1929

*Nov. 8.
*Dec. 9.

THE CONTINENTAL CASUALTY COMPANY (DEFENDANT) ..... APPELLANT;

AND

JEANNE YORKE (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Motor vehicles—Insurance against liability for injury—Action, by person injured by automobile whose owner is insured, against the insurer—Insurance Act, R.S.O., 1927, c. 222, s. 85—Establishment of liability against insurer on the policy—Facts to be proved and manner of proof—Condition in policy for no liability while automobile "with the knowledge, consent or connivance of the insured is being driven by a person under the age limit fixed by law"—Insurer's onus of proof as to consent—Amount recoverable against insurer—Inclusion of costs of appeal taken by insured in plaintiff's action against insured.

Plaintiff had been injured by S.'s automobile and had recovered judgment for damages and costs against S. and issued execution which was returned unsatisfied. Plaintiff, under s. 85 of the *Insurance Act*, R.S.O., 1927, c. 222, sued defendant, which had insured S. against liability for injury to another, for the amount of her judgment.

Held: The right of action given by s. 85 is simply a right to sue on the policy in the place and stead of the insured; the plaintiff must establish liability on the policy against the insurer in the same manner and to the same extent as if the action had been brought by the insured; and the facts, required to be established as part of the plaintiff's case, that the bodily injury to another, insured against, had been inflicted by the insured's automobile, and that the insured was legally liable in damages to the plaintiff for the injury, are not established as against the insurer by the production of the judgment obtained by plaintiff against the insured. But in the present case the defendant, by reason of an admission at the trial. was precluded from contending that the liability of S. to plaintiff had not been established by production of the judgment against S.

The injury was inflicted while the automobile was being driven by S.'s son, who was only 16 years of age, and had no permit or licence to drive. The policy contained the statutory condition that the insurer should not be liable "while the automobile, with the knowledge, consent or connivance of the insured is being driven by a person under the age limit fixed by law."

Held, without deciding what was "the age limit fixed by law" (see the *Highway Traffic Act,* R.S.O., 1927, c. 251, s. 43) within the meaning of said condition, and assuming it to be 18 years, the defendant, to escape liability under the condition, must shew that the boy was driving with the knowledge, consent or connivance of S., and this it had failed to do. Such consent could not be presumed as against the plaintiff by reason of the judgment obtained by plaintiff against S.; it did not necessarily follow that because judgment was given against

*PRESENT:—Anglin C.J.C. and Duff, Rinfret, Lamont and Smith JJ.

S., the latter had any knowledge that her son was driving her automobile, or that she consented thereto (among other things in this connection, ss. 41 (1) and 42 (1) of the *Highway Traffic Act*, R.S.O., 1927, c. 251, were considered).

Judgment of the Appellate Division, Ont. (64 Ont. L.R. 109) affirming, in the result, the judgment of Raney J., for recovery by the plaintiff against the defendant of the amount claimed, affirmed. This amount included the plaintiff's costs of an appeal taken by S. from the judgment at trial in the action against S.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which dismissed its appeal from the judgment of Raney J. (2).

The defendant had issued a policy of insurance on an automobile of one Elizabeth Schwartz, insuring her to the extent of $5,000 against liabilities for bodily injuries or death caused to one person by reason of the operation of the automobile.

The plaintiff, in her statement of claim, alleged that she had been run down and injured by said automobile, the property of said Elizabeth Schwartz, which automobile at the time of the accident was being operated by A. C. Schwartz, the son of said Elizabeth Schwartz; that the accident and injuries were caused wholly by the negligence of A. C. Schwartz; that the plaintiff had brought action against Elizabeth Schwartz and A. C. Schwartz and had recovered judgment against them for damages in the sum of $2,067.25 and costs; that Elizabeth Schwartz and A. C. Schwartz had appealed to the Appellate Division and the appeal had been dismissed with costs; that the plaintiff's costs at trial and on the appeal in said action had been taxed at $633.40; that execution for the amount of the judgment and costs was placed with the sheriff who made a return of *nulla bona;* that plaintiff then notified the present defendant of the accident, the amount of the judgment, the taxed costs and the return of *nulla bona,* and made formal claim to the defendant, who disputed it.

The plaintiff's claim against the present defendant was by virtue of the provisions of s. 85 of the Ontario *Insurance*

(1) (1929) 64 Ont. L.R. 109.

(2) Raney J., on November 29, 1928, gave "judgment for the plaintiff as claimed, with costs of the action," and referred to his "reasons for judgment in *Donald* v. *Lewis* of this date." See *Donald* v. *Lewis,* 63 Ont. L.R. 310; judgment on appeal: 64 Ont. L.R. 301.

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Act, R.S.O., 1927, c. 222. She claimed $2,700.65 (being the sum of said $2,067.25 and said $633.40 costs) and interest thereon from the date of her said demand upon defendant.

Raney J. gave judgment for the plaintiff as claimed, with costs, and the defendant's appeal to the Appellate Division was dismissed with costs. The defendant then appealed to this Court. The questions in issue are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

R. S. Robertson K.C. for the appellant.

Gideon Grant K.C. for the respondent.

The judgment of the court was delivered by

LAMONT J.—On May 28, 1926, the appellant company issued a policy of insurance, in favour of one Elizabeth Schwartz, by which it agreed to indemnify her to the extent of $5,000 against liability for bodily injury or death caused to any one person injured by her automobile described in the policy.

On November 17, 1926, Mrs. Schwartz' automobile, while being driven by her son Alfred Schwartz, a boy of sixteen years of age, ran down and severely injured one Jeanne Yorke. To recover damages for the injuries she sustained Jeanne Yorke brought an action in the Supreme Court of Ontario against Mrs. Schwartz and her son and recovered judgment therein for $2,067.25 and the costs of the action. An appeal taken by Mrs. Schwartz was dismissed. Jeanne Yorke then issued execution on her judgment, to which the sheriff made a return of *nulla bona*. Not being able to obtain satisfaction for her judgment out of the property of Mrs. Schwartz or her son, Jeanne Yorke brought this action against the appellant company, claiming that it was liable to her in the amount of her judgment and costs, by virtue of a section in the *Insurance Act* (now s. 85 (1) R.S.O., 1927, c. 222), which section reads as follows:—

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

amount of the judgment in the same manner and subject to the same equities as the insured would have if the said judgment had been satisfied.

In answer to the claim the appellant set up the following defences:—

2. The defendant further says that at the time of the accident in question the automobile covered by the contract of insurance was being driven and operated by one A. C. Schwartz, a person under the age of eighteen years, with the knowledge, consent and connivance of the Assured, the said Elizabeth Schwartz.

3. The defendant further says that the said A. C. Schwartz had not passed an examination and obtained a licence to operate a motor vehicle, as provided by the Highway Traffic Act, 13-14 Geo. V, Chapter 48, Section 44, and was, therefore, prohibited from so driving or operating a motor vehicle on a highway in the Province of Ontario. The defendant says that there is no liability upon it to indemnify the said Elizabeth Schwartz in respect to the accident in question and the plaintiff has no claim against it.

4. The defendant pleads the Statutory Conditions embodied in the said Contract of Insurance and the provisions of the Ontario Insurance Act, R.S.O. (1927), Chapter 22, as a defence to this action.

Section 44 of the *Highway Traffic Act* (now s. 43 of the R.S.O., 1927, c. 251) reads as follows:—

44. (1) No person under the age of sixteen years shall drive or operate a motor vehicle, and no person over the age of sixteen years and under the age of eighteen years shall drive or operate a motor vehicle on the highway unless and until such person has passed an examination and obtained a licence as provided by section 16 of this Act.

(2) No person shall employ or permit anyone under the age of sixteen years to drive or operate a motor vehicle and no person shall employ or permit anyone over the age of sixteen and under the age of eighteen years to drive or operate a motor vehicle unless and until he has passed an examination and obtained a licence as provided by section 16.

Section 16 makes provision for the granting of chauffeurs' licences, and subsec. (1) is as follows:—

16. (1) No person shall operate or drive a motor vehicle on a highway as a chauffeur unless he is licensed so to do, and no person shall employ anyone to drive a motor vehicle who is not a licensed chauffeur.

Incorporated in the insurance policy were certain statutory conditions, of which no. 5 reads as follows:—

5. The insurer shall not be liable under this policy while the automobile, with the knowledge, consent or connivance of the insured is being driven by a person under the age limit fixed by law, or, in any event, under the age of sixteen years, or by an intoxicated person.

The learned trial judge held that the respondent was entitled to recover against the appellant the amount of her judgment and costs, on the ground that the only "age limit fixed by law" in Ontario was sixteen years, and, as Alfred Schwartz was over that age at the time of the accident, statutory condition no. 5 afforded the appellant no relief from liability.

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On appeal the First Appellate Division (1) affirmed the judgment, the Chief Justice of Ontario and Mr. Justice Middleton for the reasons given by the trial judge, while Mr. Justice Hodgins and Mr. Justice Magee, although of opinion that eighteen years was the age limit fixed by law where a driver had no licence, held that, to escape liability by reason of statutory condition no. 5, the appellant must establish that the boy was driving the automobile with the knowledge, consent or connivance of Mrs. Schwartz, and this had not been established. From the judgment of the Appellate Division this appeal is brought.

The respondent's right of action against the appellant depends upon s. 85 above quoted. That section gives the person injured by an automobile in respect of which the owner has been insured against liability for injury, a "right of action" against the insurance company issuing the policy, provided such injured person has obtained a judgment against the person insured in respect of such injury and has issued execution thereon, and the execution has been returned unsatisfied. At the trial the respondent established that these statutory conditions precedent to her right of action against the appellant had been fulfilled. She then filed the formal judgment she had recovered against Mrs. Schwartz; the certificate of the Appellate Division that the appeal therefrom had been dismissed; the certificate of the taxing office as to the amount of the taxed costs, and the policy of insurance issued by the appellant to Mrs. Schwartz. She then closed her case. The appellant called no witnesses, but it filed a certificate under the hand of the Registrar General that Alfred Schwartz was born September 3rd, 1910, and Mr. Grant, on behalf of respondent, admitted that at the time of the accident Alfred Schwartz had no permit or licence to drive.

The first question that arises, therefore, is: On the material put before the court by the respondent, had she established a *prima facie* case? 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

(1) (1929) 64 Ont. L.R. 109.

a right to sue. The statute gives the respondent a right to sue the appellant on its policy in the place and stead of the insured, which right she would not have had but for the statute. The right to sue may be exercised by the respondent in the same manner as if the insured had paid the judgment and brought the action. This, I take it, refers to procedure. It is also to be exercised subject to equities which would prevail between the appellant and the insured. This, in my opinion, means that the respondent must establish liability on the policy against the appellant to the same extent as if the action had been brought by the insured, and that whatever defences the appellant would have been entitled to raise against the insured it may raise against the respondent. Had Mrs. Schwartz paid the judgment and brought action against the appellant, she must, in my opinion, in order to succeed, have established (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.

In the present action the respondent established the agreement to indemnify by the production of the policy. The fact that an injury of the kind insured against had resulted from the operation of Mrs. Schwartz' automobile, and Mrs. Schwartz' liability therefor, the respondent attempted to establish by the production of her judgment. In my opinion neither the injury nor the liability can, as against the appellant, be established in this manner. In 13 Halsbury, at pp. 542-543, the learned author says:—

> A judgment *in personam* is conclusive proof as against parties and privies of the truth of the facts upon which such judgment is based, but, excepting as above stated to prove its existence, date, and consequences, it is inadmissible in evidence as against strangers, except (1) where it determines a question of public right and is admissible as evidence of reputation; (2) in bankruptcy or administration proceedings; (3) in divorce cases; and (4) to some extent in patent actions.

In *Allan* v. *McTavish* (1), Burton J. A. points out that a judgment is conclusive upon third parties as well as upon the defendant to establish the relationship of debtor and creditor, and the amount of the debt and the date of its recovery; but that it furnishes no evidence whatever as regards third persons of the allegations in it on which re-

(1) (1883) 8 Ont. A.R. 440, at pp. 442-3.

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covery proceeded. "Those facts," his Lordship says "if material to the plaintiff's case, have to be established by appropriate evidence." See also *Ballantyne* v. *Mackinnon* (1); *Castrique* v. *Imrie* (2); *Duchess of Kingston's* case (3).

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.

The respondent's judgment not being evidence as against the appellant 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. Had the matter rested there the plaintiff would have been in the position of not having proved her case. The matter, however, did not rest there. At the trial counsel for both parties were of opinion that the appellant was precluded by the judgment from raising the question of Mrs. Schwartz' liability to the respondent. After Mr. Grant, who appeared for the respondent, had read to his Lordship s. 85 of the *Insurance Act*, the following discussion took place:—

HIS LORDSHIP: Does that mean that the plaintiff will have to make her case over again?

Mr. GRANT: Oh, no, she sues on the judgment.

HIS LORDSHIP: The insurance company have (had) an opportunity to come in, and they are practically precluded by the judgment.

Mr. GRANT: Yes, my Lord.

Mr. WALSH: Yes, nothing turns on that; *I am ready to admit all that.*

In view of this admission it is not now open to the appellant to contend that the liability of Mrs. Swartz to the re-

(1) [1896] 2 Q.B. 455.

(2) (1869-70) L.R. 4 H.L. 414, at p. 434.

(3) (1704) 2 Smith's Leading Cases, 1929 ed., at p. 666.

spondent for injuries received has not been established by the judgment.

Before the learned trial judge counsel for the appellant contended that the only point in controversy was the construction to be put on statutory condition no. 5. This appears from the following statement by Mr. Walsh:

Mr. WALSH: I suppose my learned friend wants to get down to what is the real contest in this trial. The real contest is that we say that under the provisions of this policy, Statutory Condition No. 5, we are relieved from liability, because the boy who was driving the car was not of an age permitted by law to drive the car.

Although counsel for the respondent agreed that the construction of statutory condition no. 5 was the chief point in controversy, he argued that the consent of Mrs. Swartz to her son driving her automobile could not be presumed from the judgment. The following shews the view taken by counsel:

HIS LORDSHIP: What is the real controversy now?

Mr. GRANT: The construction of Section 5, my Lord.

Mr. WALSH: That was my understanding, that it really got down to section 5.

HIS LORDSHIP: On what point?

Mr. GRANT: As to whether this boy is one of the prohibited class.

HIS LORDSHIP: On the assumption that he was not driving with the consent of the mother.

Mr. WALSH: * * * he could be driving with the consent of the mother, because my learned friend has taken judgment against the mother. * * *

The argument on behalf of the appellant was (*a*) that, under s. 44 of the *Highway Traffic Act,* the age limit fixed by law, for one who had not passed an examination and obtained a licence, was eighteen years, and that it was admitted that Alfred Schwartz at the time of the accident was only sixteen years of age and had no licence to drive an automobile, and (*b*) that the respondent was estopped from saying that the boy was not driving with the consent of his mother because the respondent had taken a judgment against the mother which she was only entitled, under the statute, to have if the boy was driving with his mother's consent.

In the view which I take of the second branch of this argument, it is not necessary in this appeal to determine "the age limit fixed by law," within the meaning of condition no. 5 (which question I leave open), for, assuming that the appellant's contention is right and that the age

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limit fixed by law is eighteen years, the appellant, to escape liability under the condition, must also shew that the boy was driving with the knowledge, consent or connivance of his mother. Of this there was absolutely no evidence.

The appellant's contention that, as against the respondent, such consent must be presumed, cannot, in my opinion, be supported. Sec. 42 (1)* provides that the owner of a motor vehicle shall be responsible for any violation of the Act unless, at the time of such violation, the motor vehicle was in the possession of some person other than the owner or his chauffeur without the owner's consent.

Sec. 43† reads as follows:

> 43. (1) When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver.

If, therefore, Mrs. Schwartz, in the case of *Yorke* v. *Schwartz,* did not set up in her pleadings, and prove at the trial, that her son was, at the time of the accident, driving her automobile without her consent, judgment may have gone against her because she did not meet the onus cast upon her by s. 43, although, as a matter of fact, the son may have been driving the car not only without her consent but contrary to her instructions. Furthermore, I do not see anything in the Act that would prevent Mrs. Schwartz from being liable at common law for the damage caused by her son's negligence if it were shewn that he was in her employ and, at the time of the accident, in the course of his employment. It does not necessarily follow, therefore, that because judgment was given against her, Mrs. Schwartz had any knowledge that her son was driving her automobile, or that she consented thereto.

In the present action it was repeatedly stated by Mr. Grant at the trial, that, in the suit of *Yorke* v. *Schwartz,* the consent of Mrs. Schwartz was not a matter in issue, nor was any finding made thereon. The pleadings in that case were not put in evidence and they are not before us. The position taken by the parties appears clearly from the discussion before the trial judge. After Mr. Walsh had stated that the respondent was estopped from questioning

S. 41 (1) of the *Highway Traffic Act,* R.S.O., 1927, c. 251. (Repealed and new section substituted by 19 Geo. V, c. 68, s. 9).

†Now s. 42 of R.S.O., 1927, c. 251.

the consent of Mrs. Schwartz to her son driving the car, the following discussion took place:—

Mr. GRANT: That was not the issue at all in the other action.

Mr. WALSH: I think it was.

Mr. GRANT: Well, look at the pleadings and you will see what was at issue.

Mr. WALSH: I was not at the trial of the other action.

Mr. GRANT: Well, I have the pleadings here, and you can see them if you want to.

HIS LORDSHIP: Well, do you want to offer any evidence?

Mr. WALSH: I would if there was any contest about that, my Lord.

HIS LORDSHIP: Mr. Grant is not admitting that the automobile was driven with the knowledge and consent of the insured. You are not admitting that?

Mr. GRANT: No, I am not admitting that; * * *

Mr. Walsh then informed the court that he had subpoenaed the boy's mother but that she had not yet arrived in court. The hearing was adjourned until she arrived. On her arrival the following took place:—

Mr. WALSH: My Lord, since the adjournment I have looked into this matter a little further; I do not think that I am called upon to call this witness.

HIS LORDSHIP: Well, don't argue it now, but make your own case in your own way, and then we will get to the argument.

Mr. WALSH: Well, I am going to say, my Lord, I am going to rely on Section 41 of the Act.

HIS LORDSHIP: Then you are closing your case?

Mr. WALSH: Yes, my Lord.

The appellant was clearly aware that the respondent was not admitting that the boy was driving the car with the consent of his mother. The onus was, therefore, upon the appellant to prove it. That it did not do. The defence, therefore, fails.

As to the amount which the respondent is entitled to recover against the appellant, I agree with the court below. The only item requiring consideration is the costs of the appeal by Mrs. Schwartz in the former action. That appeal, I think, was a reasonable one and would likely have been taken by the appellant had it defended the action.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Walsh & Mungovan.*

Solicitors for the respondent: *Johnson, Grant, Dods & MacDonald.*