1938
* June 10.
* Dec. 5.

PROVIDENT ASSURANCE COMPANY (THIRD PARTY) .... APPELLANT;

AND

MARK ADAMSON (DEFENDANT) .... RESPONDENT;

AND

CHARLES C. MARSHALL (PLAINTIFF).

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Insurance—Motor vehicle liability policy—Claim under policy for indemnity for damages recovered against insured—Failure by insured to comply with statutory conditions requiring him to give promptly to insurer "all available particulars" of accident and to "co-operate with the insurer * * * in the defence" of the action (now 4 (1), 4 (2), under s. 188, Insurance Act, R.S.O., 1937, c. 256)—Forfeiture of right to indemnity (s. 191)—Refusal of relief (asked under s. 192).*

It was *held* that respondent, who held a motor vehicle liability policy issued by appellant insurance company, was not entitled to recover under it any indemnity against the company in respect of the judgment recovered against respondent in a certain action for damages for injuries caused by the motor vehicle (driven by respondent): on the ground that, by respondent's course of conduct (detailed in the present judgment) he had failed, in violation of his obligations under statutory conditions forming part of the policy (now numbered 4 (1), 4 (2), under s. 188 of *The Insurance Act,* R.S.O., 1937, c. 256) to give promptly to the company "all available particulars" of the accident (4 (1)) and to "co-operate with the insurer, except in a pecuniary way, in the defence" of the action against respondent (within the meaning of said statutory condition 4 (2); its meaning discussed, in reference to the facts in the present case. "The defence of the action" necessarily involves in any practical construction of the term the opportunity for an early and favourable settlement of the action). The respondent having violated a term or condition of the contract, then, by force of what is now s. 191 of *The Insurance Act* (R.S.O., 1937, c. 256), his claim was rendered invalid and his right to recover

* PRESENT:—Duff C.J. and Cannon, Crocket, Davis and Hudson JJ.

indemnity became forfeited. Relief under s. 192 of the Act was refused, the Court holding that, under all the circumstances of the case, the trial judge was amply justified, in the exercise of his discretion, in declining to relieve against the forfeiture, even if respondent's conduct could fairly be said to be merely "imperfect compliance" with the statutory conditions, which, under s. 192, is the only ground upon which the court is given power to relieve.

Judgment of the Court of Appeal for Ontario ([1937] O.R. 872) reversed; and judgment of McTague J. ([1936] O.R. 394), dismissing respondent's claim against appellant, restored.

APPEAL from the judgment of the Court of Appeal for Ontario (1) allowing (Henderson J.A. dissenting) the present respondent's appeal from the judgment of the trial judge, McTague J. (2), dismissing his claim against the appellant insurance company, under a motor vehicle liability policy issued by the company, for indemnity in respect of a judgment recovered in an action in the Supreme Court of Ontario by one Marshall (plaintiff) against the respondent (defendant) for damages for injuries suffered by Marshall (plaintiff) when a milk wagon driven by him was struck by an automobile driven by the respondent (defendant). The said insurance company was (on its application) added as a third party in the action, under subs. 7 (enacted by 25 Geo. V, c. 29, s. 36 (2)) of s. 183*h* of *The Insurance Act,* Ont. (R.S.O., 1927, c. 222) (said subs. 7 being now subs. 7 of s. 205 of *The Insurance Act,* R.S.O., 1937, c. 256). The company denied liability to indemnify the present respondent in respect of the claim in question. The material facts and circumstances of the case are set out in the judgment of Davis J. now reported. The appeal of the company to this Court was allowed and the judgment at the trial was restored with costs throughout.

G. A. Drew K.C. for the appellant.

I. F. Hellmuth K.C. and *J. R. Cartwright K.C.* for the respondent.

The judgment of the Chief Justice and Crocket, Davis and Hudson JJ. was delivered by

DAVIS J.—This is an appeal from the Court of Appeal for Ontario (1) in an automobile insurance case. The re-

(1) [1937] O.R. 872; [1937] 4 D.L.R. 292.

(2) [1936] O.R. 394; [1936] 4 D.L.R. 383.

spondent at the time of the accident in question held an owner's motor vehicle liability policy with the appellant insurance company. The company denied liability for indemnity in respect of the particular accident and that issue falls to be determined in these somewhat novel proceedings which form part of the action in which the injured party sued the respondent for damages for the injuries received in the accident and in which action the injured party as plaintiff recovered judgment against the respondent as defendant for $6,500 and costs. The procedure for setting up and determining the issue of liability as between the defendant and the insurance company was introduced in Ontario in 1935 (25 Geo. V, ch. 29, sec. 36 (2)) when the following subsection (7) was added to sec. 183*h* of *The Insurance Act:*

> (7) Where an insurer denies liability under a motor vehicle liability policy it shall have the right upon application to the court to be made a third party in any action to which the insured is a party and in which a claim is made by any party to the action for which it is or might be asserted indemnity is provided by the said policy.

That subsection is now sec. 205 (7) of *The Insurance Act,* being ch. 256 of the Revised Statutes of Ontario, 1937. The insurance policy in question was issued May 15th, 1934, and was by renewal in full force and effect at the date of the accident, October 3rd, 1935.

The facts now known are not really in dispute. The respondent Adamson, a married man, 51 years of age, was a fruit broker residing and carrying on business in Toronto. On the evening of October 2nd, 1935, he and two other men remained in Adamson's downtown office from about eleven o'clock in the evening until around two o'clock in the morning. Two young women, about 28 or 30 years of age, neither employees nor relatives, came to the office about eleven or eleven-thirty that evening and remained till around two o'clock in the morning. Adamson admitted that there were two cases of beer, though he said only half a dozen pints were consumed and that he had about two glasses—a bottle and a half—perhaps one hour apart. Adamson, some time after two o'clock, was driving his motor car up town with the two girls in the front seat with him when he struck a milk wagon crossing in his path. He heard the man on the milk wagon yell and he felt the impact but he did not stop his car. At the next

corner he let the girls out of the car and proceeded by a somewhat circuitous route to his home in the northern part of the city. The police were at his home shortly thereafter; he denied that he was in any accident but the police told him that they had witnesses of the accident. It is not necessary to follow the police court proceedings. The man on the milk wagon was very seriously injured and was removed to the hospital and in his subsequent action against Adamson recovered, as stated above, $6,500 and costs.

In what is called the third party proceedings (in the action between the injured man and Adamson) the appellant company denied liability under its policy upon the ground, speaking broadly for the moment, that Adamson did not give the insurance company "all available particulars" of the accident, as it is alleged he was by his contract bound to do, and failed to "co-operate" with the insurance company in the defence of the action, as it is further alleged he was bound by his contract to do.

What happened was this: The day of the accident, October 3rd, 1935, Adamson telephoned the insurance company that he had had an accident in the early hours of the morning. The insurance company instructed its adjuster, Bethune, to deal with the matter. Bethune tried to communicate with Adamson on October 3rd but was unable to reach him until the next day when Adamson answered Bethune's telephone message to him. Bethune asked Adamson on the telephone certain specific questions. Adamson stated that there were no witnesses to the accident and also that he had consumed no intoxicating drinks before the accident. Bethune then gave instructions to West, in his office, to investigate the claim. West had considerable difficulty in arranging an appointment with Adamson and it was not until nearly two months after the accident, in spite of numerous calls at Adamson's office and of telephone messages to communicate with him, that West procured an interview with and obtained a signed statement from Adamson in regard to the accident. In this written statement Adamson repeated that he had consumed no intoxicating drinks before the accident, but he left blank the space for the answers to the questions as to the names and addresses of the witnesses in his own car and of the

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witnesses in the other car, and of the other witnesses. Prior to signing this statement Adamson told West positively that there were no passengers in the car with him at the time of the accident. Then, in a general discussion after signing the form, Adamson told West that he had a gentleman in the automobile with him. When West questioned Adamson about not giving this information before, Adamson explained that the gentleman was a rather prominent individual and that he did not wish his name to become involved on account of the accident. West then pointed out that it was necessary that he give the name of this passenger and insisted that he do so. Adamson then said that he was in error, that he had made a mistake in regard to this gentleman, and that there were in fact no passengers in the automobile with him.

On November 27th, 1935, Marshall, the injured man, had issued a writ against Adamson. On December 5th, 1935, the solicitor for the insurance company under instructions from the company entered an appearance on behalf of Adamson. On December 11th a formal statement of defence was delivered, though the company's solicitor had never had an opportunity to see Adamson. On December 14th, 1935, the solicitor for the company wrote to Adamson, advising him of the steps which had been taken and pointing out that " we are defending this action under the provisions set forth in the policy between you and the Provident Assurance Company." On December 21st, 1935, the solicitor again wrote to Adamson, stating that he had had no communication from him. The letter proceeded:

> We would like your immediate attention to this matter and request that you get in touch with this office as soon as possible, as we require complete co-operation from you in the matter. It is our duty to point out to you now that if for lack of co-operation or any other reason that we have not yet learned, the liability as between the company and you is called into question, that anything we are now doing in defence of the action will not estop us from claiming over against you for anything we may have to pay, by reason of statutory obligation, or because of anything else affecting the contract of insurance, as between yourself and the company.
>
> Please telephone this office without delay for an appointment to go into this matter.

Notwithstanding the letter of December 21st, it was not until January 8th, 1936, that the company's solicitor saw Adamson for the first time. Adamson went into the solicitor's office that day at the exact hour fixed for Adamson's

examination for discovery as defendant in the action, although he had been asked to go half an hour earlier than the time fixed for the examination. The solicitor asked Adamson if there were any passengers in the car with him and he stated that he was alone in his car. The solicitor says that from Adamson's

demeanour at the time, and also because I had reason to suspect that he had a man with him—that being the report I got—I warned him that it was a serious matter to go into the evidence on the examination for discovery, as he would be under oath.

There was a silence followed during which he looked at me blankly. The next remark was that he would like to see his own solicitor and have him present at the examination for discovery if possible. I told him he could do that by all means and suggested that he telephone his solicitor from my office.

Adamson, after telephoning his own solicitor's office and finding his solicitor was out, then said he did not intend to go on with the examination for discovery until he had seen his own solicitor and asked him what would happen to him if he did not attend the examination after being served and paid the conduct money. Adamson refused to go on with the examination fixed for that day. Subsequently a motion to commit was launched by the solicitors for the plaintiff but this motion appears to have been adjourned from time to time, no doubt by consent of the solicitors for the parties, and the examination for discovery took place some weeks later, Adamson's own solicitor appearing with him.

On January 11th Adamson's personal solicitor called on the company's solicitor and gave the information that Adamson had had a couple of girls in the car. On January 13th Adamson, accompanied by his own solicitor, went to the office of the company's solicitor and gave a full statement. The company's solicitor immediately notified his client of these facts and, following the receipt of instructions from the company, wrote to Adamson on January 16th, 1936, denying liability under the policy of insurance and notifying Adamson that his firm would not continue the conduct of the defence.

When we originally undertook your defence, we were unaware of the circumstances which we now propose to set up in denying our responsibility for indemnity.

The company's solicitor made inquiries regarding the two girls whose names had been given to him and found no one with the names given to him at the given addresses.

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On May 12th, 1936, Adamson's personal solicitor wrote the company's solicitor (following a telephone conversation between them) that the earlier addresses were incorrect and that the correct addresses were now being given. It was said that there was no intention on Adamson's part to mislead the company's solicitor in any way and that the wrong addresses were merely an error.

Following upon the letter of the company's solicitor to Adamson of January 16th, 1936, above referred to, the appellant company made application to the Master in Chambers to be added as a third party in the action by virtue of subsection (7) added to sec. 183*h* of *The Insurance Act* above set out; the order was refused on January 31st but that order was reversed by Middleton, J.A., on February 13th, 1936, and the appellant was added as a third party in the action. The settlement of the formal order of Mr. Justice Middleton did not take place until April 15th. Up until that time the name of the company's solicitor remained formally on the record as solicitor for Adamson.

The trial of the third party issue was a separate trial from that of the original issue in the action between the injured man, Marshall, and Adamson, though both issues were tried by the same judge, Mr. Justice McTague. The learned trial judge dismissed with costs the respondent's claim for indemnity (1). The judgment was reversed by a majority of the Court of Appeal for Ontario (2), which held that the appellant was bound to fully indemnify the respondent against the original judgment and costs.

In the meantime, as now appears to us from a reading of the appellant's factum though the matter was never mentioned to us during the argument, the appellant has paid $5,000 and costs to the plaintiff and the respondent has paid $1,500, the balance of the judgment.

The insurance company is now obviously in the position of having to claim the return of its money from the insured, Adamson, though no amendments have been made; in fact, nothing was said about this aspect of the case. The statement is only now noticed in the appellant's factum (to which no objection was taken by counsel for

(1) [1936] O.R. 394; [1936] 4 D.L.R. 383.

(2) [1937] O.R. 872; [1937] 4 D.L.R. 292.

the respondent) that the insurance company has paid to the plaintiff in the action $5,000 and costs "under the provisions of sec. 205 of *The Insurance Act*.". The question whether or not sec. 205 of *The Insurance Act*, R.S.O., 1937, chap. 256, really means that an insurance company has to pay, notwithstanding that there may be no liability to its insured, was not even mentioned by any of the counsel on the hearing of the appeal before us. That being so, for the purposes of this appeal we ought not to enter upon the rather difficult question that may be raised in some other case as to what is the proper interpretation of the section. Section 205 was the provision under which the appellant must have felt bound to pay the claimant. That section reads as follows:

205. (1) Any person having a claim against an insured, for which indemnity is provided by a motor vehicle liability policy, shall, notwithstanding that such person is not a party to the contract, be entitled, upon recovering a judgment therefor against the insured, to have the insurance money payable under the policy applied in or towards satisfaction of his judgment and of any other judgments or claims against the insured covered by the indemnity and may, on behalf of himself and all persons having such judgments or claims, maintain an action against the insurer to have the insurance money so applied.

(2) No creditor of the insured shall be entitled to share in the insurance money payable under any such policy in respect of any claim for which indemnity is not provided by the policy.

(3) (i) No assignment, waiver, surrender, cancellation or discharge of the policy, or of any interest therein or of the proceeds thereof, made by the insured after the happening of the event giving rise to a claim under the policy, and

(ii) no act or default of the insured before or after such event in violation of the provisions of this Part or of the terms of the contract, and

(iii) no violation of the *Criminal Code* or of any law or statute of any province, state or country, by the owner or driver of the automobile,

shall prejudice the right of any person, entitled under subsection 1, to have the insurance money applied upon his judgment or claim, or be available to the insurer as a defence to such action.

(4) The insurer may require any other insurers liable to indemnify the insured in respect of judgments or claims referred to in subsection 1 to be made parties to the action and to contribute rateably according to their respective liabilities, and the insured shall, on demand, furnish the insurer with particulars of all other insurance covering the subject-matter of the contract.

(5) Where a policy provides for coverage in excess of the limits mentioned in section 202 or for extended coverage in pursuance of section 203, nothing in this section shall, with respect to such excess coverage or extended coverage, prevent the insurer from availing itself, as against any claimant, of any defence which the insurer is entitled to set up against the insured.

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(6) The insured shall be liable to pay or reimburse the insurer, upon demand, any amount which the insurer has paid by reason of the provisions of this section which it would not otherwise be liable to pay.

(7) Where an insurer denies liability under a motor vehicle liability policy it shall have the right upon application to the court to be made a third party in any action to which the insured is a party and in which a claim is made by any party to the action for which it is or might be asserted indemnity is provided by the said policy.

The minimum coverage provided for by sec. 202 is $5,000 for any one person but the policy in question was for an extended coverage, i.e., up to $10,000 for any one person.

For the purposes of this appeal, in view of the attitude taken by counsel for both parties, we shall assume that the real issue before us, as it was argued, is whether or not there was any liability upon the insurance company to indemnify Adamson in respect of the claim arising out of the accident, and, if there was not such liability, then order the respondent Adamson to repay to the appellant company the amount that the company paid to the plaintiff in satisfaction *pro tanto* of his judgment against Adamson.

The Court of Appeal attached considerable significance to the fact that statutory condition 11, found in R.S.O., 1927, chap. 222, sec. 175, was omitted from the statutory conditions as revised in 1932 and now appearing in R.S.O., 1937, chap. 256, sec. 188.

Statutory condition 11, which was omitted, read as follows:

> Any fraud or wilfully false statement made under oath or in a declaration in relation to any of the above particulars shall vitiate the claim of the person making the declaration in any matter affected by such fraud or false statement.

But the effect of statutory condition 11 did not entirely disappear from the *Insurance Act.* A new and separate section of the Act was added in the revision of 1932 (22 Geo. V, chap. 25) and appears now in Revised Statutes of Ontario, 1937, as sec. 191. This provides:

> 191. (1) Where an applicant for a contract falsely describes the automobile to be insured, to the prejudice of the insurer, or knowingly misrepresents or fails to disclose in the application any fact required to be stated therein or where the insured violates any term or condition of the policy or commits any fraud, or makes any wilfully false statement with respect to a claim under the policy, any claim by the insured shall be rendered invalid and the right of the insured to recover indemnity shall be forfeited.

Two statutory conditions (sec. 188) relied upon by the appellant appear in and form part of the policy.

4. (1) The insured shall promptly give to the insurer written notice, with all available particulars, of any accident involving loss or damage to persons or property, and of any claim made on account of accident; shall verify by affidavit or statutory declaration, if required by the insurer, that the claim arises out of the operation or use of an automobile described in the policy and that the person operating or responsible for the operation of the automobile at the time of the accident is a person insured by the policy; and shall forward immediately to the insurer every writ, letter, document or advice received by him from or on behalf of the claimant.

(2) The insured shall not voluntarily assume any liability or settle any claim except at his own cost. The insured shall not interfere in any negotiations for settlement or in any legal proceeding but, whenever requested by the insurer, shall aid in securing information and evidence and the attendance of any witness, and shall co-operate with the insurer, except in a pecuniary way, in the defence of any action or proceeding or in the prosecution of any appeal.

The respondent's obligation under statutory condition 4 (1) was to give promptly to the insurance company "all available particulars" of the accident. That he did not do so is beyond question. He deliberately withheld particulars from the company for several months. I cannot imagine that any competent solicitor engaged in the practice of defending motor accident cases, given the full story and the surrounding facts and circumstances of this case as we now know them, would not at once have made every reasonable and proper effort to effect a settlement of the injured man's claim to avoid the submission of the story to a jury. It is admitted that the injured man did not know the facts until the examination of the respondent for discovery, which did not take place until several months after the accident. When the full story was known to the injured man, a settlement to the advantage of the respondent and his insurer would obviously become almost impossible in an action in which the injured man would be entitled to a jury. It is highly probable that a settlement of the claim could have been arrived at, at a moderate amount, had the claim been adjusted and settled at once, as it, no doubt, would have been had the insurance company been given promptly all available particulars.

The respondent's further obligation, under statutory condition 4 (2), was to co-operate with the insurer, except in a pecuniary way, in the defence of the action. The con-

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tention of the respondent, which was accepted by the majority of the Court of Appeal, was that there had been no failure to co-operate with the insurer in the defence of the action within the meaning of the policy. Counsel for the respondent put their submission in their factum this way:

> An admittedly false statement in a collateral matter made after the accident is retracted and corrected before the insurer had acted in any way upon it. Sufficient information had been supplied to enable the pleadings to be drawn without reference to the insured. Before the examination for discovery is held, the company is in possession of all the facts in ample time to prepare for the trial of the action. It is submitted that on any reasonable test this conduct does not constitute a "failure to co-operate in the defence of the action."

But "the defence of the action" necessarily involves in any practical construction or interpretation of the term the opportunity for an early and favourable settlement of the action. It is, in my view, far too narrow a construction to put upon this term of the policy that so long as the insured turns up at the trial, a year or so after the accident, and assists in the defence that he has fulfilled his obligation, notwithstanding such a course of conduct as the respondent adopted in this case during the first two or three months following upon the accident.

The respondent clearly violated a term or condition of the contract and by force of sec. 191 his claim was rendered invalid and his right to recover indemnity became forfeited.

The respondent, however, invokes the relieving provision, sec. 192 of *The Insurance Act*, R.S.O., 1937, ch. 256 (formerly sec. 178 as enacted 1932, ch. 25, sec. 2), which is as follows:

> Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss, and a consequent forfeiture or avoidance of the insurance in whole or in part, and the Court deems it inequitable that the insurance should be forfeited or avoided on that ground, the Court may relieve against the forfeiture or avoidance on such terms as it may deem just.

Here there was a deliberate failure on the part of the respondent to comply with the statutory conditions requiring him to give promptly all available particulars of the accident and to co-operate in the defence of the action. The learned trial judge exercised his discretion in declining to relieve against the forfeiture, and under all the circumstances of the case he was amply justified, in my view, in so doing, even if the conduct of the respondent

in this case could fairly be said to be merely "imperfect compliance" with the statutory conditions, which, under sec. 192, is the only ground upon which the court is given power to relieve.

I would allow the appeal and restore the judgment at the trial with costs throughout.

CANNON J.—I would allow the appeal and restore the judgment of the trial judge with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Balfour, Drew & Taylor.*

Solicitors for the respondent: *Smith, Rae, Greer & Cartwright.*