one, Jean Berry, infant daughter of R. E. Berry, against the Defendant, The Preferred Accident Insurance Company of New York, to recover the sum of $4600·00 judgment and $660·20 costs and $388·51 interest thereon under an Insurance Policy with the Preferred Accident Insurance Company of New York covering damages for injuries caused by the motor car of R. E. Berry and all persons driving with his consent.

On October 7th, 1929, the said R. E. Berry on the application of the Respondent was joined as a party Defendant in this action as Trustee for Jean Berry, he having refused to join as Party Plaintiff.

This action came to trial on the 25th and 26th days of November, 1929, before the Honourable Mr. Justice Gregory who, on the 24th day of December, 1929, gave judgment for the Respondent against the Appellant, The Preferred Accident Insurance Company of New York, for the sum of $5,000·00 only and gave judgment against the Defendant, R. E. Berry for costs.

An appeal was taken by the Appellant to the Court of Appeal of British Columbia and the Respondent cross-appealed on the question of the quantum of the Judgment. The appeal was dismissed and the cross-appeal was allowed and the Judgment of the Respondent increased from the sum of $5,000·00 to the sum of $5,648·71. The Defendant, R. E. Berry, did not appeal.

The facts leading to this action are as follows :—

On the 5th day of March, 1928, one Jean Berry, nineteen year old daughter of R. E. Berry while driving her father's motor-car McLaughlin Buick, Licence Number 10–525 negligently collided with a motor-car in which the Respondent was a passenger, injuring the Respondent.

The Appellant Company has issued an Insurance Policy to R. E. Berry and this policy insured the said motor-car and the driver at the time the Respondent was injured.

The Policy (Case—Exhibit 3) covered among other things, legal liability for bodily injuries suffered by third persons. There is a clause in the policy (last paragraph of Insuring Agreements) providing that the indemnity for legal liability for bodily injuries 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.

At the time the policy in question was issued by the Appellant and at the time Jean Berry injured the Respondent, Jean Berry was legally driving the said motor-car with the consent of R. E. Berry for private or pleasure purposes.

On the 8th day of March, 1928, R. E. Berry gave notice of the accident of March 5th to the said Appellant Company on the forms supplied him by the Appellant and on the same day and on the same form Jean Berry filled in the " Statement of Person driving car at time of accident " both of which were delivered to the said Insurance Company (Exhibit 4).

The said R. E. Berry and the said Jean Berry did all things required of them by the Appellant in respect to the claim of the Plaintiff.

On March 14th, 1928, the Respondent brought an action in the Supreme Court of British Columbia against Jean Berry to recover damages for the injuries sustained by the Plaintiff by reason of the negligent driving of McLaughlin-Buick by Jean Berry.

In the action the Defendant, Jean Berry, applied for and obtained an order joining E. J. Vandepitte, the husband of the Plaintiff and the driver of the motor-car in which Respondent was a passenger, as Third Party for contribution.

The trial of the action came on before the Honourable Mr. Justice Macdonald who, on June 13th, 1928, awarded the Respondent the sum of $4600·00 damages for her injuries and costs against Jean Berry, and in the Third Party action awarded Jean Berry the sum of $2300·00 and costs against the Third Party, E. J. Vandepitte.

Jean Berry's defence and the Third Party action on her behalf was conducted by the Appellant.

The Appearance filed on behalf of Jean Berry did not, nor did any subsequent pleadings or proceedings disclose that Jean Berry was an

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No. 25. Factum of A. M. Vandepitte —*continued.*

infant and it was only on the trial that the Respondent, her Counsel or her Solicitor became aware of that fact.

On the 9th day of July, 1928, a Writ of Fieri Facias was issued on behalf of the Plaintiff out of the Supreme Court of British Columbia, directed to the Sheriff of the County of Vancouver, British Columbia, against the goods and chattels of Jean Berry. A return of Nulla Bona to the said Writ was made by the said Sheriff.

On September 5th, 1928, the Respondent moved to set aside her judgment against Jean Berry on the ground that Jean Berry, not having defended by a guardian *ad litem*, the judgment was a nullity.

The motion came on for hearing before the Honourable Mr. Justice Macdonald, the trial judge, and was dismissed.

The Respondent thereupon appealed to the Court of Appeal and the appeal was dismissed on the 27th November, 1928.

Both the motion and the appeal were defended by the Appellant, which taxed the costs of both against the Respondent.

Sometime prior to the hearing of the said appeal Jean Berry left the Province of British Columbia and did not return until the Spring of 1929.

On numerous occasions the Respondent's Solicitor and Counsel applied to the Solicitors of the Appellant Company for the name of the Company which had insured the said motor-car, but the name was refused.

On the return of Jean Berry to British Columbia the Respondent obtained an order for the examination of Jean Berry in aid of execution but on the examination the said Jean Berry did not produce the insurance policy and she swore that she did not know the name of the Company which had insured the said motor-car.

On the application of the Respondent an order was made by the Honourable the Chief Justice of the Supreme Court of British Columbia, which order was settled and signed on May 20th, 1929, that Jean Berry inform herself of the name of the Insurance Company and on the same day the Solicitors for the Appellant advised Respondent's Solicitor of the name of the Appellant.

On the examination in aid of execution and on the said application before the Honourable the Chief Justice, Jean Berry was represented by the Solicitors for the Appellant.

On the same day, May 20th, 1929, the Respondent brought this action as a Judgment Creditor under Section 24 of the Insurance Act, 1925, Statutes of British Columbia, Chapter 20, to recover the amount of her judgment against Jean Berry from the Appellant under its policy.

After the issuance of this Writ of Summons, R. E. Berry, father of the infant Jean Berry, was requested on behalf of the Respondent to join with her as a Party Plaintiff as Trustee for said Jean Berry on the promise of being indemnified for costs, but the said R. E. Berry refused and on application, the said R. E. Berry was on October 7th, 1929, joined as a Party Defendant.

On the trial the Honourable Mr. Justice Gregory held that Appellant's policy insured Jean Berry for damages occasioned by her to Respondent

and that the Respondent was entitled to judgment under Section 24 of the Insurance Act. The trial Judge held, however, that the Appellant's limit of liability was $5000·00 as being the face value of the policy (Section E of Policy, Exhibit 3) although subsection 4 of Section E expressly provides for payment of all costs taxed and all interest accruing after entry of Judgment.

The Appellant appealed to the Court of Appeal which appeal was dismissed and the Respondent cross-appealed on the ground that the Respondent was entitled to $5648·71 made up of $4600·00 judgment and costs and interest to the date of trial. This cross-appeal was allowed.

Part II.—Points of Law.

It is submitted that—

1. Respondent proved a legal liability had been imposed on Jean Berry and is therefore entitled to judgment under Section 24 of B.C. Insurance Act, 1925, St. of B.C., Chap. 20.
2. Jean Berry was insured under the policy.
3. Jean Berry had an insurable interest as a driver of the car.
4. The policy did not require R. E. Berry in writing to direct the Appellant to pay Respondent's judgment.
5. The face value of the policy is for judgment up to $5,000·00 and costs and interest.

Part III.—Argument.

1. Section 24 of the Insurance Act, B.C. Statutes, 1925, Chap. 20, provides as follows :—

> " 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."

The wording of this section is practically in the same terms as Section 85 of the Ontario Insurance Act Sec. 85 (1) of R.S.O. 1927, Chap. 222.

It cannot be denied that the Respondent has proven that she has a judgment against Jean Berry which together with costs and interest up to the date of trial amounted to $5648.71 and that this Judgment is unsatisfied.

Respondent has proven that a Writ of Execution was issued against Jean Berry under this judgment and that a return of nulla bona was made thereto by the Sheriff.

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No. 25. Factum of A. M. Vandepitte —*continued.*

The Respondent must prove what Jean Berry would have to prove had she paid the judgment and sued on the policy for indemnity. As was said by Mr. Justice Lamont in *Continental Casualty* vs. *Yorke*, 1930, 1 D.L.R. 609, at page 613, it is necessary for the Plaintiff under the Ontario Section to prove three things.

> " Had Mrs. Schwartz (here Jean Berry) paid the judgment and brought action against the Appellant she must have established :
>
> 1. The agreement to indemnify.
> 2. That bodily injury insured against had been inflicted by her automobile.
> 3. That she was legally liable in damages to the Respondent for injuries received by her."

The Respondent has proved that there was an agreement to indemnify by showing that the car of R. E. Berry was insured with the Appellant and by production of the policy (Exhibit 3).

The Respondent has shown that bodily injury insured against has been inflicted by R. E. Berry's automobile, while being driven by Jean Berry by showing that she, the Respondent, was Plaintiff in an action against Jean Berry for personal injuries received by Respondent by reason of Jean Berry's driving of the said automobile.

As to the third requisite, namely, proof that Jean Berry was legally liable in damages to the Respondent for the injuries received, there is the Respondent's evidence already referred to that she sued Jean Berry for injuries occasioned by Jean Berry while driving an automobile and the Writ of Summons, Statement of Claim, Statement of Defence and Judgment in the action of Respondent against Jean Berry (Case exhibit 1).

It was contended by Appellant in the Court of Appeal that this evidence was not sufficient but that in this action in order to prove Jean Berry had been held legally liable for damages, it was necessary for the Respondent to prove her case against Jean Berry de novo.

The Continental case is, I submit, no authority for that proposition. In that case Mrs. Schwartz was insured against liability for injuries caused to any person by the operation of her motor-car. The Plaintiff Yorke recovered judgment and then sued the Continental Casualty Co. under Section 85 of the Ontario Insurance Act. At the trial no oral evidence was given and the injury and liability were sought to be proven by the mere production of the judgment of Yorke against Mrs. Schwartz. This was in the opinion of the Court, insufficient, Mr. Justice Lamont saying at page 614, " The Respondent's (Yorke's) judgment not being evidence as against the Appellant (Continental Casualty Co.) of the circumstances upon which it was founded, there was no evidence before the Court that the conditions, upon which liability under the policy arose, had been fulfilled." Certainly that language does not imply that the legal liability must be proved de novo. What it does mean, I submit, is that in a case of this kind oral evidence must be given that injuries were received and that an action was brought to recover for such injuries and that judgment was awarded on the claim.

If I am correct in this the Respondent has established by her oral evidence and by the production of the pleadings and judgment in her action, that Jean Berry was held legally liable in damages to her.

Should it, however, be held that the Appellant's contention is correct, then the Continental Casualty Case is distinguishable from the one at bar.

In the Continental Case the Judgment obtained in the action against Mrs. Schwartz was not defended by the Insurance Company. In the case at bar the defence of Jean Berry was conducted by the Appellant. This difference is of great importance because in the case at bar the Appellant was in fact the real defendant, while Jean Berry was only nominally the Defendant.

To the general rule that judgments are conclusive only against parties and their privies there is this important exception, namely, that the judgment is conclusive against a person who has agreed to indemnify another against such a judgment.

This exception was established by the case of *Parker* vs. *Lewis*, 8 Ch. App. 1035. It was there held, that a stranger to a judgment may also be bound by it if he expressly so contracted. Thus if "A" contracted to indemnify "B" against any damage recoverable against the latter by "C," and "B" has bona fide defended the action and paid the amount, the Judgment will be conclusive.

At page 1059 Sir G. Mellish says :—

> "I think that the law with reference to express contracts of indemnity is that if a person has agreed to indemnify another against a particular claim or a particular demand and an action is brought on that demand, he may then give notice to the person who has agreed to indemnify him, to come in and defend the action . . . he may, if he pleases, go on and defend it and then if the verdict is obtained against him and judgment signed upon it, I agree that at law that Judgment, in the case of express contract of indemnity is conclusive . . . But I apprehend it is conclusive on account of what the law considers the true meaning of such a contract of indemnity to be . . . It would be very hard indeed, if, when he came to claim the indemnity, the person against whom he claimed it could fight the question over again and run the chance of whether a second jury would take a different view and give an opposite verdict to the first. Therefore, by reason of that contract of indemnity, the Judgment is conclusive; but in my opinion it is conclusive because that is the meaning of the contract between the parties for it unquestionably is not the general rule of law that a judgment obtained by "A" against "B" is conclusive in an action by "B" against "C." It is quite plain that the ordinary rule of law is that a judgment *in rem* is conclusive but a judgment *inter partes* is conclusive only between the parties and the persons claiming under them."

In this case the contract of the Appellant (Section E of the Insuring Agreements) is to indemnify the insured against loss from liability imposed

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by law for damages on account of bodily injuries accidentally suffered as a result of the use of the automobile. A judgment in favour of the Respondent having been rendered against Jean Berry, that judgment, adopting the reasoning of the Parker case, is by reason of the contract, conclusive against Appellant.

Since the Appellant conducted Jean Berry's defence there can be no question of the bona fides of such defence.

There is another exception to the rule above enunciated, that a judgment may be conclusive on the ground of estoppel.

The facts on which an estoppel is based are shortly these. The Appellant defended the action against Jean Berry. It launched and prosecuted the Third Party action against E. J. Vandepitte. It attempted to set off the Third Party judgment against the Respondent's judgment. It opposed and successfully opposed the endeavour of the Respondent and the Third Party to set aside the Judgment against Jean Berry and against E. J. Vandepitte. Having done these things thereby depriving Jean Berry of her right to conduct her own defence and having kept the fruits of the judgment against E. J. Vandepitte, the Appellant has acquiesced in this Judgment and is estopped.

See: Re: Last—*Wilkinson* vs. *Blades* (1896) 2 Ch. 788. The facts on which an estoppel were based in this case are found on page 791 to 792 of the Judgment. The head note of that case is as follows:—

> " A person not a party to an action or summons nor technically bound by the judgment but fully cognizant of the proceedings, who stands by and deliberately takes the benefit of a decision on the construction of a will under which a particular fund is distributed, is estopped by his conduct where the circumstances are identical from re-opening any of the questions covered by the former judgment by means of a fresh action or summons relating to another fund under the same Will though claiming in respect of a different interest."

At page 795 Mr. Justice Chitty says:

> " Now, I have not said he is bound by the judgment—I think he was not, but by his conduct after the Judgment and under the judgment—knowing all the circumstances and deliberately taking the benefit of it, knowing that in a certain event that Judgment might prove adverse to his material interest, he stood by and by taking the money, has acquiesced if ever a man could acquiesce."

And at page 796 the learned Judge says that the result is that though Mr. Wilkinson is not technically bound by the judgment, yet having regard to his conduct, his knowledge and the circumstances of the case, it is contrary to good faith and to equity that he should raise this question at the present time.

This same principle was laid down in the case of *Mohan* vs. *Broughton*, 1900, P. 56. In that case the Plaintiff claimed to be entitled as next-of-kin

of an intestate three years after the distribution of the estate—she sought to impeach the title of those amongst whom the estate had been distributed on the ground of illegitimacy of one of the ancestors. The Plaintiff was aware at the date of distribution, of the alleged illegitimacy, but pleaded want of means in justification of the delay in bringing the action. It was held that the Plaintiff was debarred by laches and acquiescence from prosecuting her claim.

It is submitted on behalf of the Respondent that in this case the Appellant is debarred by laches and acquiescence from now claiming that the judgment against Jean Berry is not conclusive as against it.

2. It was contended by the Appellant in the Courts below that Jean Berry was not insured by the policy in question. This argument was based on two premises.

(*a*) That if Jean Berry had paid the Judgment she could not have sued to recover indemnity under the policy.

(*b*) The policy in question is in the name of R. E. Berry and not Jean Berry and the application for insurance was made by R. E. Berry and not Jean Berry.

I propose to deal with these two points at some length.

(*a*) The contention, that Jean Berry if she had paid the judgment could not have maintained an action for indemnity is based on the premise that under the insurance contract she could not have maintained an action in her own name. Whether she could or not can make no difference if Section 24 of the British Columbia Insurance Act gives a judgment creditor the right of action against the insurer. That section as has already been pointed out gives the judgment creditor the right to sue any person insured by a policy. In section 85 of the Ontario Act the Judgment Creditor is given the right to sue " in the same manner " as the assured would sue if she herself had satisfied the judgment. The words " in the same manner " do not appear in the British Columbia Act. In *Continental Casualty* vs. *Yorke*, 1930, 1 D.L.R. 609 Mr. Justice Lamont dealing with these words of the Statute at page 612 says :

> " 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 husband the 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."

That being so, under a Statute prescribing that the action should be brought " in the same manner," it is much more so under the British Columbia Statute where there is no reference to any manner of procedure and a right of action is vested in the Judgment Creditor. It is submitted

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therefor that whether Jean Berry could sue the Appellant or not, Section 24 confers the right of action on the Judgment Creditor.

(*b*) While it is true that the policy is in the name of R. E. Berry it is obvious from the language of the Omnibus Clause (last paragraph of insuring agreements—Ex. 3) that the policy is one insuring R. E. Berry and all other persons driving the car with his permission. The language in that respect is clear and unequivocal and in the proviso of the omnibus clause the policy itself refers to a named insured and to other persons entitled to indemnity under the policy. That such policies are valid has been firmly established by *Waters* vs. *Monarch Fire & Life Insurance Co.* 1856—5 E. & B. 870 and by *London & North Western Railway* vs. *Glyn* 1 El. & El. 652, 663. In the case of *Williams* vs. *Baltic Insurance Co.* 1924, 2 K.B. 282, the facts were on all fours with the facts in the case at bar. There Bransby Williams the owner of a motor-car, took out a policy of insurance by which the insurer agreed to indemnify him against damage to or loss of his motor-car and (by Clause 2) " against all sums for which the insured or any licensed personal friend or relative of the insured while driving the car with the insured's general knowledge and consent, shall become legally liable in compensation for accidental bodily injury caused to any person." While, the car was being driven by the insured's sister with the insured's general knowledge and consent, an accident happened which caused personal injuries to third persons and in respect of which those persons recovered damages against her. The insured claimed that the insurers were liable under the policy to indemnify his sister and to pay to her or to him as Trustee for her, the amount of those damages. It was held that the insurers were liable for the amount payable under the judgment against her. It was there contended that Bransby Williams was the insured. Dealing with that argument, Mr. Justice Roche at page 290 says :

> " The general argument that Mr. Bransby Williams cannot recover for Miss Bransby Williams because the latter cannot recover for herself is based upon this, that the insured is Mr. Bransby Williams. That, I think, is begging the question. Mr. Bransby Williams is the insured in the sense that he is the person who effected the insurance. But it is an insurance for himself and the other persons mentioned in Cl. 2 and, accordingly, the Company's contract is to indemnify all such persons in the event of those things happening against which the insurance is effected. The principle of *Waters* vs. *Monarch Fire & Life Assurance Co.* in that matter also applies here."

In the case of *Schoenfeld* vs. *Pilot Automobile & Insurance Co.*, 1930, 2 D.L.R. 1. The facts were altogether similar to the facts in the case at Bar. Shortly they were these : The Plaintiffs recovered Judgment against one, George Cooper, for damages for the negligent operation of a motor vehicle. The judgment not being satisfied, the Plaintiffs then brought an action under Section 85 (1) of the Ontario Insurance Act. The motor-car which did the damage to the Plaintiffs was on that occasion driven by Cooper but it was the property of his wife who was not made a party defendant in the

original action nor in the action under Section 85. The car was insured with the Defendant Company under a policy issued in the name of Edith Cooper. The Omnibus Clause in which the Insurance Company agreed to indemnify the insured and any person driving with the insured's consent was to all intents and purposes the same as the Omnibus Clause in this case. It was there held that the husband, George Cooper, was " a person insured." At page 3 Mr. Justice Garrow says as follows :—

" If the words in the section ' a person insured ' mean only a person having an insurance policy issued directly to himself in respect of a motor vehicle owned by himself and as to which he has paid the premium, then obviously that situation does not exist here. The person with whom the insurance contract was directly made and the person who paid the premium and who owned the car insured was and is Edith Cooper and not her husband.

" But should the words be so restricted in their interpretation? I have, on consideration, come to the conclusion that they should not. The purpose of this comparatively recent legislation is that damage to person or property resulting from the negligence of an impecunious operator of a motor vehicle shall not go uncompensated when the very event which resulted in the loss has been insured against by some insurance company, and I do not agree that the section is to be construed in any narrow or restricted sense.

" Here the policy itself provides that, in the event which has happened, the indemnity . . . shall be available to the driver of the car in the same manner and under the same conditions as it is available to the insured. Having regard to that language, it seems to me to be clear that Cooper was and is ' a person insured ' within the meaning of the section. And the proviso in the policy to the effect that the indemnity payable shall be applied first to the protection of the insured, and the remainder, if any, to the protection of the other person entitled to indemnify, as the named insured shall in writing direct, evidently from its very language contemplates that the other person . . . in this case Cooper . . . is directly entitled to certain benefits under the policy."

The Respondent, therefore, submits that Jean Berry is " insured " within the meaning of Section 24 of the British Columbia Act.

It was, however, contended by the Appellant that if that is so, R. E. Berry must be joined as a party Plaintiff in the capacity of Trustee as was done in *Williams* vs. *Baltic*. In answer to that it is sufficient to say that R. E. Berry was requested to join as a party Plaintiff and refused. An application was thereupon made to join him as a party defendant in the capacity of trustee and that order was made. To that the Appellant contended that the joinder was after the expiration of one year from the date of loss and that the statutory condition 8 (3) requires the action to be brought within a year from the date of loss. To that contention the Respondent's submission is twofold.

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First, that the action by Respondent was brought within the year so that at the worst the action was defectively constituted if R. E. Berry was a necessary party.

See *Thompson* vs. *Standard Mutual Fire Ins. Co.* 17 O.L.R. 214. In that case the action was on fire insurance policies. On September 4th, 1906, the fire took place. On the 15th of November, 1906, the Plaintiff assigned all his right, title and interest to any money which might become payable to him under the policies to a bank, his creditors. No notice of this assignment was ever given to the Insurance Companies until long after the commencement of the action. At the trial, October, 1907, the Bank was added as Plaintiff *ab initio* and *nunc pro tunc*. Held: That at the time of the commencement of the action the Plaintiff had an interest in the insurance and the actions were, therefore, not nullities but were at the most, defectively constituted, and although the Bank was not made a party until more than a year after the loss occurred, its remedies were not barred by Statutory Condition number 22. Statutory Condition number 22 required actions on the policy within one year from the date of loss.

Moss, C.J., at page 236 says:

> "But it is contended that the actions must now be treated as the bank's actions only, and that as it was not made a party until more than a year after the loss occurred, its remedies are barred by the terms of the condition. One sufficient answer to this objection is that at the time of the commencement of the actions, the Plaintiff Thompson had an interest in the insurances. The actions were, therefore, not nullities; at the utmost they were defectively constituted."

And so here, Jean Berry had an interest in the policy by virtue of the Omnibus Clause of the policy. That being so, the action at the worst was defectively constituted only.

Secondly, it is submitted that the Appellant is estopped from setting up the said Statutory Condition as a defence. For eleven months the Respondent was prevented by all possible means from obtaining the name of the Insurance Co. and commencing her action. By reason of its conduct it is estopped from setting up the violation of the Statutory Condition.

See *Cousineau* vs. *City of London Fire Insurance Co.*, 1888, 15 O.R. 329. In that case the Plaintiff sued upon an Insurance policy for a loss occasioned by fire which took place on the 28th of March, 1886. One of the Statutory Conditions provided that every action thereunder should be absolutely barred unless commenced within one year after the loss occurred. The action was not commenced until the 11th July, 1887. After the Plaintiff had filed his proofs of loss the Defendant from time to time up to May 11, 1887, requested the Plaintiff to procure and furnish and the Plaintiff did so procure and furnish, additional particulars concerning the claim. It was held that the conduct of the Defendant in requiring additional particulars was a waiver of and precluded the Defendants from setting up the Statutory Condition limiting the time for bringing the action.

Armour, C.J., at page 333 says :—

> " I am of opinion that the conduct of the Defendants in requesting the Plaintiff to procure and furnish additional particulars concerning the claim up to the time mentioned in the case and thereby putting him to loss of time, trouble and expense in procuring and furnishing the same, was a waiver of and precluded the Defendants from setting up the twenty-second Statutory Condition."

In the case at Bar, if the Appellant were able to set up this defence the benefit of Section 24 would be mythical. By simply preventing a judgment creditor from obtaining the name of the insurer it could escape liability. Here the Appellant refused to give Respondent the name of the insurer and it was only after Morrison, C.J., made his order requiring Jean Berry to advise herself that the name was forthcoming.

The Appellant also contended below that even if the policy were taken out for the benefit of R. E. Berry himself and for the benefit of those persons whom he might permit to drive, that such policy to be a binding contract as far as Jean Berry is concerned, must either have been authorized by Jean Berry or ratified before loss. While there is no direct evidence that the policy was either authorized or ratified by Jean Berry, there is the evidence of Robertson the Attorney for the Province of British Columbia of the Appellant Company to this effect : On the receipt of the report of Miss Berry the matter was taken out of her hands by the Appellant and placed in the hands of the Appellant's adjusters and Solicitors; the Appellant conducted Jean Berry's defence and sought to set off the Third Party Judgment against the Respondent. It opposed the Respondent's motion to set aside her judgment and it did not repudiate liability to Jean Berry. The only complaint that Robertson had was that he did not receive a notice that Jean Berry would be claiming indemnity under the policy. He took no objection to want of notice (if such is required) but it only occurred to him to take that objection after the Respondent had obtained judgment against Jean Berry and this present action was commenced. The only inference that can be drawn from such conduct is that Jean Berry either authorized the issuance of the policy or subsequently ratified it. No Insurance company certainly would conduct a defence and assume a judgment unless the policy had been authorized or subsequently ratified.

See *Watson* vs. *Swann*, 1862, 11 C.B. (N.S.) 756, where Erle, C.J., at p. 769 says :—

> A wide extension to the principle as to parties to contracts has been made *re* insurance policies " viz., that persons who could not be named or ascertained at time the policy is effected are allowed to come in and take the benefit of the insurance " but they must be persons contemplated at time policy was made.

Jean Berry was contemplated at the time the policy was made. She was then driving the motor-car almost exclusively.

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Ratification except in Marine cases must be before loss. The ratification was before Judgment in this case and that is before loss. Until judgment had been rendered against Jean Berry there had been no loss and all that the Respondent had was a " right of action."

3. It was contended by the Appellant below that Jean Berry had no insurable interest in the motor-car and that therefore by Section 10 of the B.C. Insurance Act, Stat. of B.C. 1925, Chap. 20, the policy is void as a Gaming or Wagering Contract.

The Respondent admits that Jean Berry had no interest in the motor-car insured. The car was the property of R. E. Berry. Her only interest in the motor-car was the right or license she had to drive it. She drove with the permission of R. E. Berry. At the date the policy was issued she was using the car every day and almost exclusively and with permission. At the date of the accident she was also driving with permission, from her University.

It is submitted that Jean Berry has an insurable interest as a driver against liability for negligence. In *Stock* vs. *Inglis*, 12 Q.B.D. 564, Brett, M.R. at page 571 says :—

> " In my opinion it is the duty of a Court always to lean in favour of an insurable interest if possible, for it seems to me that after underwriters have received the premium the objection that there was no insurable interest is often as nearly as possible, a technical objection and one which has no real merit, certainly not as between the assured and the insurer."

Certainly it is matter of common knowledge that the insurance premium was measurably increased by the added risk of insuring persons driving with the consent of the owner and the trial judge so found.

A good broad definition of insurable interest is stated in McGillivray's Insurance Law, p. 117 to 118, as follows :—

> " Where the assured is so situated that the happening of the event on which the insurance money is to become payable, would, as a proximate result, involve the insured in the loss or diminution of any right recognized by law or in any legal liability, there is an insurable interest to the extent of a possible loss or liability."

And at page 121 the same author says :—

> " The chance of incurring legal liability in consequence of the happening of an event gives an interest just as much as the chance of losing a right."

Although Jean Berry had no property interest in the motor-car, an accident while she was driving, if due to negligence, would involve her in a legal liability, and she has an insurable interest as driver to the extent of her liability.

McGillivray's statement of the law is supported by the following authorities.

See *Mackenzie* vs. *Whitworth*, 1875, 1 Ex. D. 36, where it was held that an underwriter who has insured may re-insure and his possible liability in the event of a loss is an insurable interest.

Mr. J. Blackburn, at p. 44 says :—

> " The assured here had a direct interest in the safe arrival of the cotton . . . It was, though not a property in the cotton, an interest in the cotton created and evidenced by a binding legal contract between them and the owners of that cotton."

In *Crowley* vs. *Cohen*, 1832, 3 B. & Ad. 478 carriers on a canal effected insurance on " goods, as interest may appear." It was held that the policy covered a loss arising out of the Plaintiff's liability as carrier.

In *Boehm* vs. *Bell*, 1799, 8 T.R. 154 a ship was captured by a Captain in His Majesty's service on the high seas. If the capture was held illegal he would have been liable in an action for damages. It was held that he could insure himself against a decision which might have loaded him with damages and costs for wrongful seizure and to this extent he had an insurable interest.

In *Wilson* vs. *Jones*, 1867, 2 Ex. 139, the Plaintiff who was a shareholder in Atlantic Telegraph Co. took out an insurance policy to cover the laying of the cable from Newfoundland to Ireland. The policy " to cover every risk attending the conveyance and successful laying of the cable, until one hundred words be transmitted from Ireland to Newfoundland." The cable broke whilst being hauled in to remedy a defect in the insulations. One half the cable was saved. The property in the cable was in the Atlantic Telegraph Co. It was held that the policy was not on the cable but on Plaintiff's interest in the adventure. That is, on the profits to be derived by him from the success of the adventure. Such an interest was an insurable interest.

In *Germania Fire Assurance* vs. *Thompson*, 1877, 95 U.S. 547 a distillery Company distilled whisky owned by one D. The Company was a surety on D's bond to the United States and as such were liable for the revenue tax if not paid by D or made out of the whisky. It was held that the Company's liability for the tax was an insurable interest.

Miller, J. at p. 551 says : " In the event of the whisky being destroyed by fire the danger of their personal liability was greatly increased . . . As long as the whisky was in the warehouse, the Plaintiffs (the distillery Company) were not liable for the tax. The moment it was lost they became liable. This was a fair subject of insurance.

On the principle as stated by MacGillivray and the cases above quoted Jean Berry had an insurable interest whilst driving the motor-car against legal liability.

Two cases, already dealt with, were decided on practically the same facts as in the case at bar.

See *Williams* vs. *Baltic Insurance Association*, 1924, 2 K.B. 282 and *Schoenfeld* vs. *Pilot Automobile & Accident Insurance Company*, 1930, 2 D.L.R. 1.

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In *Williams* vs. *Baltic* the owner of a motor-car took out a policy of insurance by which the insurers agreed to indemnify him against damage to his motor-car and " against all sums for which the insured (or any licensed personal friend or relative of the insured while driving the car with the insured's general knowledge and consent) shall become legally liable in compensation for accidental bodily injury caused to any person."

While the car was being driven by his sister with his consent an accident happened which caused personal damage to third persons in respect of which those persons recovered damages.

On the question of whether there was an insurable interest, Mr. J. Roche, at p. 290 says: " On the question of interest, Mr. Claughton Scott said Mr. Bransby Williams (the insured) was interested in Miss Bransby Williams's immunity from claims and that she was herself interested in her protection against claims; further that she was interested as the driver of the motor-car in respect of the motor-car itself. I do not decide these points, but I think there is a great deal in them."

As I have already shown, Jean Berry had an interest in being indemnified for liability. R. E. Berry also had an interest in her being indemnified because, apart from a desire to have her protected, the Statutes of B.C. 1926–27, Chap. 44, Sec. 12, imposed a liability on him for her torts. Jean Berry was at the time of the accident a minor and living at home with her parents and under this section R. E. Berry was liable in damages for her negligent driving.

4. Is it a condition precedent to recovery that the named assured R. E. Berry direct Appellant in writing to pay the judgment of Respondent? It was argued that it was. The governing words are found in the final paragraph of the insuring agreements (Exhibit 3). After providing that the indemnity available to the named insured shall be likewise available to persons driving with his consent, the clause goes on " provided that the indemnity payable hereunder shall be applied first, to the protection 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.

The obvious intention of this clause is that in the event of liability being imposed on the named assured and on the unnamed insured, that Appellant shall first indemnify the named insured and as to any others, indemnify them to the limit of the policy as the named insured may direct in writing. In other words, when more than one unnamed insured is liable, the named assured can prefer which shall be indemnified and in what order they shall be indemnified. This clause can have no application when the named insured is under no liability as in this case.

In any event, it is not a condition precedent. This was decided in *Schoenfeld* vs. *Pilot Automobile & Accident Insurance Company*, 1930, 2 D.L.R. 1, p. 5, where the point was raised. Mr. J. Garrow, at page 5 states " But the fact that the wife (the named insured) has not so far signified her wishes in regard to the indemnity payable need not prevent her doing so

now; nor was her doing so, in my opinion, a condition precedent to the bringing of the present action."

Should the written direction be held a condition precedent, then it has been waived.

The Appellant, after notice of the accident, took the matter out of the hands of the Berrys and placed it in the hands of its adjusters and solicitors. The Appellant never required that R. E. Berry direct it to indemnify Jean Berry. It only occurred to Appellant to take this objection after Respondent had commenced this action.

As was said by Mr. J. Lamont in *Continental Casualty* vs. *Yorke* at p. 612, " It (the judgment creditors right of action) 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 . . . . and that whatever defences the Appellant would have been entitled to raise against the insured it may raise against the Respondent." On the facts as above stated it is submitted that under the authority of *Western Canada Acc. & Guar. Co.* vs. *Parrott*, 61 S.C.R. 595, the Appellant would be estopped from requiring compliance with this condition and would be held to have waived it.

To require such a direction in writing as a condition precedent would be to nullify and defeat the provisions of Sec. 24 of the Insurance Act and make abortive any attempt by a judgment creditor to sue.

R. E. Berry was a party to the action and if a direction in writing is necessary, the Court has power to make such a direction. It is a fair inference that R. E. Berry did not direct the Appellant to pay Respondent's judgment at the request of Appellant as it only would be interested in Respondent not being paid.

5. The trial judge held that the Appellant's liability was limited to the face value of the policy, which face value in the opinion of the said trial judge was the sum of $5,000·00. It is submitted that the face value of the policy is not confined to the sum of $5,000·00, being the Insurance Company's limit of liability, under Section E of the Insuring Agreements for it is obvious by Sub-Section 4 of Section E that the Appellant's liability is $5,000·00 Judgment and in addition, all costs taxed against the insured and all interest accruing after the entry of Judgment. If this were not so, Sub-Section 4 would be meaningless. The Court of Appeal held that face value of the policy meant the full limit of Appellant's liability under the policy, and this, it is submitted is the correct interpretation of those words.

See *New Amsterdam Casualty Co.* vs. *Cumberland Telephone Co.*, 1907, 152 Fed. Rep. 961. A policy insured against loss from liability for damages on account of bodily injuries accidentally suffered by any person caused by the negligence of the assured and against the expenses of defending any suit for such damages. It limited the Company's liability arising from injury or death of one person to $5,000·00 and provided for notice of any injury. It further provided that the Company should defend or settle any suit and prohibit the assured of making any settlement, incurring any expense or interfering, etc. It was held that the limitation did not include the costs

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and expenses of a suit on a claim for damages for the death of a person which was defended by the Company pursuant to the terms of the policy and that on recovery of a larger sum by the Plaintiff the assured was entitled under the policy to be reimbursed for the costs and expenses which it was compelled to pay in addition to the $5,000·00 indemnity against the damages recovered.

Respectfully submitted,
C. L. McALPINE,
Counsel for Respondent.

No. 26. Formal Judgment, 6th October 1931.

No. 26.

Formal Judgment.

IN THE SUPREME COURT OF CANADA,

Tuesday the 6th day of October, A.D. 1931.

Present :—

The Right Honourable Mr. JUSTICE DUFF, P.C.
The Honourable Mr. JUSTICE NEWCOMBE, C.M.G.
The Honourable Mr. JUSTICE RINFRET.
The Honourable Mr. JUSTICE LAMONT.
The Honourable Mr. JUSTICE CANNON.

Between :—

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

and

ALICE MARIE VANDEPITTE, Married Woman - - - - - - - (*Plaintiff*) *Respondent.*

and

R. E. BERRY.

THE APPEAL of the above named Appellant from the Judgment of the Court of Appeal for British Columbia pronounced in the above cause on the thirtieth day of June in the Year of our Lord one thousand and nine hundred and thirty dismissing with costs, an Appeal from the Judgment of the Supreme Court of British Columbia, delivered by the Honourable Mr. Justice Gregory on the twenty-fourth day of December in the year of our Lord one thousand nine hundred and twenty nine, and allowing, with costs, the Respondent's cross-appeal therefrom and increasing the amount of the Judgment in the Respondent's favour to the sum of five thousand six hundred and forty-eight dollars and seventy one cents ($5,648.71), having come on to be heard before this Court on the third day of February

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Formal Judgment, 6th October 1931—*continued.*

in the year of our Lord one thousand nine hundred and thirty one, in the presence of Counsel as well for the Appellants as the Respondent, and upon hearing what was alleged by Counsel aforesaid this Court was pleased to direct that the said Appeal should stand over for Judgment, and the same coming on this day for Judgment.

THIS COURT DID ORDER AND ADJUDGE that the said Appeal should be and the same was allowed; that the said Judgment of the Court of Appeal for British Columbia be reversed and set aside and the action dismissed.

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the said Respondent should and do pay to the said Appellants the costs incurred by the said Appellants as well in the said Court of Appeal for British Columbia, and in the said Supreme Court of British Columbia, as in this Court.

J. F. SMELLIE,
Registrar.

No. 27.
Reasons for Judgment.
(*a*) Duff, J.

No. 27.

Reasons for Judgment.

(*a*) DUFF, J.—

I agree with the conclusion of my brother Newcombe and in substance with his reasons.

The action out of which the appeal arises was instituted under sec. 24 of the B.C. Insurance Act of 1925, ch. 20, which reads as follows :—

> 24. 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.

The respondent was injured in a motor accident, the car in which she was a passenger having come into collision with a car owned by the defendant R. E. Berry, and driven by his daughter Jean Berry. The judgment was against Jean Berry for $4,600 damages and costs taxed at $780.25. In the action Jean Berry was the sole defendant, and she was defended by solicitors appointed by the appellants, professing to act in pursuance of the policy, her father, R. E. Berry, having given notice of the accident pursuant to the policy.

The B.C. courts held that by virtue of this policy, Miss Jean Berry was "insured" within the meaning of s. 24 in respect of any liability attaching to her by reason of automobile accidents while driving a car belonging to her father, and consequently that the respondent was entitled to recover

In the Supreme Court of Canada.

No. 27. Reasons for Judgment. (a) Duff, J. —*continued.*

from the appellants the amount of her judgment up to the sum named in the policy.

I agree that the insurance contemplated by sec. 24 is one which confers a right of indemnity, that is within the protection of the law, that is to say, one which the person incurring the liability has the legal means, direct or indirect, of enforcing. I think this is so for two reasons. First, unless it is so restricted in its operation, it is difficult to assign any certain limits to the scope of the section. Second, 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. In many cases, no doubt, the same result might be achieved through a receiver by way of equitable execution—perhaps in all cases; but the legislature has seen fit to give to the person injured a direct action against the insurance company in his own name, and there may have been very good reasons for doing so. So long as the enactment is limited to enforcing against the insurance company a right which could have been enforced through the courts by the person responsible for the injury, the insurance company, so far as one can see, can have nothing to complain of, especially in cases in which the same object could have been effectuated by a more circuitous method. It would, however, be an obvious injustice to establish by legislation a right of recourse against the insurance company in respect of which no person having a right of indemnity enforceable against the insurance company, is in any way responsible. Here the father R. E. Berry was responsible for his daughter's act under sec. 12 of cap. 44 of the B.C. Statutes of 1926 and 1927, but the respondent elected to proceed against the daughter. No judgment having been recovered against the father, the conditions never arose, under which, alone, by the terms of the policy, the insurance company could be called upon to indemnify him in respect of his liability to the respondent. 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.

The respondents base their claim upon two alternative contentions. The first is that Miss Berry was entitled to require the insurance company to indemnify her in respect of the judgment recovered against her, either directly, or indirectly, by calling upon her father to take proceedings under the policy. The second ground is that in consequence of the steps taken by the insurance company in defence of the action, they are estopped from denying Miss Berry's right to indemnity under the policy, as against both Miss Berry and the plaintiff.

It will be convenient to consider these contentions in the order in which I have stated them. I agree with my brother Newcombe, that there is no ground for holding that the policy was effected by R. E. Berry as trustee for Miss Berry.

The clause relied upon, by which the indemnity under section E. becomes available for the benefit of the classes of persons mentioned in it, does not, I think, disclose an intention to declare that the named insured is contracting as trustee. That clause is in these words :—

> The foregoing indemnity provided by Section D and/or E shall be available in the same manner and under the same conditions as it is available to the Insured to any person or persons riding in or legally operating the automobile for private or pleasure purposes, with the permission of the Insured, or of an adult member of the Insured's household other than a chauffeur or domestic servant; provided that the indemnity payable hereunder shall be applied, first, to the protection 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.

It may be that a trust would arise in consequence of a written direction by the insured under this clause, but until there is such a direction, at all events, it seems clear that the named insured is entirely master of the situation, and under no enforceable obligation to require the Company to indemnify any one of the classes of persons described. Indeed until a direction in writing is given, he is not entitled to require the insurance company to provide indemnity in respect of any liability other than his own.

Then as to agency. The fair inference from the clause as a whole is that he is not contracting as agent; and since he is not professing to contract as agent, ratification (assuming there be adequate evidence of ratification) would be of no avail.

A word upon *Williams* v. *Baltic*. There the action was brought by the named insurer; and ratification by the beneficiary before the accident occurred brought the case within the scope of Lord Campbell's judgment in Waters' Case. The question of the right of the beneficiary to recover on the policy in her own name is not discussed in the judgment, and, apparently, that question was not considered material by Roche, J. The judgment lends no support to the respondent.

There remains the question whether, by defending the action, the appellants have precluded themselves from denying that Miss Berry was "insured" under policy within the meaning of sec. 24. The appellants professed to undertake the defence of the action on her behalf under the policy, and upon the invitation of the father. That was a recognition that the claim against Miss Berry was a claim covered by the policy; but it was not necessarily a recognition of Miss Berry's right to require indemnity either directly, or indirectly, by compelling her father to proceed. The course of the company is quite naturally attributable to a desire to fulfil their obligations to R. E. Berry himself; and there is no evidence to justify the conclusion that the solicitors who acted for Miss Berry had not her full consent to do so. It is impossible to affirm, judicially, upon the evidence before us, that the solicitors derived their authority solely from the policy.

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No. 27. Reasons for Judgment. (*b*) Newcombe, J. (concurred in by Rinfret, Lamont and Cannon, JJ.).

Whether, in assuming the defence of the action in execution of a contract with the father, and with the daughter's consent, the company may have exposed themselves to a charge of maintenance, is another question.

The appeal should be allowed and the action dismissed with costs throughout.

(*b*) NEWCOMBE, J. (Concurred in by RINFRET, LAMONT and CANNON, JJ.).

The Respondent was injured while riding in a car, driven by her husband, which collided with a car belonging to the defendant, R. E. Berry, and driven by his daughter, Jean Berry. The Respondent in an action against Jean Berry, recovered judgment on 13th June, 1928, for $4600·00 damages and costs, taxed at $780·25; and, in third party proceedings, the Respondent's husband was held liable to contribute to Jean Berry $2300·00 and costs, upon the finding that he and she, the drivers of the two cars, were guilty of negligence in the same degree.

The Defendant, R. E. Berry, was insured, by a combination automobile policy of the appellant company, against legal liability for bodily injuries or death of one person, for $5000·00; and it was provided by the clause described as "Insuring Agreements," printed upon the back of the policy, that the insurers agreed, among other clauses, to section E, entitled "Legal liability for bodily injuries or death," and thereby undertook (quoting the words and figures).

(1) To indemnify the Insured against loss from the liability imposed by law upon the Insured for damages on account of bodily injuries (including death, at any time resulting therefrom) accidentally suffered or alleged to have been suffered by any person or persons (excluding employees of the Insured engaged in the operation, maintenance and repair of the automobile, and employees of the Insured who at the time of the accident are engaged in the trade, business, profession or occupation of the Insured) as a result of the ownership, maintenance or use of the automobile; provided that on account of bodily injuries to or the death of 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 or the death of 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.

(5) To reimburse the Insured for the expense incurred in providing such immediate surgical relief as is imperative at the time such injuries are sustained.

The foregoing indemnity provided by sections D and/or E 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, or of an adult member of the Insured's household other than a chauffeur or domestic servant; provided that the indemnity payable hereunder shall be applied, first, to the protection 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.

It is provided by the Insurance Act of British Columbia, 1925, cap. 20, sec. 24, 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 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.

The Defendant, R. E. Berry, had given notice of the accident to the insurers, pursuant to the policy, and his daughter, Jean, in the action to which I have referred, was represented and defended by solicitors named and instructed by the appellant company.

The present action was commenced on 20th May, 1929, against the appellant company as sole defendant; but, by order of 7th October, 1929, R. E. Berry was added as a defendant subject to a proviso " that the joinder " should not in itself entitle the plaintiff to any relief which she could not " have claimed if the action had commenced at the time of such joinder."

The action was tried before Gregory, J., of the Supreme Court of British Columbia, who held that the plaintiff (Respondent) was entitled to recover from the defendant company (Appellant) the sum of $5,000·00 and her costs. The company appealed, and the respondent cross-appealed claiming that the amount of her recovery was insufficient and should be increased by the sum of $648·70. The Court of Appeal, composed of Martin, Galliher and McPhillips, JJ., dismissed the appeal and allowed the cross-appeal, directing that the judgment should be increased by the sum claimed.

Upon the appeal to this Court the appellant company contends that Jean Berry was not entitled to sue upon the policy, and that a case of

In the Supreme Court of Canada.

No. 27. Reasons for Judgment. (*b*) Newcombe, J. (concurred in by Rinfret, Lamont and Cannon, JJ.)—*continued.*

liability under the policy has not been established. There are other submissions on behalf of the appellant, to which, in my view, it will be unnecessary to refer.

The main question depends upon the interpretation of section 24 of the Insurance Act in its application to the provisions of section E of the Insuring Agreements, by which it is provided, as already shown, that the 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 . . ."

Section 24 is obviously a provision in aid of execution, and in the nature of a garnishee proceeding. The action thereby authorised lies 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. Now the policy is between R. E. Berry, the insured, and the appellant company, the insurer, and Jean Berry, the insured's daughter, is not a party to it. Moreover, there is no consideration moving from her to the insured for the covenant upon which the respondent relies to establish that Miss Berry is insured, within the meaning of section 24 of the statute. In *Colyear* v. *Mulgrave*, 1836, 2 Keen, 81, 44 R.R. 191, to which the Court of Appeal referred with approval *In re D'Angibau*, *Andrews* v. *Andrews*, 1880, 15 Ch. D., 242, it was held that where two persons for valuable consideration as between themselves covenant to do some act for the benefit of a third person, that person cannot enforce the covenant against the two, though either of the two might do so against the other.

In *Tweddle* v. *Atkinson*, 1861, 1 B. & S., 393, in the Queen's Bench, the judgment of Wightman, J., in which Crompton and Blackburn, JJ., agreed, is as follows:—

> Some of the old decisions appear to support the proposition that a stranger to the consideration of a contract may maintain an action upon it, if he stands in such a near relationship to the party from whom the consideration proceeds, that he may be considered a party to the consideration. The strongest of those cases is that cited in *Bourne* v. *Mason*, 1 Ventr. 6, in which it was held that the daughter of a physician might maintain assumpsit upon a promise to her father to give her a sum of money if he performed a certain cure. But there is no modern case in which the proposition has been supported. On the contrary, it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit.

In *Gray* v. *Pearson*, 1870, L.R., 5 Common Pleas, 568, 574, Willes, J., said, at the beginning of his judgment:

> I am of opinion that this action cannot be maintained, and for the simple reason—a reason not applicable merely to the procedure of this country, but one affecting all sound procedure—that the proper person to bring an action is the person whose right has been violated.

In *Gandy* v. *Gandy* 1885, 30 Ch. D., 57, at page 69, Bowen, L.J., said

> It was supposed at one time in the history of our common law, that there was an exceptional class of cases, in which where a contract was made for the benefit of a person who was not a contracting party, that is to say, a stranger, it could be enforced by that person at law. It would be mere pedantry now to go through the history of that idea: it is sufficient to say that in the case of *Tweddle* v. *Atkinson*, 1 B. & S., 393, to which we were referred, the true common law doctrine has been laid down. But whatever may have been the common law doctrine, if the true intent and the true effect of this deed was to give to the children a beneficial right under it, that is to say, to give them a right to have these covenants performed, and to call upon the trustees to protect their rights and interests under it, then the children would be outside the common law doctrine, and would, in a Court of Equity, be allowed to enforce their rights under the deed. But the whole application of that doctrine, of course depends upon its being made out that upon the true construction of this deed it was a deed which gave the children such a beneficial right.

Numerous other cases might be cited to the same effect, and Lord Haldane's speech in *Dunlop Pneumatic Tyre Coy.* v. *Selfridge and Coy.*, 1915 A.C., at p. 853, should not be overlooked.

I construe the policy to have effect only as between the parties to it, namely, R. E. Berry and the company; and while it may be that the former, according to the covenant, may recover from the insurer, presumably for the benefit of a person driving his car with his permission, I find nothing to convince me that the insured can be compelled to exercise such a right of recovery or to undertake the duties and responsibilities of a trustee, unless by his consent or by reason of his having become the custodian of indemnity belonging to his daughter. The intention of the clause is, perhaps, not perfectly clear; but it should be so construed, if possible, as to make it operative for some purpose. Certainly, it does not confer upon the licensee of the car a right of action upon the policy to recover against the insurer, or to compel the insured to exercise his remedies for the recovery; and it seems unreasonable to suppose that the insured would be compelled to become a trustee for a stranger for no other cause than that he or a member of his household had permitted the stranger to drive his car or to ride in it at a time when that stranger negligently caused an accident in which a third party suffered bodily injuries.

But it is said that this case is different because of what I am about to state.

The plaintiff, in her action against Miss Berry, in answer to the company's denial that Miss Berry was insured, pleaded that the company, by its conduct in defending the plaintiff's action against her, was estopped from denying liability under the insurance policy issued by the Company to Miss Berry's father. The evidence is that Mr. Berry, as the insured,

In the Supreme Court of Canada.

No. 27. Reasons for Judgment. (*b*) Newcombe, J. (concurred in by Rinfret, Lamont and Cannon, JJ.)—*continued.*

under that policy, gave, in his own name, notice of the accident to the insurer, and that, on the back of this notice, his daughter filled up and signed the form requiring a statement of particulars from her as the "person driving car at time of accident." Mr. Berry is asked "Who defended the action?" and he says "The insurance company." In his examination for discovery, he said that he knew the action against his daughter was defended by the insurance company, and that neither he nor his daughter paid for any legal services in connection with that lawsuit. Referring to the company, he says that "They got all the information from my daughter; they did not ask me for anything." The adjusters, he says, took the whole matter over. Miss Berry, upon discovery after judgment, says that she knew the company's solicitors were her solicitors. The learned Judges in British Columbia seem to have thought that in view of these facts, the company became liable, as insurer, to indemnify Miss Berry; but, with due respect, I do not agree. What the evidence suggests, and what I think may be assumed, is that the company was acting in pursuance of its practice under section E of the Insuring Agreements, and not with the intention or effect of incurring, or as representing itself as willing to incur, any obligation for payment of indemnity to the insured's daughter not enforceable by her under the policy. The essentials of estoppel are lacking; and the company's defence of the plaintiff's action against Miss Berry does not, in my opinion, cut any figure in determining liability in this case, wherein the respondent is asserting a direct statutory obligation of the company, as the insurer of Miss Berry, to pay the respondent's judgment up to the face value of the policy.

I would allow the appeal and dismiss the action with costs throughout.

In the Privy Council.

No. 28. Order in Council granting special leave to appeal to His Majesty in Council, 17th December 1931. (Extract.)

No. 28.

Order in Council granting special leave to appeal to His Majesty in Council.

(Extract.)

AT THE COURT AT BUCKINGHAM PALACE.

The 17th day of December 1931.

PRESENT.

THE KING'S MOST EXCELLENT MAJESTY.

* * * * *

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 7th day of December 1931 in the words following, viz.:—

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was

In the Privy Council.

No. 28. Order in Council granting special leave to appeal to His Majesty in Council, 17th December 1931. (Extract)—*continued.*

referred unto this Committee a humble Petition of Alice Marie Vandepitte wife of E. J. Vandepitte in the matter of an Appeal from the Supreme Court of Canada between the Petitioner Appellant and the Preferred Accident Insurance Company of New York Respondents setting forth (amongst other matters):

* * * * *

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute her Appeal against the Judgment of the Supreme Court of Canada dated the 6th day of October 1931 upon depositing in the Registry of the Privy Council the sum £400 as security for costs.

"AND Their Lordships do further report to Your Majesty that the proper officer of the said Supreme Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

M. P. A. HANKEY.

Exhibits.

P.1. Proceedings in action *Vandepitte* v. *Berry*. (1).

EXHIBITS.

P.1.—PROCEEDINGS IN ACTION VANDEPITTE v. BERRY.

(1) Writ of Summons, 14th March, 1928.

(*Not printed.*)

(2).

(2) Notice of Entry of Appearance, 22nd March, 1928.

(*Not printed.*)

(3) Statement of Claim.

(3) Statement of Claim, 23rd March 1928.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

No. V334/1928.

Between

ALICE MARIE VANDEPITTE, Married Woman, the wife of E. J. Vandepitte - - - - - - - - - *Plaintiff*

and

JEAN BERRY - - - - - - - - - - - *Defendant.*

(Writ issued March 14th, 1928.)

1. The plaintiff is a married woman the wife of E. J. Vandepitte and is a saleswoman residing at 556 Georgia Street West in the City of Vancouver, British Columbia.

2. The defendant is a student residing at 5076 Connaught Drive in the City and Province aforesaid.

3. On or about the 5th day of March, 1928, the plaintiff was a passenger in a motor car driven by her husband which was proceeding southerly on Carnarvon Street in the City of Vancouver, Province of British Columbia, and which motor car was crossing the intersection of Tenth Avenue in the said City and was more than half way across the said Tenth Avenue, when the defendant so carelessly and negligently managed and/or drove a motor car B.C. License No. (1928) 10-525, which she was driving easterly along the said Tenth Avenue, that the said motor car ran into and violently collided with the said motor car driven by the husband of the plaintiff and the plaintiff was hurled violently against the door of the said motor car driven by her husband and was hurled violently out of the said

motor car and to the pavement causing injuries to the plaintiff particulars whereof are set out in paragraph 4 hereof.

4. The said motor car driven by the husband of the plaintiff in which the plaintiff was a passenger was proceeding southerly along Carnarvon Street as aforesaid in a lawful manner when the said motor car was struck on its rear right hand part by the motor car driven by the defendant and the plaintiff was hurled violently against the door of the motor car in which she was a passenger and was hurled violently out of the said motor car and to the pavement as aforesaid and the plaintiff suffered a fracture of one of the vertebra of the neck, fracture of both bones of the left forearm, severe head bruises and severe minor bruises, and her teeth were broken and she received severe cuts and contusions and her body was bruised generally and she received severe shock to her nervous system and she is not yet recovered and is permanently injured, and her wearing apparel was destroyed.

5. The said negligence of the defendant consisted in the defendant driving the said motor car at an excessive rate of speed having regard to the nature, condition, and use of the highway, the said Tenth Avenue, and in failing to keep the said motor car within her control, and in failing to keep a proper lookout, and in failing to sound any horn or give any warning on approaching the motor car in which the plaintiff was a passenger, and in increasing the speed of the motor car which the defendant was driving immediately before the collision with the motor car in which the plaintiff was riding, and in failing to avoid the motor car in which the plaintiff was a passenger, and in colliding with the said motor car.

6. In the alternative the plaintiff says the defendant drove and/or managed the said motor car carelessly and negligently and in a manner dangerous to the public, contrary to the "Motor Vehicles Act" being Revised Statutes of British Columbia, 1924, Section 13, and Amending Acts, and contrary to the by-laws of the City of Vancouver.

7. The plaintiff has in consequence suffered great pain and has been and still is confined in the hospital, and serious surgical operations have necessarily been performed and will have to be performed on her person, and she is permanently injured, and she has suffered severe injury to her nervous system and resultant nervous disability and her health has been permanently impaired.

PARTICULARS OF INJURIES:

Fracture of both bones of the left forearm.
Fracture of one of the vertebra of the neck.
Severe head bruises.
Severe minor bruises to her body.
Contusions and cuts.
Injury to the nervous system and resultant injury to the nervous system.
Resultant partial paralysis of the upper back and left side.

Exhibits.

P.1. Proceedings in action *Vandepitte* v. *Berry*.

(3) Statement of Claim, 23rd March 1928—*continued*.

8. By reason of the premises the plaintiff has been put to and has incurred expense for medical and surgical attendances and services, and nursing, and hospital expenses, and dental work, and X-ray expenses, and ambulance hire, and she has lost her employment and her earnings, and she has lost and will be put to expense in repairing, restoring and replacing her wearing apparel, and her wrist watch was destroyed and lost.

PARTICULARS OF LOSS, EXPENSES, ETC.

Medical expenses	$ 300.00
Hospital expenses—Vancouver General, two months at $49.00 per week	392.00
Loss of wages—1 year at $30.00 per week	1660.00
X-ray expenses—five examinations	50.00
Special nurse—four days and four nights	40.00
Ambulance hire	5.00
Loss of wearing apparel	62.00
Loss of dental bridge work and teeth	50.00
Loss and destruction of white gold wrist watch	35.00
Medicine and sundries	25.00
Total loss, expenses, etc.	$2619.00

WHEREFOR THE PLAINTIFF claims special damages in the sum of $2619.00 in respect of the matters mentioned in paragraph 8 hereof and general damages in the sum of fifteen thousand dollars ($15,000.00) in respect of the said personal injuries, and the costs of this action to be taxed.

Place of Trial: Vancouver, British Columbia.

Dated at Vancouver, B.C., this 23rd day of March, A.D. 1928.

W. H. CAMPBELL,
Plaintiff's Solicitor.

This Statement of Claim is filed and delivered by William Henry Campbell, Solicitor for the Plaintiff, whose place of business and address for service is 126 Rogers Building, 470 Granville Street, Vancouver, B.C.

To the defendant, and to W. W. Walsh, Esq., her Solicitor.

Service of a true copy hereof admitted this 23rd day of March, 1928.

W. W. WALSH,
Solicitor for the Defendant.

Exhibits.

P.1.
Proceedings in action *Vandepitte* v. *Berry*.

(4) Statement of Defence, 12th April 1928.

(4) Statement of Defence.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

No. V334/1928.

Between

ALICE MARIE VANDEPITTE, Married Woman, the wife of E. J. Vandepitte - - - - - - - - *Plaintiff*

and

JEAN BERRY - - - - - - - - - - - *Defendant.*

1. The Defendant denies the allegation of fact contained in Paragraph 1 of the Statement of Claim that the Plaintiff is a saleswoman or that she resides at 556 Georgia Street, in the City of Vancouver, Province of British Columbia.

2. The Defendant admits the allegations set forth in Paragraph 2 of the Statement of Claim.

3. The Defendant denies each and every allegation of fact set forth in Paragraph 3 of the Statement of Claim herein and denies that the Plaintiff was a passenger in a motor car driven by her husband or that the motor car therein mentioned was more than half way across Tenth Avenue or that the Defendant carelessly or negligently managed or drove the motor car therein mentioned; or that a motor car driven by the Defendant ran into or violently collided with a motor car driven by the husband of the Plaintiff or that the Plaintiff was hurled against the door of the motor car therein mentioned as therein alleged or at all, or that she was hurled out of the said motor car or to the pavement as therein alleged or at all or that she received the injuries therein mentioned or any injuries whatsoever.

4. The Defendant denies each and every allegation of fact contained in Paragraph 4 of the Statement of Claim herein, and denies that the automobile alleged to have been driven by the Plaintiff's husband was proceeding in a lawful manner or that it was struck by a motor car driven by the Defendant as therein alleged or at all or that the Plaintiff was hurled violently against the door of the motor car as therein alleged or at all or hurled violently out of the said motor car or to the pavement as therein alleged or at all or that she suffered the injuries set forth in Paragraph 4 of the Statement of Claim or any injuries whatsoever or that the Defendant is in any way responsible therefor.

5. The Defendant denies each and every allegation of fact contained in Paragraph 5 of the Statement of Claim herein and denies that she was guilty of any negligence as therein set forth or at all and in particular says :—

(*a*) She was not driving at an excessive rate of speed;
(*b*) She had the motor car under control;
(*c*) She was keeping a proper lookout;

Exhibits.

P.1. Proceedings in action *Vandepitte* v. *Berry*.

(4) Statement of Defence, 12th April 1928—*continued*.

(*d*) She gave all necessary warning, and IN THE ALTERNATIVE no warning was necessary under the circumstances so far as she was concerned;

(*e*) She did not increase the speed of her motor immediately before the collision;

(*f*) She took all reasonable steps to avoid a collision with the car in which the Plaintiff is alleged to have been a passenger;

6. The Defendant denies each and every allegation of fact contained in Paragraph 6 of the Statement of Claim herein and denies that she drove or managed a motor car carelessly or negligently or in a manner dangerous to the public, or that she was guilty of any infraction of the "Motor Vehicle Act" or of the By-Laws of the City of Vancouver, and IN THE ALTERNATIVE the Defendant says that no breach of the "Motor Vehicle Act" or the By-Laws of the City of Vancouver on her part affords to the Plaintiff any cause of action.

7. The Defendant denies each and every allegation of fact contained in Paragraph 7 of the Statement of Claim herein and denies that the Plaintiff has suffered the injuries or damages therein set forth or that she, the Defendant, is in any way responsible therefor.

8. The Defendant denies each and every allegation of fact contained in Paragraph 8 of the Statement of Claim herein and denies that the Plaintiff has suffered the injuries or damages therein set forth or that she, the Defendant, is in any way responsible therefor.

9. In answer to the whole Statement of Claim the Defendant says that if a collision occurred as alleged in the Statement of Claim, which is not admitted but denied, and if the Plaintiff received injuries or suffered damages as a result of such collision, which is not admitted but denied, such collision was caused solely by the negligence of the husband of the Plaintiff in his management and operation of the motor car in which the Plaintiff is alleged to have been riding, and such negligence on his part was the effective cause of the collision in question, particulars of this negligence are as follows:—

(*a*) He was driving at an excessive rate of speed;

(*b*) He was not keeping a proper lookout;

(*c*) He did not have the motor car under proper control;

(*d*) He approached and attempted to cross Tenth Avenue, a main-travelled thoroughfare, at an excessive rate of speed;

(*e*) He did not slacken his speed on approaching the intersection in question;

(*f*) He did not yield to the Defendant the right-of-way to which she was entitled under the provisions of the "Highway Act" and the By-Laws of the City of Vancouver;

(*g*) He did not yield to the Defendant the right-of-way to which she was entitled both by reason of being on the main-travelled thoroughfare, and by reason of being first in the intersection in question;

(*h*) He did not sound his horn or give any warning of his approach, or of his intention to cross the intersection in question in the face of oncoming traffic;

(*i*) He did not apply his brakes, or make any attempt to check the speed of his car or change his direction so as to avoid or minimize the collision;

(*j*) He accelerated his speed and endeavoured to cut across the bows of the Defendant's car; notwithstanding the fact that she was well into the intersection at the time.

10. The Defendant further says that the Plaintiff was not a passenger in the car in question but that she was the owner or had an interest in the said car, and that she is responsible for the negligence of her said husband as set forth in the last preceding paragraph.

11. IN THE ALTERNATIVE the Defendant says that the Plaintiff is so identified with the negligence of her said husband as set forth in the second last preceding paragraph as to make her responsible for his said negligence.

12. The Defendant submits that the Statement of Claim herein discloses no cause of action, and that the action should be dismissed with costs.

DATED at Vancouver, British Columbia, this 12th day of April, A.D. 1928.

W. W. WALSH,
Defendant's Solicitor.

To the above-named Plaintiff AND TO W. H. Campbell, Esq., Her Solicitor.

This Statement of Defence is delivered by Walter William Walsh of the firm of Walsh, McKim, Housser & Molson, whose place of business and address for service is 432 Richards Street, Vancouver, B.C.

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(5) Formal Judgment, W. A. Macdonald J., 13th June, 1928. (5).

(*Printed in Exhibit P.2 at p. 91.*)

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(6) Allocatur for Plaintiff's costs, 7th July, 1928. (6).

(*Not printed.*)

Exhibits.

P.1. Proceedings in action *Vandepitte* v. *Berry*.

(7) Writ of Fieri Facias, 9th July 1928.

(7) Writ of Fieri Facias.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

No. V334/1928.

British Columbia Law Stamp—50c.
Seal of Supreme Court of B.C.
Vancouver Registry, Filed July 7, 1928.

Between

ALICE MARIE VANDEPITTE, Married Woman, the wife of E. J. Vandepitte - - - - - - - *Plaintiff*

and

JEAN BERRY - - - - - - - - - *Defendant*

and

E. J. VANDEPITTE - - - - - - - *Third Party.*

GEORGE THE FIFTH, by the Grace of God, of Great Britain, Ireland, and the British Dominions Beyond the Seas, King, Defender of the Faith, Emperor of India.

TO THE SHERIFF FOR THE COUNTY OF VANCOUVER, GREETING.

WE COMMAND YOU, that of the goods and chattels of Jean Berry, in your bailiwick you cause to be made the sum of $4600.00 and also interest thereon at the rate of 5 per centum per annum from the thirteenth day of June, 1928, which said sum of money and interest were lately before US in Our Supreme Court in a certain action wherein Alice Marie Vandepitte, Married Woman, the wife of E. J. Vandepitte, is the Plaintiff, and Jean Berry, Defendant, by a judgment of Our said Court bearing date the 13th day of June, 1928, adjudged to be paid by the said Defendant to the said Plaintiff, together with certain costs in the said judgment mentioned, and which costs have been taxed and allowed by one of the taxing officers of Our said Court at the sum of $580.25 as appears by the certificate of the said taxing officer dated the 7th July, 1928.

AND that of the goods and chattels of the said Jean Berry in your bailiwick you further cause to be made the sum of $580.25 together with interest thereon at the rate of 5 per centum per annum from the 27th day of June, 1928.

AND that you have that money and interest before US in Our said Court immediately after the execution hereof to be paid to the said Alice Marie Vandepitte in pursuance of the said Judgment. AND in what manner you shall have executed this Our Writ, make appear to US in Our said Court immediately, after the execution hereof AND HAVE THERE, THEN, THIS WRIT.

WITNESS, the HONOURABLE Gordon Hunter, CHIEF JUSTICE OF OUR SUPREME COURT OF BRITISH COLUMBIA, at VANCOUVER, B.C., this 7th day of July, in the year of our Lord One thousand nine hundred and twenty-eight.

NULLA BONA.

The within defendant has no goods nor chattels within my bailiwick whereof I can make moneys to be levied, as within commanded.

G. W. ROBERTSON,
Dept. Sheriff of Vancouver.

Dated at Vancouver, B.C., this 9th day of July, 1928.

Levy $5180.25 and $..... for costs of execution, etc., and also interest on $5180.25 at 5 per centum per annum from the dates herein stated, until payment besides sheriff's poundage, officers' fees, costs of levying and all other legal incidental expenses.

THIS WRIT was issued by W. H. Campbell, whose address for service is 126 Rogers Bldg., 470 Granville Street, Vancouver, B.C., Solicitor for the said plaintiff who resides at 12th Ave. and Carnarvon Streets, Vancouver, B.C. The defendant is a student and resides at 5076, Connaught Drive, Vancouver.

Exhibits.

P.1. Proceedings in action *Vandepitte* v. *Berry*.

(8) Examination of Judgment Debtor in aid of Execution, 9th April 1929.

(8) Examination of Judgment Debtor in aid of Execution.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

(Before the Examiner.)

No. V334/1928.

Vancouver, B.C., April 9, 1929.

Between

ALICE MARIE VANDEPITTE, Married Woman, the wife of E. J. Vandepitte - - - - - - - *Plaintiff* (Judgment Creditor)

and

JEAN BERRY - - - - - - - - - - *Defendant* (Judgment Debtor)

and

E. J. VANDEPITTE - - - - - - - - *Third Party.*

EXAMINATION OF THE JUDGMENT DEBTOR FOR DISCOVERY IN AID OF EXECUTION

pursuant to order herein.

C. L. McAlpine, Esq.,
Appearing for the Judgment Creditor.

H. E. Molson, Esq.,
Appearing for the Judgment Debtor.

JEAN BERRY, Sworn.

EXAMINED BY MR. MCALPINE.

1. *Q.* You are Miss Jean Berry?—*A.* Yes.
2. *Q.* You have been sworn?—*A.* Yes.
3. *Q.* Miss Berry, you were served with a notice to produce the insurance policy covering R. E. Berry on McLaughlin motor car, 1928 licence, 10-525. Have you brought it with you?—*A.* I don't know anything about those papers, I don't know the name of the company even.
4. *Q.* Your solicitors have the policy, have they not?—*A.* I don't know anything about it.
5. *Q.* Miss Berry, you do know something about it?—*A.* I beg your pardon, I do not know. I don't know anything about the papers.
6. *Q.* This action was defended by Messrs. Walsh, McKim & Housser?—*A.* Yes.
7. *Q.* And Walsh, McKim & Housser were acting for the insurance company, weren't they?—*A.* I don't know.
8. *Q.* Miss Berry ——*A.* I know they were my lawyers.

9. *Q*. You know they are your lawyers. You knew that they were the insurance company's lawyers?—*A*. Well, I guess I did. I just knew they were my lawyers.

10. *Q*. And as your solicitors, they would have a copy of the policy? —*A*. I don't know that.

11. *Q*. You don't?—*A*. No.

12. *Q*. I guess I had better get Mr. Mather. Miss Berry, you asked the person who served the document on you what you were to bring, and you were told to bring that insurance policy. That is correct?—*A*. No, I have no knowledge of anything.

13. *Q*. You were not told to bring the insurance policy?—*A*. I was handed that, and that is all she said to me.

14. *Q*. And you did not ask anything?—*A*. I said, "What is this for?" I opened it up and she did not reply anything.

15. *Q*. Didn't you ask?—*A*. She said, "Bring those papers," and she handed me this.

(At this stage of the Examination the Registrar attended.)

Mr. McAlpine: The Judgment Debtor has been served with notice to produce an insurance policy. This action was defended by the solicitors for the insurance company on her behalf. I am instructed the policy is in the possession of the solicitors. She has refused to produce it, and has refused to give me the names. I am asking you to instruct her that she must inform herself, and adjourn the examination until she does produce the policy.

The Registrar: 16. *Q*. Have you got the policy?—*A*. No, I haven't it in my possession. I do not know anything about it.

Mr. McAlpine: Her solicitors have the policy.

The Registrar: Have you made any efforts to get it?—*A*. No, I just come over. I do not know a thing about anything.

Mr. McAlpine: There is not a question, I know for a fact the solicitors have the policy, her solicitors. There is no use going on or attempting to go on without it. She says she does not know the name of the company insuring her and she has made absolutely no attempt to get the policy although she was served with a subpœna and a notice to produce.

The Registrar: Is Miss Berry herself the insured?

Mr. McAlpine: I think her father is. It is covered by a blanket policy, I think. It covered the father and members of the family. There is no question about the fact that this action was defended by Miss Berry by the solicitors on behalf of the insurance company. I have endeavoured to get the insurance policy from the solicitors and they have refused consistently and now she is doing the same thing, and the law is that it is her duty to inform herself and produce documents.

The Registrar: 17. *Q*. Would you be able to get the information that Mr. McAlpine is now asking you?—*A*. I don't know. I will have to find out. I don't know a thing about it right now, not a thing.

Exhibits.

P.1.
Proceedings in action *Vandepitte* v. *Berry*.

(8) Examination of Judgment Debtor in aid of Execution, 9th April 1929—*continued*.

THE REGISTRAR: We had better adjourn this.

Mr. McALPINE: Until to-morrow at this time? I would ask for the cost of the adjournment.

THE REGISTRAR: I am not going to deal with any costs. They are dealt with under the tariff. You can adjourn. We had better adjourn it until Thursday at this hour.

Mr. McALPINE: Miss Berry is going away, I understand.

18. *Q.* When are you going away?—*A.* I am not going away at all, sir.

THE REGISTRAR: The reason I say to adjourn it beyond to-morrow would be that Miss Berry could advise you whether she is going to or not. There is no use coming up if she refuses. You will have to go to the Court.

Mr. McALPINE: I cannot do that unless she comes up. I have an order for an appointment and I have to have her answer on the notes. What I am asking for is that you advise her that she is compelled to ascertain or get the information required and to produce the policy.

THE REGISTRAR: Make your adjournment until to-morrow at 2.30.

Mr. McALPINE: Will you tell Miss Berry.

THE REGISTRAR: The document tells her everything that she is going to be told. She has a solicitor, and he, no doubt will explain to her what the notice to produce conveys.

(Examination adjourned until 2.30 p.m., April 10th, 1929.)

Apl. 10th, 1929.

19. *Q.* Miss Berry, you were sworn yesterday?—*A.* Yes, Sir.
20. *Q.* Did you bring the insurance policy?—*A.* No, I didn't.
21. *Q.* Why not?—*A.* I was given this letter.
22. *Q.* Who gave you the letter?—*A.* My solicitor.
23. *Q.* Who is your solicitor?—*A.* Mr. Molson.
24. *Q.* Mr. Housser was your solicitor in this action, was he not?—*A.* Yes.
25. *Q.* Did you ask Mr. Housser for the insurance policy? Did you ask him for the insurance policy?—*A.* Well, I say he —— gave me this letter.
26. *Q.* Did he tell you the name of the insurance company?—*A.* He just gave a letter.
27. *Q.* Did you ask him for the name of the insurance company? —*A.* I cannot remember the conversation. He just, I think—I merely asked—that I was supposed to bring the papers to—and he gave me this letter.
28. *Q.* Do you remember then later that I asked you to bring the name of the insurance policy?—*A.* I don't remember ——

29. *Q.* Didn't I ask you, now?—*A.* Well, how can I bring it when I ——

30. *Q.* Well, I asked you that yesterday, didn't I?—*A.* Yes.

31. *Q.* And did you go to Mr. Housser and ask him for it?—*A.* Yes.

32. *Q.* And you didn't get any answer?—*A.* I didn't get any answer.

33. *Q.* Did you ask for the name of the insurance company? I asked you yesterday to get the name of the insurance company, did I not?—*A.* Yes you asked me to bring it.

34. *Q.* You didn't ask Mr. Housser for the name of the insurance company? Is that correct?—*A.* I think he gave —— my information is that he didn't know himself.

35. *Q.* Are you seriously telling me that he didn't know the name of the insurance company?—*A.* Well, as a matter of fact I cannot swear ——

36. *Q.* Well, I cannot ask you more than that, can I? And that was the reason it was adjourned. And you said no. Now, do you want to change that?—*A.* Well, the only thing I can change it to is that I don't know whether I did or didn't.

37. *Q.* Now, you remember that this action of Vandepitte vs. yourself was an action as a result of an accident between two motor cars, one of which you were driving?—*A.* Yes.

38. *Q.* And the motor car that you were driving was insured, was it not?—*A.* I believe it was. I have never been told otherwise.

39. *Q.* You knew as a matter of fact that it was?—*A.* I knew that the car was insured, that is all I know about ——

40. *Q.* And you were also told that you were also insured for any ——? —*A.* Mr. Housser never told me that.

41. *Q.* Mr. Housser never told you that?—*A.* Mr. Housser never told me that ——

42. *Q.* Did Mr. Housser act for you in this action?—*A.* Mr. Housser, the lawyer, acted for me.

43. *Q.* Did you pay him?—*A.* I have not the vaguest idea.

44. *Q.* You don't know whether you paid him?—*A.* No, I don't.

45. *Q.* Have you a bank account?—*A.* No.

46. *Q.* Did you have a bank account at the time of the accident? —*A.* I didn't have a bank account at the time of the accident.

47. *Q.* Are you in receipt of any money?—*A.* Only the $5 I have in my purse.

48. *Q.* I am not asking about that. Are you in receipt of any income? —*A.* No.

49. *Q.* You were away to school, were you not?—*A.* Yes, I was.

50. *Q.* And were you getting a regular allowance?—*A.* Yes—I was not getting a regular allowance.

51. *Q.* Well, you were in receipt of a regular allowance?—*A.* But I don't understand the term.

52. *Q.* And what was the allowance?—*A.* Well, one hundred—it was not any definite allowance. I was merely sent money.

Exhibits.

P.1. Proceedings in action *Vandepitte* v. *Berry*.

(8) Examination of Judgment Debtor in aid of Execution, 9th April 1929—*continued.*

53. *Q.* Well, how much?—*A.* Well, one time it was 15 and 25 and another time 30 dollars ——

54. *Q.* A month?—*A.* Yes, it would fully——

55. *Q.* What has been your average income from any source whatsoever?—*A.* I have no idea, you see. You mean during the time I was in school? I do not know what I spent for my stockings—I have not the vaguest idea.

56. *Q.* You can tell approximately?—*A.* I could not tell you. I have not the vaguest idea. I cannot tell what I ——

57. *Q.* Give me an idea, please.—*A.* I could tell you the answer, and it might be more or less out. The money that I have received from my parents?

58. *Q.* No, I didn't ask you that. From any source whatsoever?—*A.* Well, I don't know.

59. *Q.* Well, you understand English. How much during the last year, do you think, approximately you received from any source whatsoever?—*A.* Oh, roughly around $200.

60. *Q.* Year?—*A.* I don't know. I have not the vaguest idea.

61. *Q.* It is more like $1,000 isn't it? Isn't that correct?—*A.* I don't know.

62. *Q.* You are not very anxious to—can you find out? You can find out?—*A.* No.

63. *Q.* No?—*A.* If I could remember all that I paid for every stocking or—

64. *Q.* Do you think if you asked your father he could tell you?—*A.* I don't know. He might.

65. *Q.* Did you receive any money from anybody but your father?—*A.* No, I didn't.

66. *Q.* Have you any real estate?—*A.* No.

67. *Q.* Do you own personal chattels?—*A.* Only a few things.

68. *Q.* Any furniture?—*A.* Not a thing.

69. *Q.* Have you any interest in any real estate, chattels of any kind?—*A.* No.

70. *Q.* Any prospects of any money being willed to you in the near future?—*A.* No.

71. *Q.* Any source of income at all except from your parents?—*A.* That is all I get.

72. *Q.* Now, let me go back again to this insurance policy. You know that you didn't pay Mr. Housser one cent for the conduct of this action of Vandepitte?—*A.* I don't know.

73. *Q.* If you paid any money don't you think you would remember?—*A.* Oh, I might.

74. *Q.* You might and you might not. But you *didn't handle a great deal of money, or you *didn't? Do you think you could remember whether you paid Mr. Housser or not?—*A.* I probably—

**sic?*

76. *Q.* And now I will say—I ask again did you pay Mr. Housser any money? One cent?—*A.* No.

77. *Q*. Your answer was no? You don't know. That is correct? Isn't it?—*A*. Yes, certainly.

78. *Q*. Now, have you ever discussed this judgment with your father?—*A*. Never.

79. *Q*. Never?—*A*. What do you mean? Just exactly what do you mean by this judgment? Not that I am aware.

80. *Q*. Have you discussed this judgment with your father?—*A*. I merely state—you mean after the trial——

81. *Q*. At any time?—*A*. I said I know what I had—I didn't talk very much about it.

82. *Q*. And your father told you that there was insurance covering this liability?—*A*. No, he never told me.

83. *Q*. And you don't know?—*A*. I don't know anything about it.

84. *Q*. Do you know whether or not there is an insurance policy covering this liability—an insurance policy? I know you don't know, because you don't want to know. I understand. Answer the question, please.—*A*. Well, I understand that the car is insured——

85. *Q*. For liability while you were driving it?—*A*. No, I don't know.

86. *Q*. You don't know? No?—*A*. I don't know it—I was never told.

87. *Q*. You were never told that?—*A*. No, I was never told.

88. *Q*. You and your father don't talk very much?—*A*. No, we don't.

89. *Q*. Let me see the letter please.—*A*. (Handing document to counsel.)

90. *Q*. Now, you know, Miss Berry, do you not, that this defence in this Vandepitte action was conducted by Mr. Housser on behalf of the insurance company?—*A*. I merely know that he was my lawyer. I only know that he was defending——

91. *Q*. ——on behalf of the insurance company?—*A*. I don't know.

92. *Q*. You don't know?—*A*. No, I didn't know that at the time.

93. *Q*. Do you know it now?—*A*. Yes.

94. *Q*. Yes, you know it now?—*A*. Yes.

95. *Q*. Do you know where the policy is?—*A*. No, I don't.

96. *Q*. Did you ever ask Mr. Housser for the name of the insurance company? Is that right?—*A*. Yes—I don't know whether I did, I cannot swear either way—I was just talking.

97. *Q*. You know that I asked you yesterday to ask him. You know that, don't you?—*A*. Yes, sir, and I was told—and I went to ask my lawyers and I was given this letter. That is all I know about it.

98. *Q*. Who did you ask?—*A*. Asked my——

99. *Q*. Who did you ask for the insurance policy?—*A*. Mr. Housser and Mr. Molson. I don't know.

100. *Q*. Now, you don't know.—*A*. No, sir——

101. *Q*. Well, now, will you swear that you asked them. No, you won't swear that you asked them for the name of the insurance policy or—— *A*. I asked them for the insurance policy. I never asked them for the insurance company. I never asked them for the insurance——

Exhibits.

P.1. Proceedings in action *Vandepitte* v. *Berry*.

(8) Examination of Judgment Debtor in aid of Execution, 9th April 1929—*continued*.

102. *Q*. And you don't intend to ask them, or do you?—*A*. Well, they are advising me.

103. *Q*. Never mind whether they are advising you or not.—*A*. I have no answer to that.

104. *Q*. Well, then I can take it that you don't intend to ask them?—*A*. No, because that was not my answer. My answer is that I don't know.

104. *Q*. Or at some future time—*A*. I am not going to decide right now.

105. *Q*. Did you ever hear the name of the insurance company?—*A*. No, sir.

106. *Q*. Never heard of it?—*A*. Never heard of it.

107. *Q*. You didn't ask your father for the name?—*A*. The name of the insurance company?

108. *Q*. Yes?—*A*. No, I don't think—I never mentioned it to him.

109. *Q*. All right. We will have to adjourn and apply. Adjourn it sine die.

(Examination adjourned sine die.)

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(9) Order of Morrison, C.J., 17th May 1929.

(9) Order of Morrison, C.J.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

British Columbia Law Stamps—60c. No. V334/1928

Vancouver Registry, October 16, 1929.

Between

ALICE MARIE VANDEPITTE, Married Woman, the wife of E. J. Vandepitte - - - *Plaintiff* (*Judgment Creditor*)

And

JEAN BERRY - - - - - *Defendant* (*Judgment Debtor*)

And

E. J. VANDEPITTE - - - - - - - - - *Third Party*.

Before the Honourable the CHIEF JUSTICE, in Chambers.

Friday, the 17th day of May, A.D. 1929.

UPON APPLICATION on behalf of the Judgment Creditor: UPON READING the Notice of Motion herein dated the 30th day of April, A.D. 1929, and the affidavit of W. H. Campbell sworn the 27th day of April, 1929, and filed herein and the exhibits thereto: UPON READING the examination of the Judgment Debtor in aid of execution and UPON HEARING Mr. C. L. McAlpine of Counsel for the Judgment Creditor and Mr. Alfred Bull of Counsel for the Judgment Debtor.

Exhibits.

P.1. Proceedings in action *Vandepitte* v. *Berry*.

(9) Order of Morrison, C.J., 17th May 1929—*continued.*

IT IS ORDERED that the Judgment Debtor, Jean Berry, do forthwith make such inquiries as may be necessary to inform herself of the name of the Insurance Company whose policy covered the McLaughlin motor car of R. E. Berry, 1928, License 10–525 on the 5th day of March, 1928.

AND IT IS FURTHER ORDERED that the Judgment Debtor, Jean Berry, shall thereupon at her own expense, attend before the Registrar of the Supreme Court at the Court House, Vancouver, B.C., at such time and place as he may appoint, for further examination upon oath, respecting the name of the Insurance Company aforesaid, and shall in answer to proper questions give the proper and full name of such Insurance Company.

AND IT IS FURTHER ORDERED that the costs of and incidental to this application be reserved to be dealt with after such examination.

AULAY MORRISON, J.

Entered Oct. 16th, 1929.
Order Book Vol. 144, Fol. 175.
Per A. L. R.

Service of a true copy hereof admitted this 16th day of October, 1929.

W. W. WALSH,
Defendant's Solicitor.

To the Judgment Debtor, JEAN BERRY :—

If You, the within named Jean Berry, neglect to obey this Order by the time therein limited you will be liable to process of execution for the purpose of compelling you to obey the same order.

District Registrar.

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(10) Order of Gregory, J., as to costs.

(10) Order of Gregory, J., as to costs, 7th October 1929.

Before the Honourable Mr. JUSTICE GREGORY, in Chambers.

Monday, the 7th day of October, 1929.

UPON APPLICATION on behalf of the above named JUDGMENT CREDITOR: UPON READING the affidavit of William H. Campbell, sworn the 1st day of October, 1929, and filed herein; and upon reading the Order of the Honourable Mr. Justice W. A. Macdonald, dated the 4th day of April, 1929, and the Order of the Honourable The Chief Justice herein dated the 17th day of May, 1929; and upon hearing Mr. C. L. McAlpine of Counsel for the JUDGMENT CREDITOR and Mr. Alfred Bull of Counsel for the JUDGMENT DEBTOR.

Exhibits.

P.1. Proceedings in action *Vandepitte* v. *Berry.*

(10) Order of Gregory, J., as to costs, 7th October 1929—*continued.*

IT IS ORDERED that the JUDGMENT DEBTOR do forthwith pay to the JUDGMENT CREDITOR the costs of and incidental to the application and the Order of the Honourable Mr. Justice W. A. Macdonald herein dated the 4th day of April, 1929, including the costs of and incidental to the examinations of the JUDGMENT DEBTOR on Discovery in aid of Execution, and the costs of and incidental to the application and the Order of the Honourable The Chief Justice dated the 17th day of May, 1929, and the costs of and incidental to this application.

H. B. GREGORY, J.

J.F.M., D.R.

(11).

(11) Allocatur for costs, 21st November, 1929.

(*Not printed.*)

P.2. Proceedings in Plaintiff's Appeal from Order of W. A. Macdonald, J., of 1st October 1928, in action *Vandepitte* v. *Berry.*

P.2.—PROCEEDINGS IN PLAINTIFF'S APPEAL FROM ORDER OF W. A. MACDONALD, J., OF 1ST OCTOBER, 1928, IN ACTION VANDEPITTE *v.* BERRY.

(1).

(1) Title page.

(*Not printed.*)

(2) Order of Gregory, J., to add E. J. Vandepitte as Party Defendant, 2nd June 1928.

(2) Order of Gregory, J., to add E. J. Vandepitte as Party Defendant.

Saturday the 2nd day of June A.D. 1928.

UPON APPLICATION on behalf of the above-named Defendant and UPON HEARING READ the pleadings in this action and the Affidavit of George Elliott Housser sworn herein the 22nd day of May, A.D. 1928, and filed, and UPON HEARING Mr. George E. Housser of Counsel for the Defendant and Mr. C. L. McAlpine of Counsel for the Plaintiff, and Judgment being reserved until this day:

IT IS HEREBY ORDERED AND ADJUDGED that the Defendant's application for an Order adding one, E. J. Vandepitte, as a Party Defendant be and the same is hereby dismissed.

AND IT IS FURTHER ORDERED and DIRECTED that the Defendant be at liberty to issue a Third Party Notice pursuant to Order 16 of the Supreme Court Rules, and that the same may be served on the said E. J. Vandepitte at any time within five days from the date hereof, and that the said E. J. Vandepitte do have liberty to defend the claim against him

for contribution without any further or other order or application and that he do if he so wishes to defend, within five days from the date of service on him of the Third Party Notice, cause to be served on the Defendant's Solicitors a statement of his Defence to the claim of the Defendant as set forth in the Third Party Notice. And that he be at liberty to appear at the trial and take such part therein as may be just, and that he shall be bound by any Judgment at the trial of the action.

AND IT IS FURTHER ORDERED AND DIRECTED that the costs of this Application be costs to the Plaintiff in the cause and that all other costs occasioned hereby be reserved to be disposed of by the Judge at the trial of this action.

Entered June 8, 1928.

F. B. GREGORY
by
W. A. MACDONALD.

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(3) Formal Judgment (W. A. Macdonald, J.).

Wednesday the 13th day of June A.D. 1928.

THIS ACTION having come on for trial on the 12th and 13th days of June, 1928, before the Honourable Mr. Justice W. A. Macdonald; and having been adjourned to the 18th day of June, and further adjourned to the 20th day of June, 1928, on the question of costs; UPON HEARING Mr. C. L. McAlpine and Mr. W. H. Campbell of Counsel for the Plaintiff, and Mr. H. E. Molson and Mr. A. H. Ray of Counsel for the Defendants; and Mr. C. L. McAlpine appearing on behalf of the Third Party:

THIS COURT DOTH ORDER AND ADJUDGE that the Plaintiff recover against the Defendant the sum of $4,600.00 and her costs of this action to be taxed.

By the Court,
H. BROWN,
Dep. District Registrar.

Entered June 26, 1928.

Exhibits.

P.2. Proceedings in Plaintiff's Appeal from Order of W. A. Macdonald, J., of 1st October 1928, in action *Vandepitte* v. *Berry*.

(4) Judgment (W. A. Macdonald, J.) in favour of Jean Berry against E. J. Vandepitte, 13th June 1928.

(4) Judgment (W. A. Macdonald, J.) in favour of Jean Berry against E. J. Vandepitte.

Wednesday, the 13th day of June A.D. 1928.

THIS ACTION having come on for trial on the 12th and 13th days of June, A.D. 1928, before the Honourable Mr. Justice W. A. Macdonald and having been adjourned to the 18th day of June, and further adjourned to the 20th day of June, 1928, on the question of costs; and upon hearing the evidence adduced on behalf of the Plaintiff and the Defendant and the Third Party; and upon hearing Mr. C. L. McAlpine and Mr. W. H. Campbell of Counsel for the Plaintiff and the Third Party and Mr. Harold E. Molson and Mr. A. H. Ray of Counsel for the Defendant, and the said Mr. Justice W. A. Macdonald on the said 13th day of June, A.D. 1928, having ordered that Judgment be entered against the Third Party, E. J. Vandepitte for $2300.00 and the costs of the Third Party proceedings as between party and party.

IT IS THIS DAY ADJUDGED that the Defendant, Jean Berry do recover against the said E. J. Vandepitte the said sum of $2300.00 together with the costs of the Third Party proceedings to be taxed as between party and party, provided however that execution shall not issue hereunder without leave of the Court or a Judge thereof.

By the Court,
J. F. MATHER,
District Registrar.

Entered June 26, 1928.

Exhibits.

P.2. Proceedings in Plaintiff's Appeal from Order of W. A. Macdonald, J., of 1st October 1928, in action *Vandepitte* v. *Berry*.

(5) Notice of Motion, 5th September 1928.

(5) Notice of Motion.

TAKE NOTICE that this Honourable Court will be moved on Monday the 10th day of September 1928, at the Court House, Vancouver, B.C., at the hour of 10.30 o'clock in the forenoon or as soon thereafter as Counsel may be heard for an Order that the appearance of Jean Berry, Dated the 15th day of March, 1928, to the Writ of Summons herein be struck out and that all proceedings and pleadings filed or issued subsequent thereto in this action be struck out; and for an Order striking out the third party notice of the said Defendant Jean Berry, dated the 2nd day of June, 1928, and all proceedings and pleadings subsequent thereto; and for an Order that the Judgment entered in this action by the Plaintiff against the Defendant and the Defendant against the third party be struck out and declared null and void. And the costs of the Plaintiff and Third Party as between solicitor and client from the said W. W. Walsh.

AND TAKE NOTICE that in support of this application will be read the proceedings and pleadings in this action and the Affidavit of W. H. Campbell sworn the 5th day of September, 1928, and filed herein.

DATED at Vancouver, B.C., this 5th day of September, 1928.

W. H. CAMPBELL,
Solicitor for the Plaintiff
and Third Party.

To the Defendant
JEAN BERRY.

And to W. W. WALSH, Esq.,
her Solicitor.

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(6) Affidavit of W. H. Campbell, 5th September 1928.

(6) Affidavit of W. H. Campbell.

I, WILLIAM HENRY CAMPBELL, of 470 Granville Street, in the City of Vancouver, Province of British Columbia, Solicitor, MAKE OATH AND SAY:

1. THAT I am the Solicitor on record for the Plaintiff and for the Third Party in this action.

2. THAT this action was commenced by Writ of Summons on the 14th day of March, 1928, and on the 15th day of March, 1928, Mr. W. W. Walsh, Solicitor, accepted service of the said Writ of Summons and undertook in writing to enter an appearance thereto in due course according to the exigencies thereof on behalf of the defendant, Jean Berry.

3. THAT on the 22nd day of March, 1928, the said Mr. W. W. Walsh, duly entered an appearance at the office of the District Registrar of the

Exhibits.

P.2. Proceedings in Plaintiff's Appeal from Order of W. A. Macdonald, J., of 1st October 1928, in action *Vandepitte* v. *Berry*.

(6) Affidavit of W. H. Campbell, 5th September 1928 —*continued*.

Supreme Court of British Columbia at the City of Vancouver, B.C., and on the said day Notice of the said appearance was duly served on me.

4. THAT the said appearance did not state nor show in any way that the said Defendant, Jean Berry, was an infant.

5. THAT on the 2nd day of June, 1928, the said Solicitor, Mr. W. W. Walsh, filed in the Vancouver Registry Office a third party notice on behalf of the said defendant, Jean Berry, addressed to the Third Party, E. J. Vandepitte, and which Third Party Notice was duly served on me as Solicitor for the said E. J. Vandepitte.

6. THAT the said Third Party Notice did not state nor show in any way that the said Defendant, Jean Berry, was an infant.

7. THAT the trial of this action as between the Plaintiff and the Defendant, and the Defendant and the Third Party was heard on the 12th and 13th days of June, 1928, and Judgment was given for the Plaintiff against the Defendant, and for the Defendant against the Third Party.

8. THAT at the said Trial the Defendant, Jean Berry, testified under oath that she was 19 years of age.

9. THAT I did not know that the said Defendant was an infant until she so testified on the trial of this action.

10. THAT I am informed by Mr. C. L. McAlpine who acted as Counsel on the trial of this action for the Plaintiff and for the Third Party and I verily believe that he was not aware that the Defendant Jean Berry was an infant until she so testified at the trial of this action.

11. THAT I am informed by Alice Marie Vandepitte, the Plaintiff in this action, and by E. J. Vandepitte, the Third Party in this action, and I verily believe that they were not aware that the Defendant, Jean Berry, was an infant until the date of the trial of this action.

SWORN before me at the City of Vancouver, in the Province of British Columbia, this 5th day of September, A.D. 1928.

JOHN A. W. O'NEILL.

A Notary Public in and for the Province of British Columbia.

W. H. CAMPBELL.

Exhibits.

P.2. Proceedings in Plaintiff's Appeal from Order of W. A. Macdonald, J., of 1st October 1928, in action *Vandepitte* v. *Berry*.

(7) Affidavit of G. E. Housser, 11th September 1928.

(7) Affidavit of G. E. Housser.

I, GEORGE ELLIOTT HOUSSER of the City of Vancouver, in the Province of British Columbia, Barrister-at-Law, MAKE OATH AND SAY AS FOLLOWS :—

1. THAT I am a partner in the firm of Walsh, McKim, Housser and Molson, Solicitors for the above-named Defendant, Jean Berry, and as such have personal knowledge of the facts and matters hereinafter deposed to.

2. THAT I RECEIVED instructions from Messrs. Perraton & McLaren, Insurance Adjusters, to accept service of a Writ on behalf of Jean Berry and to enter an Appearance on her behalf and all my instructions were received from the said firm of Messrs. Perraton & McLaren.

3. THAT I had at no time any instructions or any information as to the age of the Defendant, Jean Berry, nor did I receive any information as to her age or any suggestion that she was an infant until I took the minutes of her evidence prior to the trial of this action.

4. THAT I have not now and never had any other information than was before the Honourable Mr. Justice W. A. Macdonald at the time of the trial of this action, and until taking the minutes of her evidence prior to the trial no instructions were given to me as to the age of the Defendant, Jean Berry, nor had I any information as to her age.

5. THAT I interviewed the said Jean Berry after the trial of the action in connection with a Writ of Execution issued against her in this action and received from her a copy of the said Writ as served on her by the Sheriff's Officer and she at that time in no way disputed the validity of the Judgment against her, nor has she at any time to my knowledge disputed the same.

6. THAT it is the practice in my office to enter all Appearances in the name of Walter William Walsh, but that he had no knowledge of this action nor of any matters in connection therewith and I have been informed by him and verily believe that he had no knowledge of the said Jean Berry or her age or even that my firm was acting for her.

7. THAT on two occasions after the trial of this action, I had conversations with C. L. McAlpine, who appeared as Senior Counsel for the Plaintiff and the Third Party at the trial of this action; that I asked him on each occasion why he had not joined R. E. Berry, the father of the Defendant, as a Party Defendant in his Writ in view of the provisions of Section 12 of the Motor Vehicle Act Amendment Act, S.C.B. 1926 and 1927, Chapter 44, to which he replied that he had revised the Statement of Claim, but that he had not considered it necessary to join Mr. R. E. Berry because he knew that the car which the Defendant was driving was insured and he felt that if he obtained a Judgment against the Defendant the Insurance Company would satisfy the same; he further stated on one of these occasions that he had had a similar action against Mr. Farris in which he

Exhibits.

P.2. Proceedings in Plaintiff's Appeal from Order of W. A. Macdonald, J., of 1st October 1928, in action *Vandepitte* v. *Berry*.

(7) Affidavit of G. E. Housser, 11th September 1928 —*continued*.

had not joined the father and in which the Insurance Company had paid the Judgment without question; that during these conversations the said C. L. McAlpine never at any time stated or intimated that he had not had information from the inception of the action of the age of the Defendant, Jean Berry.

SWORN before me at the City of Vancouver, in the Province of British Columbia, this 11th day of September, A.D. 1928.

G. E. HOUSSER.

PERCY A. WHITE

A Notary Public in and for the Province of British Columbia.

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(8) Affidavit of H. E. Molson.

(8) Affidavit of H. E. Molson, 11th September 1928.

I, HAROLD ELSDALE MOLSON of the City of Vancouver, in the Province of British Columbia, Barrister-at-Law, MAKE OATH AND SAY AS FOLLOWS:

1. THAT I am a member of the firm of Walsh, McKim, Housser and Molson, Solicitors for the above-named Defendant, Jean Berry, and as such have personal knowledge of the facts and matters hereinafter deposed to.

2. THAT I had no knowledge of this action until two or three days before the trial and had no part in the conduct of the case until two or three days before the trial when I was instructed by Mr. George Elliott Housser to act as Counsel in this case.

3. THAT although during the course of the trial the Defendant, Jean Berry, stated that she was under the age of twenty-one years, yet no comment was made by Counsel for the Plaintiff and the Third Party, nor was any protest made with regard to the irregularity of the Appearance or proceedings, nor was any protest made at any time afterwards until some two months after the Judgment had been settled and entered, the costs taxed and an Execution issued by the Plaintiff.

4. THAT on the settlement of the Judgment and after the trial the Defendant, Jean Berry's admission was drawn to the attention of the Counsel for the Plaintiff by Mr. Justice W. A. Macdonald who stated that the father of Jean Berry should have been made a Defendant in order to obtain the benefit of Section 12 of the Motor Vehicle Act Amendment Act, S.B.C. 1926 and 1927, Chapter 44, but the Counsel for the Plaintiff, when his attention had been drawn to this admission stated that he was not afraid of being able to collect from the Defendant and proposed to take out Judgment against her.

5. THAT Counsel for the Plaintiff, after his attention had been drawn to the Defendant's admission continued to press for the settlement of the Judgment as drawn by him or by the Plaintiff's Solicitor, and the Judgment was settled by Mr. Justice W. A. Macdonald as drawn by the Plaintiff's Counsel or Solicitor.

6. THAT the Solicitor for the Plaintiff, has since the settling of the Judgment taxed his costs, attended on the taxation of the costs of the Defendant against the Third Party, taken steps towards realizing on the Judgment and has issued an Execution which has been returned nulla bona by the Sheriff.

SWORN before me at the City of Vancouver, in the Province of British Columbia, this 11th day of September, A.D. 1928.

PERCY A. WHITE,
A Notary Public in and for the Province of British Columbia.

HAROLD E. MOLSON.

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(9) Affidavit of C. L. McAlpine.

I, CLAUDE LORNE McALPINE, of the City of Vancouver, in the Province of British Columbia, Barrister, and Solicitor, MAKE OATH AND SAY AS FOLLOWS:—

1. THAT I have read the Affidavit of George Elliott Housser, sworn herein the 11th day of September, A.D. 1928.

2. THAT I was Counsel at the trial of this action for the Plaintiff and for the third party.

3. THAT until the said trial, as far as I am aware, I never saw Miss Jean Berry the Defendant, in my life.

4. THAT until Miss Berry gave evidence on her own behalf and stated that she was nineteen years of age, I had no knowledge, intimation or suspicion that the said Jean Berry was a minor and not of the full age of twenty-one years.

SWORN before me at the City of Vancouver, Province of British Columbia, this 15th day of September, A.D. 1928.

SYDNEY S. PENNY,
A Notary Public in and for the Province of British Columbia.

C. L. McALPINE

Exhibits.

P.2. Proceedings in Plaintiff's Appeal from Order of W. A. Macdonald, J., of 1st October 1928, in action *Vandepitte* v. *Berry*.

(10) Formal Judgment dismissing Motion, 1st October 1928.

(10) Formal Judgment dismissing Motion.

Before the Honourable Mr. JUSTICE W. A. MACDONALD } Monday, the 1st day of October, 1928.

UPON MOTION to this Court on behalf of the Plaintiff and the Third Party herein by Notice of Motion dated the 5th day of September, 1928, coming on for hearing on the 10th day of September, 1928, and having been adjourned and coming on again before the Honourable Mr. Justice W. A. Macdonald on the 17th and 24th days of September, 1928, and the Court having directed that the Motion stand for Judgment, and the same coming on this day for Judgment. UPON HEARING Mr. C. L. McAlpine of Counsel for the said Plaintiff and the Third Party, and Mr. Alfred Bull of Counsel for the Defendant, UPON READING the said Notice of Motion and the Affidavit of William Henry Campbell sworn the 5th day of September, 1928, and the Affidavit of Claude Lorne McAlpine sworn the 15th day of September, 1928, the Affidavit of George Elliott Housser, sworn herein the 11th day of September, 1928, and the Affidavit of Harold Elsdale Molson sworn the 11th day of September, 1928, and the transcript of the cross-examination of William Henry Campbell on his affidavit sworn the 5th day of September, 1928, all of which said Affidavits are filed herein.

THIS COURT DOTH ORDER AND ADJUDGE that the said application of the Plaintiff and the Third Party be and the same is hereby dismissed with costs payable forthwith after taxation thereof and that the costs so payable by the Plaintiff be payable out of her separate estate only.

By the Court,
J. F. MATHER,
District Registrar.

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(11) Reasons for Judgment (W. A. Macdonald, J.), 15th October 1928.

(11) Reasons for Judgment (W. A. Macdonald, J.).

Plaintiff sued Defendant to recover damages for negligence arising out of an automobile accident and Defendant then applied to have the husband of the Plaintiff joined as a Third Party. When the action came on for trial Plaintiff recovered damages for $4600.00 and joint negligence being found, Defendant was held entitled to contribution from the Third Party for one-half this amount. During the trial on the 13th June, it appeared from the evidence of the Defendant that she was not of age. No comment was made thereto by any of the Counsel engaged, nor was there any application in the matter. Upon the settlement of the Order for Judgment according to the Affidavit of H. E. Molson, Counsel for Defendant, the trial Judge referred to the fact that the father of the Defendant should have been made

Exhibits.

P.2. Proceedings in Plaintiff's Appeal from Order of W. A. Macdonald, J., of 1st October 1928, in action *Vandepitte* v. *Berry*.

(11) Reasons for Judgment (W. A. Macdonald, J.), 15th October 1928—*continued*.

a party Defendant in order to obtain the benefit of the "Motor Vehicle Amendment Act," but Counsel for the Plaintiff stated he was not afraid of being able to collect from the Defendant and proposed to take Judgment against her. Order for Judgment was accordingly settled and subsequent thereto the Plaintiff taxed her costs and attended upon the taxation of the costs of the Defendant against the Third Party. She has also taken steps towards realizing on the Judgment and issued execution against the Defendant for that purpose which was returned *nulla bona*. Under these circumstances Plaintiff now seeks to set aside the Judgment of the Plaintiff against the Defendant and of the Defendant against the Third Party on the ground that the Defendant, not being of age, such judgments are null and void. She also seeks to recover costs against the Solicitor who appeared for the Defendant so under age, without having a guardian appointed for such Defendant. Defendant through her Counsel resists the application and supports her position by Affidavits. It is contended on her behalf that the Judgment is now binding and that the Plaintiff upon the law and facts, is estopped from interfering with her judgment obtained in the manner shortly outlined. Several cases were cited upon the argument, but I think a discussion of one or two will suffice.

Plaintiff relied on the case of *Fountain* vs. *McSween* 4 Ont. Prac. Rep. 240, in which the headnote states an appearance entered by an Attorney for an infant Defendant without appointment of a guardian is a nullity and not simply an irregularity. In that case, however, the Plaintiff's Attorney was in error as in default of defence he signed Judgment knowing that the Defendant was an infant. The Defendant then, as distinguished from the present case, moved to set aside the Judgment and succeeded in doing so. The Order, however, being without costs.

In *Carr* vs. *Cooper* 1 B. & S., page 230. After the Plaintiff had signed Judgment for debt and costs where the Defendant had appeared by Attorney, proceedings in error were taken by the Defendant on the ground that he, being an infant, ought to appear by guardian. It appeared that the Plaintiff had taken steps in the cause after the fact of the Defendant's infancy had been made known to him. He sought as here, to remedy his position by obtaining an Order that the appearance should be amended by ordering that the Defendant appear by guardian and that all subsequent proceedings might be amended accordingly.

Cockburn, C. J., during the course of the argument referred to the case of *Shipman* vs. *Stevens*, 2 Wils, page 50, where as here, when the cause came on for trial it was discovered that the Defendant was an infant. The Plaintiff then did not proceed. The Court stated that the Plaintiff's Attorney ought to have applied to the Defendant to name a guardian and it was the Plaintiff's Attorney's own fault through having proceeded erroneously. The Court in *Carr* vs. *Cooper* refused the remedy sought by the Plaintiff but set aside the Judgment and proceedings thereafter and ordered the Defendant to appear by guardian. This involved a new trial with presumably the same result. This position was perchance prevalent in the

Exhibits.

P.2. Proceedings in Plaintiff's Appeal from Order of W. A. Macdonald, J., of 1st October 1928, in action *Vandepitte* v. *Berry*.

(11) Reasons for Judgment (W. A. Macdonald, J.), 15th October 1928—*continued*.

mind of the Court as Chief Justice Cockburn in giving the Judgment stated that they had no power to do what was asked by Plaintiff, added :

> " We have no power to do what is here asked. There is no longer any real distinction between appearance by guardian and appearance by Attorney and it would be far better that the useless idle law creating that distinction should be repealed than we should place an untruth on our record."

In this case the Plaintiff is not applying to remedy her judgment but to set it aside with an ulterior object in view. In obtaining judgment against Defendant it was the goal which she sought to reach according to the pleadings. She would not obtain any greater benefit, if, as a matter of procedure a guardian ad litem to the Defendant had been appointed. The Judgment then recovered would be against the infant Defendant. Here the Judgment is only objectionable to its form not as to its substance.

As to the effect of a Judgment, where an infant is not objecting, an extract from Seton on Decrees, Vol. 2, p. 981, is instructive :

> " In general, an infant either Plaintiff or Defendant, is as much bound by a Judgment as an adult : Gregory *v.* Molesworth, 3 Atk. 626; Sheffield *v.* D. Buckingham, West. 684; Bennet *v.* Lee, 2 Atk. 531; Simpson 501, 502; even though it has been irregularly obtained, especially when acquiesced in for some time and acted upon in subsequent proceedings; see Morrison *v.* M. 4 My. & Cr. 216."

Even if the Defendant were moving to set aside the Judgment, it is doubtful if under the circumstances she would succeed, as while the rules of Court differ between Ontario and this province, still the principles underlying the rules as to procedure to be adopted to ensure protection to infants who may sue or be sued, are the same.

In *Straughan* vs. *Smith* 19 O.R. p. 558, it was held where a Plaintiff had obtained judgment for damages against an infant, that the Judgment should not be set aside through a guardian not having been appointed. The fact of infancy was well known to the Defendant's parents and to the Solicitor and Counsel who appeared for him at the trial. On motion to set aside the verdict, then for the first time objection was taken to a guardian not having been appointed to the infant Defendant. Boyd C. in his judgment said on the ground of infancy he was not disposed to interfere and then referred to *Furnival* vs. *Brooke*, 49 L.T.N.S. 134, as showing that—

> " The Judges have a discretion whether or not to interfere in cases of infancy, according to circumstances. This is rested there partly upon the phraseology of the English orders and ours, though different in form are on this point identical. I refer to those numbered 261 and 313 in which " may " is used as in the order under consideration in *Furnival* vs. *Brooke*. Such discretion, however, would, apart from rules and orders, appear to be inherent in the Court; *see Wright* vs. *Hunter*, 1 L.J.O.S. K.B. 248. There is no reason to believe or indeed suspect, that the interests of this infant were not carefully considered and protected."

The case of *Wright* vs. *Hunter* supra, decided that where an infant Defendant had contracted a debt in business and failed to enter an appearance, thus resulting in an interlocutory judgment being signed, the Court would not interfere, the Judgment being as follows :

> " We sometimes set a Judgment aside to allow a person to plead infancy, but what claim has this Defendant on the indulgence of the Court. Leaving London he travels about the country and obtains credit as an adult from persons who could not suppose to know that he is an infant."

Plaintiff, however, contends that the Judgment she obtained was a nullity and thus the signing of same coupled with the subsequent proceedings did not operate as a waiver of her right to make this application. I think this position is untenable, as even though the Defendant is an infant, still she was bound by her attendance at the trial and instructing Counsel. Further she is not opposing the setting aside of the Judgment, but through Counsel, presumably properly instructed, is contesting the application and contending that the Judgment should remain undisturbed.

It was submitted in *Pisani* vs. *Attorney-General for Gibraltar* (1873) Priv. Coun. App. page 517, that the Plaintiff (Pisani) could object to an agreement entered into as to amendment of the pleadings through two of the Defendants being infants, whose consent had not been given to such agreement. Their Lordships after considering that the agreement was apparently for the benefit of the infants, added :

> " And further, whether that be so or not, their Lordships think that Mr. Pisani, after entering into it with a knowledge of the fact that the parties were infants, cannot be now heard to object that his consent does not bind him."

A party to an action cannot approbate and reprobate at the same time, or as it has been so aptly expressed, blow hot and cold in the same breath. So in view of the course adopted by the Plaintiff herein to accede to this motion, it would, as expressed by Bowen, L. J., in *Gandy* vs. *Gandy* 30 Ch. Div. 57 at page 82, " It would be playing fast and loose with justice if the Court allowed that."

The effect of *Furnival* vs. *Brooke* supra, would appear to have been somewhat destroyed by the change in the English rules which took place in 1883. This was referred to by Lord Darling, in *Leaver* vs. *Torres* (1899) 43 So. Jo. page 778. This change in the rules, however, is not noted as affecting the *Furnival* vs. *Brooke* case in the text books. Such case is referred to in the 1926 edition of *Eversley's Law on Domestic Relations* at page 809 as directing that :

> " Where a Plaintiff signed Judgment for a default of appearance, the Court has entire discretion whether such Judgment shall be set aside."

Exhibits.

P.2. Proceedings in Plaintiff's Appeal from Order of W. A. Macdonald, J., of 1st October 1928, in action *Vandepitte* v. *Berry*.

(11) Reasons for Judgment (W. A. Macdonald, J.), 15th October 1928—*continued*.

Cf. Daniels Chan. Prac. Vol. 1, page 300, in somewhat different terms also referring to *Furnival* vs. *Brooke* as follows :

> " In cases where Judgment is signed without the Plaintiff being aware of the infancy, the Court has a discretion to say whether the Judgment shall be set aside or not."

If the infant defendant had been applying to set aside the Judgment I would have no hesitation in deciding that her interests had been fully protected at all times during the litigation. Such protection is the primary object to be considered by the court. A foot-note to *Leggo's Chan. Forms*, 2nd Edition, page 322, emphasizes this fact. After a discussion of the case of Dewitt *vs.* Ward, in which an infant sought to have the official guardian removed and another guardian substituted, such note concludes as follows :

> " It would therefore seem that the Court has deprived infants of all voice in the appointment of guardians ad litem and that they must submit to accept the nomination of the Court unless they can show that the guardian assigned by the Court is for any reason personally unfit to represent them or protect their interest."

Here an infant so protected is not seeking to avoid a Judgment but a Plaintiff who had proceeded and obtained Judgment against an infant is attempting to avoid the proceedings under the circumstances outlined. The utmost benefit Plaintiff might expect to obtain upon the application would be that granted to the Plaintiff in *Carr* vs. *Cooper* supra. There would be no object attained by pursuing that course as it would only involve a new trial without even a suggestion that any further evidence would then be adduced. It would prolong the litigation with attendant expense. In this connection I might well adopt the remarks of Boyd C. in *Straughan* vs. *Smith* as follows :

> " No good purpose would be served by a réchauffé of this case before another Jury." (Judge.)

I have not dealt specially with the position of the third party before deciding as I do, that the Judgment of the Plaintiff is binding upon all concerned. In this respect it follows that the remedy of contribution granted to the infant Defendant should not be disturbed.

The application is dismissed with costs.

W. A. MACDONALD, J.

Exhibits.

P.2. Proceedings in Plaintiff's Appeal from Order of W. A. Macdonald, J., of 1st October 1928, in action *Vandepitte* v. *Berry*.

(12) Notice of Appeal, 15th October 1928.

(12) Notice of Appeal.

TAKE NOTICE that the Plaintiff and the Third Party herein do hereby appeal to the Court of Appeal from the Order of the Honourable Mr. Justice W. A. Macdonald dated the 1st day of October, A.D. 1928, whereby the Plaintiff's motion to strike out the Appearance of the Defendant and all subsequent proceedings in the said action was dismissed; and whereby the Motion of the Third Party to strike out the Third Party proceedings was dismissed.

AND FURTHER TAKE NOTICE that the Court of Appeal will be moved at the present sittings of the said Court which commenced on Tuesday, the 2nd day of October, 1928, at the Law Courts at the City of Vancouver, Province of British Columbia, by Counsel on behalf of the said Defendant and Third Party for an Order reversing the Order of the Honourable Mr. Justice W. A. Macdonald and for an order striking out the appearance of the Defendant and all subsequent proceedings in the said action and striking out the third party notice and all proceedings and pleadings subsequent thereto and for an Order that the judgment entered in this action by the Plaintiff against the Defendant and the Defendant against the Third Party be struck out and declared null and void and the costs of the Plaintiff and Third Party as between Solicitor and Client from the said W. W. Walsh on the following grounds :—

1. That the said Order is against the law.
2. That the learned trial Judge erred in not finding that the appearance of the Defendant and the Judgment against the Defendant was void and of no effect.
3. That the learned trial Judge erred in not finding that the third party proceedings and the Judgment against the third party were void and of no effect.
4. That the learned trial Judge erred in not striking out the Defendant's appearance and all subsequent proceedings thereto and the Judgment against the Defendant.
5. That the learned trial Judge erred in not setting aside the Judgment of the Defendant against the third party.
6. That the learned trial Judge erred in not awarding the Plaintiff and Third Party costs as between Solicitor and client against W. W. Walsh.

DATED this 15th day of October, A.D. 1928.

W. H. CAMPBELL,
Solicitor for the Plaintiff and the third party.

To the Defendant, Jean Berry, and to W. W. Walsh, Esq., Her Solicitor.

This Notice of Appeal is filed by W. H. Campbell, whose place of business and address for service is 470 Granville Street, Vancouver, B.C.

(13) Affidavit of A. H. Ray.

Exhibits.

P.2. Proceedings in Plaintiff's Appeal from Order of W. A. Macdonald, J., of 1st October 1928, in action *Vandepitte* v. *Berry*.

(13) Affidavit of A. H. Ray, 30th October 1928.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

I, ARTHUR HUGO RAY, of 819 Nicola Street in the City of Vancouver in the Province of British Columbia MAKE OATH AND SAY AS FOLLOWS:

1. THAT I am a Solicitor in the offices of W. W. Walsh Solicitor for the above-named Defendant and as such have personal knowledge of the matters hereinafter deposed to.

2. THAT on October the 1st A.D. 1928, the Honourable Mr. Justice W. A. Macdonald made an Order dismissing the Plaintiff's Motion to strike out the Appearance of the Defendant and all subsequent proceedings in the said Action and dismissing the Motion of the Third Party to strike out the Third Party Proceedings with costs payable to the Defendant forthwith after taxation thereof.

3. THAT on the 15th day of October A.D. 1928 Notice of Appeal on behalf of the above-named Plaintiff and the above-named Third Party, appealing from the above-mentioned Order of the Honourable Mr. Justice W. A. Macdonald was served on the Defendant's Solicitors.

4. THAT on October 19th, 1928, Demand for security for costs, a copy of which is now produced and shown to me and marked Exhibit "A" to this my Affidavit, was duly served on W. H. Campbell, Solicitor for the above-named Plaintiff and Third party.

5. THAT now produced and shown to me and marked Exhibit "B" to this my Affidavit is the letter received from Messrs. McAlpine & McAlpine who have been acting in conjunction with Mr. W. H. Campbell on behalf of the Plaintiff and Third Party herein.

6. THAT the above-named Defendant obtained a Judgment against the above-named Third Party for the sum of $2300·00 and the costs of the Third Party Proceedings as between Party and Party which costs were taxed and allowed at the sum of $552·00.

7. THAT no part of the said Judgment or costs has been paid by the said Third Party.

A. HUGO RAY.

SWORN BEFORE ME at the City of Vancouver Province of British Columbia this 30th day of October, A.D. 1928.

BURCHELL O. OUGHTON,
A Commissioner for taking Affidavits
in British Columbia.

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(14). **(14) Notice of Motion, 13th November, 1928.**
(Not printed.)

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(15). **(15) Appointment to settle Appeal Book, 13th November, 1928.**
(Not printed.)

Exhibits.

P.2. Proceedings in Plaintiff's Appeal from Order of W. A. Macdonald, J., of 1st October 1928, in action *Vandepitte* v. *Berry*.

(16) Formal Judgment of Court of Appeal, 27th November 1928.

(16) Formal Judgment of Court of Appeal.

ALICE MARIE VANDEPITTE, Married Woman, the wife of
E. J. Vandepitte - - - - - - *Plaintiff (Appellant)*
And
JEAN BERRY - - - - - - - - - *Defendant (Respondent)*
And
E. J. VANDEPITTE - - - - - - *Third Party (Appellant)*

B. C. L. S. $1·10.

Vancouver Registry, Filed Dec. 5, 1928.

Coram :

The Honourable the CHIEF JUSTICE
The Honourable Mr. JUSTICE MARTIN
The Honourable Mr. JUSTICE GALLIHER
The Honourable Mr. JUSTICE MCPHILLIPS
The Honourable Mr. JUSTICE M. A. MACDONALD

Vancouver, B.C., Tuesday, the 27th day of November, A.D. 1928.

UPON THE APPEAL of the Plaintiff and the Third Party (Appellants) from the Order of the Honourable Mr. Justice W. A. Macdonald dated the first day of October, 1928, whereby the Motion of the Plaintiff and of the Third Party to strike out the Appearance of the Defendant and all subsequent proceedings in the said action, and to strike out the Third Party proceedings was dismissed, coming on for hearing before this Court at Vancouver on the 26th and 27th days of November, 1928. Upon hearing Mr. C. L. McAlpine of Counsel for the Plaintiff and the Third Party (Appellants), and Mr. Alfred Bull of Counsel for the Defendant (Respondent), and upon reading the Appeal Book.

THIS COURT DOTH ORDER AND ADJUDGE that the said Appeal be and the same is hereby dismissed with costs to be taxed.

BY THE COURT.

H. BROWN,
Dep. Registrar.

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(17) Appointment to tax Respondent's costs, 13th December, 1928. (17).

(*Not printed.*)

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(18) Respondent's Bill of Costs as taxed. (18).

(*Not printed.*)

Exhibits.

P.3.

P.3.—Specimen Policy, Application for Insurance and Daily Report, 14th April, 1927.

(Separate document.)

P.4.

P.4.—Automobile Accident Notice and Statement of person driving car at time of accident, 8th March, 1928.

(Separate document.)

P.5. Letter from Walsh, McKim, Housser and Molson to W. H. Campbell, 5th July 1928.

P.5.—Letter from Walsh, McKim, Housser and Molson to W. H. Campbell.

432 Richards Street,
Vancouver, British Columbia.
July 5, 1928.

Re VANDEPITTE *vs.* BERRY.

Dear Sir,

We have considered this matter very carefully and discussed it with our client Miss Berry. The situation is that your client has a Judgment for $4,600·00 and costs against Jean Berry and Jean Berry has a Judgment over against your client's husband for $2,300·00 and costs. Mrs. Vandepitte now seeks to force the collection of her Judgment in full and leave Miss Berry to the very doubtful remedy of collecting her Judgment from Mr. Vandepitte. In view of your remarks to our Mr. Walsh the morning after the trial to the effect that Mr. Vandepitte was only a poor tailor, it would seem to us that Miss Berry's chances of recovering anything on account of her Judgment may be far from bright. Under these circumstances she can hardly be blamed if she does not feel like parting with something over $5000·00 with no assurance that she will be able to recover anything on account of her Judgment against the husband of the Payee. She therefore feels that both Judgments must be considered together and that it is a most unfair proposition to attempt to deal with them separately.

The only way therefore, in which this matter can be settled is on what we think is a fair and equitable basis, no matter what the strictly legal aspects of the situation may be. Our client is prepared to procure and hand over to you a cheque for $2,300·00 together with the difference between Mrs. Vandepitte's costs and hers and also to furnish a Satisfaction Piece of the Judgment against Mr. Vandepitte. This cheque and Satisfaction Piece

Exhibits.

P.5. Letter from Walsh, McKim, Housser and Molson to W. H. Campbell, 5th July 1928—*continued.*

will of course be exchanged for a complete Release by your client. Our client has no desire or intention to avoid the payment of her just obligations but she has no intention of paying over the amount of the Judgment against her and being left with an uncollectible Judgment against the husband of the successful Plaintiff.

Yours truly,

WALSH, McKIM, HOUSSER & MOLSON.
Per G. E. H.

GEH/EM

Please excuse corrected draft, but do not wish to do it in margin.—G. E. H.

P.7.—Letter from McAlpine & McAlpine to Walsh, McKim, Housser & Molson.

P.7. Letter from McAlpine & McAlpine to Walsh, McKim, Housser & Molson, 21st August 1928.

August 21st, 1928. Attention Mr. Housser.

Re VANDEPITTE *vs.* BERRY.

Dear Sirs,

It is now two months since Judgment was delivered in the above matter and our clients have as yet no assurance that payment will be made.

In our opinion our client is entitled to know what the Insurance Company intends doing. It was in the expectation of avoiding unnecessary expense that we have not taken steps to collect judgment before. It seemed to us that no purpose could be served by your not supplying us with the name of the Insurance Company and the writer's understanding with your Mr. Housser was that the Company had left that entirely in the latter's discretion. The writer further understood from Mr. Housser that he would supply us with the name but that he wished to write again. That was over three weeks ago and we are no further ahead.

We think that you will agree that the Insurance Company has had plenty of time now and we would therefore request that you supply us with the name of the Company.

We ourselves have been subject to severe criticism from our clients and have been definitely instructed to take action without further delay. It is therefore impossible for us to do otherwise and unless you supply us with the name of the Company not later than Thursday next we shall have to proceed.

Kindly let us hear from you.

Yours truly,

McALPINE & McALPINE,
per

CLM/W.

Exhibits.

P.6.—(*a*) Letter from Walsh, McKim, Housser & Molson to McAlpine and McAlpine.

P.6.
(*a*) Letter from Walsh, McKim, Housser & Molson to McAlpine & McAlpine, 23rd August 1928.

432 Richards Street,
Vancouver, British Columbia.
August 23, 1928.

Re VANDEPITTE *vs.* BERRY.

Dear Sirs,

We have your letter of the 21st instant and also a letter from the Insurance Company. They state that in order to get this matter settled they are quite prepared to pay the amount of the Judgment less the Judgment obtained by Miss Berry against Mr. Vandepitte. Further than this, however, they will not go and if this is not acceptable, your client will have to take such further proceedings as she may deem advisable. This is in the nature of an ex gratia offer of settlement and must not be taken as in any way an admission of liability.

We may say that the Company take what seems to us a very fair attitude with regard to the whole matter. They feel that it is inequitable to ask them to pay over $4,600·00 and costs to the wife and in all probability find it impossible to collect the Judgment from the husband. They realize that legally their contention may be entirely unsound, but morally they feel that their position is unanswerable.

They do not, however, wish to throw any obstacles in your way if you are not disposed to accept their proposition. They do, however, wish to have it clearly understood that if you go ahead either against Mr. Berry or against them and are unsuccessful, it will be absolutely useless to then re-open negotiations. So far as they are concerned the matter will be closed for all time, and you will be left to whatever remedies you may have against Miss Berry.

They have instructed me to furnish you with the name of the Insurance Company and to give you all necessary information to enable you to commence an action on the following stipulations :

1. You are to undertake on behalf of your client that no appeal will be launched by Vandepitte against the Judgment against him and that he, Vandepitte, will undertake not to dispose of his assets in any way pending the trial of any action which you may bring.

2. That you agree not to launch an action against Mr. Berry. They have taken this matter up with their general solicitors, who confirm our opinion that an action against Berry could not be joined in an action against the Insurance Company and that if you sued both, it would have to be by separate actions. They do not mind defending one action, but they do not propose to defend two. Therefore, if you wish to proceed against Mr. Berry, we are not at liberty to give you the name of the Insurance Company and you will have to take your chances in an action against him. If, however, you will agree not to proceed against Mr. Berry,

Exhibits.

P.6.
(a) Letter from Walsh, McKim, Housser & Molson to McAlpine & McAlpine, 23rd August 1928—*continued.*

we will give you all information to enable you to proceed against the Insurance Company. We discussed this matter a couple of weeks ago in my office, and understood that you agreed to this as being quite reasonable.

3. If you proceed with an action against the Insurance Company, we must be given ample time to submit all pleadings, examinations, etc., to Head Office in order that they may consult their general solicitors with regard to each step in the action. It is necessary that we make this stipulation because the ordinary time for defence, etc., will not be sufficient if we are going to keep in communication with Head Office. We will of course undertake to expedite matters as much as possible and not to ask for unnecessary extensions of time.

In conclusion we may say that we are sorry there has been so much delay, but we wish to assure you that it was not on our part. We wrote to Toronto the day we had our last interview with you and we are notifying you the day we receive a reply from the Insurance Company. We take it that any delay at Head Office has been caused by the desire of the Company to consult their general solicitors before replying.

Yours truly,
WALSH, McKIM, HOUSSER & MOLSON.
Per "H."

GEH/EM.

Without prejudice.

Exhibits.

P.8.
Letter from McAlpine & McAlpine to Walsh, McKim, Housser & Molson, 23rd August 1928.

P.8.—Letter from McAlpine & McAlpine to Walsh, McKim, Housser & Molson.

August 23rd, 1928.

Re VANDEPITTE *vs.* BERRY.

Dear Sirs,

We have your letter of the 23rd inst. with reference to the above. We have consulted our client with reference to the contents thereof and have been instructed to proceed as we deem best.

It seems to us therefore that the only thing to do is to keep our hands free. We think you will agree that it would be foolish to enter any of the undertakings with no assurance that by so doing our client will profit anything. Consequently we are compelled to refuse your offer.

We are willing to proceed first with the Insurance Company provided you supply us with a copy of the policy and the name of the Company. Otherwise we will be compelled to examine Miss Berry which would serve no useful purpose.

Will you kindly advise us tomorrow, the 24th inst., as to whether or not you will do so.

Kindly let us hear from you.

Yours truly,
McALPINE & McALPINE,
Per

CLM/W.

P.6.—(*b*) Letter from Walsh, McKim, Housser & Molson to McAlpine & McAlpine.

Exhibits.

P.6. (*b*) Letter from Walsh, McKim, Housser & Molson to McAlpine & McAlpine, 27th August 1928.

432 Richards Street,
Vancouver, British Columbia.
August 27, 1928.

Re VANDEPITTE *vs.* BERRY.

Dear Sirs,

We have your letter of the 23rd instant. We do not quite understand your attitude in the matter. We may say quite frankly we do not think you will ever get the name of the Insurance Company unless we give it to you, but we are quite prepared to furnish you with all necessary information as long as we have some reasonable understanding. If any of the suggestions made in our letter are unreasonable, we have no doubt you can show us where we are asking something that we should not, and we would certainly withdraw any suggestion that would unduly tie your hands.

Might we suggest that a further conference between your Mr. Claude McAlpine and the writer would probably result in our getting together.

Yours truly,
WALSH, McKIM, HOUSSER & MOLSON.
Per " H."

GEH/EM.

In the Privy Council.

No. 11 of 1932.

On Appeal from the Supreme Court of Canada.

BETWEEN

ALICE MARIE VANDEPITTE, MARRIED WOMAN, THE WIFE OF E. J. VANDEPITTE (Plaintiff) - *Appellant*

AND

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

RECORD OF PROCEEDINGS.

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

BLAKE & REDDEN,
17, Victoria Street, S.W.1.
For Respondents.

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