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Résumé de l'article

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The Omnibus Clause

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II

Voici la deuxième partie de l'étude de M. Claxton sur la clause « omnibus » dans la police d'assurance automobile. L'auteur examine maintenant le jugement de la Cour Suprême dans la cause Hallé contre Canadian Indemnity Co.

In the last number reference was made to the very important decision of the Supreme Court of Canada in the case of Hallé v The Canadian Indemnity Company (1937) S.C.R. 368; 4 Ins. L.R. 259, and the facts and the decision which

gave rise to the appeal to the Supreme Court were reviewed. It will be recalled that Laliberté J. in the Superior Court and a majority of the Court of Appeal held that the protection offered by what is called the "omnibus clause" in automobile insurance policies was ineffective to protect the brother of the insured against the brother's responsibility for damages caused while the brother was driving the car of the insured with the latter's consent. The omnibus clause was designed to give
122 just that protection and the main question in the case was whether the clause itself was valid. The Quebec courts held that it was not, principally on the ground that the insured had no insurable interest in his brother's liability and that consequently the clause did not protect the brother. From this decision, an appeal was taken to the Supreme Court and in the judgment cited above, that court unanimously allowed the appeal, maintained the plaintiff's action and upheld the omnibus clause in Quebec policies.

The judgment of the court was given by Hon. Mr. Justice Rinfret and no other judge's opinions are reported.

After reviewing the facts, the decisions and the policy the learned Judge said that while it was true that Rolland Hallé (the insured) was described in the policy as the insured it did not follow that other persons entitled to certain benefits of the insurance were to be excluded. The question is : What rights did Joseph Hallé (the brother who was driving) have under the policy ? He was undoubtedly one of the persons the Respondent Company undertook to indemnify in consideration of the premium. At page 373 he goes on :

> He was not therein mentioned (in the policy) by name; but, according to the law of Quebec, as expressed in the French doctrine and jurisprudence, it is not necessary for its validity that the stipulation for the benefit of third parties should be made in words definitely ascertaining these persons; it is sufficient if they are ascertainable on the day when the stipulation takes effect in their favour.

The Appellant, Joseph Hallé, clearly coming within the description of persons whose liability is covered by the undertaking of the company, the contention that this is invalid because Rolland Hallé, "the insured," had no insurable interest in his brother's liability was then considered, and the company's defence on this score was dismissed for reasons similar to those expressed by Sir Mathias Tellier C. J. in his dissenting opinion in the court below. Those given by Hon. Mr. Justice Rinfret were, in brief, that the insured is not necessarily the only person who can become insured under an insurance policy. The definition of the contract in C. C. 2468 does not indicate that. Nor does C. C. 2472 reading

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

mean that only the contracting party may insure objects. It was the intention of the parties that the persons coming within the class described in the omnibus clause should be covered. Joseph Hallé being such a person it followed that he was covered by the terms of the policy. And undoubtedly he had an insurable interest in his own liability. It was in no sense a gaming or wagering policy of the class prohibited by C. C. 2480.

Besides, C. C. 1029 expressly contemplates a contract of this type. It applies to all contracts unless the contrary is clear. The fact that Joseph Hallé had not yet signified his assent to the stipulation made in his favour was not necessary to bind the insurance company. It was sufficient if this was done when the accident happened. Rinfret J. said at p. 377:

> Speaking particularly of the present case, the policy confers an independent right upon the third person who is insured under it.

This disposed of the main point in the case. Joseph Hallé having an independent right and an insurable interest in his own liability, the claim was valid and effective.

The statement just quoted that Joseph Hallé had an independent right had an important bearing on a subsidiary point not previously discussed in this article. This was the contention by the insurance company that the action was brought prematurely as the insured, Rolland Hallé, had given no instructions to comply with the proviso in the policy that the indemnity payable under its terms should be applied first to the protection of the insured and only after this to the
124 benefit of other persons entitled thereto under the terms of the policy and in accordance with written instructions of the insured. The actual wording of the proviso is :

pourvu toutefois que l'indemnité payable en vertu des présentes soit appliquée d'abord à la protection de l'assuré, et le reste, s'il en est, à la protection d'autres personnes y ayant droit en vertu des présentes et ce, en conformité aux instructions que l'assuré en donnera par écrit.

This contention had been asserted by the trial judge and Mr. Justice Hall as an additional reason for dismissing the action, but Sir Mathias Tellier C. J. and Galipeault J. had rejected it and it was not discussed by the majority in the Court of Appeal as they were in favour of dismissing the case on the sole ground of lack of insurable interest.

Hon. Mr. Justice Rinfret first said that the question must be decided in accordance with the views already expressed in discussing the first point raised in the appeal.

From that standpoint (he goes on at p. 381), the insurance company has subscribed an absolute undertaking to pay the third persons coming under the description of the policy, in the events insured against for their benefit. The obligation so undertaken by the insurance company creates an independent right accruing to the third persons as soon as they have manifested their intention to avail themselves of it. That righ, by force of art. 1029 C. C., is no longer subject to the will of the "assuré", Rolland Hallé, when once the third person has "signified his assent to it" (art. 1029 C. C.).

Interpreted in that sense, the proviso comes into play only if there are concurrent claims for loss or liability either on behalf of the "assuré"

and the other third persons or on behalf of several other third persons. It qualifies the obligations of the insurer and, as a consequence, the rights of the several insured persons, only as regards distribution of the amount payable. The text of the policy is quite clear: "pourvu, toutefois, que l'indemnité payable en vertu des présentes soit appliquée etc." First, the indemnity must have the money so payable that the proviso regulates that: 1st. The money shall be applied towards the "protection de l'assuré"; 2nd. The balance, "à la protection d'autres personnes y ayant droit en vertu des présentes".

In this case, there was no occasion for written instructions on the part of Rolland Hallé, for the situation contemplated in the proviso did not arise.

In addition the court held that the naming of Rolland Hallé as mis-en-cause and therefore bound by the judgment met the purpose of the proviso.

Dealing at p. 383 with the second reason advanced by the company in support of the contention that the action was premature as having been taken as an action-in-warranty before judgment had been obtained against the insured as required by one of the policy conditions, Rinfret J. said that the omnibus clause gave Joseph Hallé all the rights of Rolland Hallé under clause B of the policy. One of these rights was to have the company contest any action taken against the insured. The company was therefore obliged to contest the action taken against Joseph Hallé and "As the respondent failed to comply with that obligation, the appellant rightly brought the action in warranty to compel it to fulfil its undertaking."

In conclusion, referring to the Vandepitte case, in which, it may be remembered, the Privy Council decided in a British Columbia case that the omnibus clause did not give the right to an indemnity to an injured third party suing the insurer of the father of the driver, Mr. Justice Rinfret says :

We ought to repeat what was said in this Court re Desrosiers v. The King. "This case affords an excellent illustration of the danger of treating English decisions as authorities in Quebec cases which do not depend upon doctrines derived from the English law."