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The Omnibus Clause

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Résumé de l'article

Dans ce premier article, M. Brooke Claxton analyse les jugements rendus par M. le juge Laliberté et par la Cour d'appel dans la cause de Joseph Hallé contre la *Canadian Indemnity Company*, qui avaient établi l'illégalité de la clause dite « omnibus » dans la police d'assurance automobile. Dans un second article, M. Claxton se propose d'examiner le jugement de la Cour suprême qui accorde à la clause un caractère de validité.

Comme on sait, le point principal des arrêts rendus jusque-là, c'était l'absence d'intérêt assurable de l'assuré dans la responsabilité du conducteur de l'automobile lorsque lui-même n'est pas au volant. La Cour suprême vient d'exprimer une opinion tout à fait contraire, au sens de l'article *1029* du Code civil, comme l'avaient fait précédemment deux des juges de la Cour d'appel. C'est ce dernier aspect que notre collaborateur traitera dans notre numéro d'octobre, avec la sûreté d'analyse qui caractérise cette première partie de son travail. – A.

The Omnibus Clause

by

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I

Dans ce premier article, M. Brooke Claxton analyse les jugements rendus par M. le juge Laliberté et par la Cour d'appel dans la cause de Joseph Hallé contre la Canadian Indemnity Company, *qui avaient établi l'illégalité de la clause dite « omnibus » dans la police d'assurance automobile. Dans un second article, M. Claxton se propose d'examiner le jugement de la Cour suprême qui accorde à la clause un caractère de validité.*

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A judgment of the greatest possible interest to everyone interested in insurance matters was recently rendered by the Supreme Court of Canada in the case of *Hallé* v. *The Canadian Indemnity Company*. The main point in issue in the case was whether or not the omnibus clause in automobile policies was valid and effective. By this clause, which forms part of practically all automobile insurance policies, the in-

surer undertook to give any person driving the automobile of the insured with his consent the same protection as was given to the insured himself against claims for damages to the persons or property of others for which the person driving the insured's automobile might be held legally liable.

The decision of the Superior Court at Quebec, in which the case arose, was given by Mr. Justice Laliberté, on the 12th January, 1936, and it was reported in 3 Ins. L. R. 188. It
78 was held that the insurance was ineffective as regards a third person driving the car, because the insured who took the policy had no insurable interest in the possible liability of a third person. That decision was to the same effect as the decision in the case of Vandepitte v. Preferred Accident Insurance Company (1933) A. C. 70; (1933) 1 D. L. R. 289, 49 T. L. R. 90; decided in favour of the Company by the Privy Council on an appeal arising in a British Columbia case, in which the terms of the contract were substantially the same as in the present case.

When the case was taken to the Court of Appeal, the majority of the court, consisting of the Honourable Mr. Justices Bernier, Hall and Barclay, affirmed the judgment of the Superior Court, maintaining the defence of the insurance company, and dismissed the appeal. The Honourable Chief Justice Sir Mathias Tellier and the Honourable Mr. Justice Galipeault dissented. The decision of the Court of Appeal is reported in 4 Ins. L. R. 3.

On a further appeal being made to the Supreme Court of Canada the latter reversed the decision of the Quebec courts and held the omnibus clause to be valid and binding against the company.

Before referring to the points of Law decided in the case, it will be convenient to describe the circumstances in which the case arose.

One Bourget was riding in an automobile belonging to Rolland Hallé. The latter had a policy of insurance in the Canadian Indemnity Company whereby it undertook to indemnify him against claims arising from his liability to other persons to the extent of $10,000, and also for damage to the property of other persons to the extent of $1,000. That policy had written into it what is called "the omnibus clause", whereby the company agreed to extend the benefit of the insurance to any person driving the automobile of the insured with his consent. The car of the insured was being driven by Joseph Hallé, the brother of the insured, with his consent. Bourget was seriously injured and sued Joseph Hallé for damages.

The defendant, Joseph Hallé, sent the action to his brother, the insured, in order that he might forward it to the company, so that it might defend him; but the company returned the action to Joseph Hallé, disclaiming liability. The Plaintiff, Bourget, then proceeded to take judgment *ex parte* against Joseph Hallé for $9,170 and costs. The Defendant, Joseph Hallé, had meanwhile taken an action in warranty against the company asking that it indemnify him against any judgment that might be rendered. When the judgment in the case was rendered, the defendant, Joseph Hallé, also made an incidental demand against the insurance company.

It is in these latter proceedings between Joseph Hallé, the defendant in the principal case, and the Canadian Indemnity Co., the insurer of his brother, that the judgment under review was given. The judgment of the Supreme Court is not yet reported.

The legal points involved in the case were really two in number, both of the utmost importance, not only in automobile insurance, but also of more general application. Disregarding other defences, the defendant insurance company asserted that there was no contract between it and Joseph Hallé. This was quite evident the only contract was one be-

tween the insurance company and Rolland Hallé. The company said that that contract was ineffective as regards Joseph Hallé or any third person because.

(1) Rolland Halle had no insurable interest in the liability of his brother, and

(2) The omnibus clause was not a valid stipulation made for another in accordance with Article 1029 of the Civil Code and, even if it was, the lack of insurable interest could not be overcome by this fact.

The rules respecting insurable interest are laid down most clearly in Articles 2472, 2474 and 2480 of the Civil Code. These Articles read as follows:

2472. All persons capable of contracting may insure objects in which they have an interest and which are subject to risk.

2474. A person has an insurable interest in the object insured whenever he may suffer direct and immediate loss by the destruction or injury of it.

2480. The contract of insurance is usually witnessed by an instrument called a policy of insurance. The policy either declares the value of the thing insured and is then called a valued policy, or it contains no declaration of value, and is then called an open policy. Wager or gaming policies, in the object of which the insured has no insurable interest, are illegal.

It has been a fundamental rule of insurance that no one can take out insurance except to cover himself against loss or against the risk of loss or liability. Otherwise a person might profit from the insurance and this might encourage the placing of insurance with the hope of reaping a profit from loss, thereby giving an incentive to destroy property or incur loss or liability. The rules respecting insurable interest are founded then on the plainest rules of good morals and public order. They are laid down in clear terms in our Code and they have been rigidly enforced by the courts, even against the contract of the parties (Anctil v. Manufacturer's Life Insurance Company (1899) A. C. 604).

Had the rules respecting insurable interest stood alone, the courts would have had little difficulty in arriving at the decision that Rolland Hallé had no insurable interest in his brother's liability; but the matter had also to be considered in the light of Article 1029 of the Civil Code. This reads:

1029. A party in like manner may stipulate for the benefit of a third person, when such is the condition of a contract which he makes for himself, or of a gift which he makes to another; and he who makes the stipulation can revoke it, if the third person have signified his assent to it.

It was argued that Rolland Hallé in taking out the insurance for himself had also made it a condition of the contract he made on his own behalf that its benefit should extend to any third person driving the automobile with his consent, and that such person (once he had been determined) had a contractual right against the insurance company which made him, as it were, the insured. It was then argued that either such third person had an insurable interest against liability for damages to others and this rendered the policy perfectly legal, or that the question of insurable interest did not arise. In other words, according to this line of argument, Rolland Hallé, who by the contract and in the circumstances, became the insured, and, having an obvious insurable interest against liability, could recover from the insurance company.

This second point, that the contract was valid under C. C. 1029, is one of very great difficulty and it is not surprising that our Court of Appeal should have divided three to two on it. This point, it will be noted, did not arise in the Vandepitte case because there is nothing equivalent to our Article 1029 in the common law which governed the matter in the Province of British Columbia where that case arose.

Referring first to the opinions of the Judges of the Court of Appeal in the present case, Mr. Justice Bernier held that in order that there might be a contract of insurance relative

to Joseph Hallé, it was essential that Rolland Hallé should have an insurable interest in the person or liability of Joseph Hallé. Moral interest was not enough. The interest to support insurance must be such that the insured would suffer direct and immediate loss, measurable in money, upon the happening of the event insured against. This was not present here. The case was not one where an owner is held responsible for the negligence of a driver under Article 1054 C. C. Rolland Hallé was not involved. Joseph Hallé was trying to sue on the policy and there being no insurable interest, he could not recover. Mr. Justice Bernier did not discuss the effect of Article 1029.

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Mr. Justice Hall said that the Company had virtually made two distinct contracts. By one it insured Rolland Hallé against his own liability and by the other it insured him against the liability of third persons. The contract in favour of the third person was quite foreign to that in his favour. While it was true that the insured, Rolland Hallé, could not profit from the insurance, and the insurance was not a wagering contract in this sense, it was none the less void as lacking in insurable interest. Moreover, the contract, insofar as it related to Joseph Hallé or a third person, was not a contract under Article 1029 of the Civil Code. It was not a condition of the contract which Rolland Hallé made for himself but was a separate undertaking to insure, foreign to the contract which Rolland Hallé made for himself. However, even if Article 1029 applied, Mr. Justice Hall held that it would be superseded by the lack of insurable interest which nothing could cover.

The Honourable Mr. Justice Barclay, speaking of the nature of the contract, said:

> The legality of the contract must depend upon the legality of what he (Rolland Hallé) is doing and not upon the capacity and the rights of the third party whom he intends to benefit. It was Rolland Hallé and not the appellant who effected the insurance, and its validity must depend upon Rolland Hallé, right at the time he made the contract.

He went on to hold that Rolland Hallé had no insurable interest in the liability of the person driving the car with his consent beyond his possible liability under Article 1054, which was not involved here. He held that this was so even if Article 1029 applied. He doubted, however, if the Article applied, as he thought that for the policy to constitute a contract between the third person driving the car with the consent of the insured and the insurance company, was to go far beyond what was intended by Article 1029.

In effect the majority of the Court of Appeal held that the contract was invalid as regards Joseph Hallé owing to lack of insurable interest, and that this was so even if the contract fell under Article 1029, which was doubted by Hall and Barclay, J.J.

Chief Justice Tellier dissented on the ground that the contract was one whereby Rolland Hallé took insurance against the liability of a third person which the third person had an insurable interest in. Rolland Hallé virtually made the contract for the benefit of the third person. Once the contract had been made for such third person, and the third person had been determined by the accident he was, as it were, the insured. He had an insurable interest in his own liability, and the policy was therefore valid as regards him. The intention of the contract was not to benefit Rolland Hallé but to benefit the third person. Rolland Hallé did not and could not benefit from a loss in any way. The contract was not a wagering contract. It had violated no law. It was in fact supported by the last paragraph of Article 2472. It was a valid contract under Article 1029, as it was not necessary that a person stipulating for another should have any peculiar interest in benefiting that other.

The Honourable Mr. Justice Galipeault said that this was not a wagering contract void under Article 2480 and it

was not immoral. To the contrary there was every moral reason for holding the clause good. He agreed that the clause protecting third persons would be void if it provided for payment to the insured, Rolland Hallé, but that was not the case here. There was only one contract of insurance but it covered the person named in the policy as the insured as well as third persons. The law did not anywhere prohibit a third person from being covered in a contract of insurance.

It is from this judgment that an appeal was taken to the Supreme Court, and the opinion of that Court will be the subject of the next article in this series.