DAME ALEXANDRA M. MELUKHOVA (PLAINTIFF)..... } APPELLANT;

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*Feb. 20.
*Mar. 29.

AND

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION (GARNISHEE)..... } RESPONDENT;

AND

ASBESTOS & ASBESTIC COMPANY (DEFENDANT).

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Practice and procedure—Seizure by garnishment—Insurance policy—Suspensive condition—Payment—Arts. 675, 685, 686, 690 C.P.C.

The appellant obtained a judgment for $5,000 for damages against the defendant company as responsible for the death of her husband while in its employment. The defendant company being in liquidation, the appellant proceeded, by way of seizure in garnishment, against the respondent company which had insured the defendant company under an indemnity policy to the extent of $2,000 for each of its employees. A clause of the policy provided that no action would lie against the respondent until loss had been actually sustained and paid in money by the insured. The respondent company, as garnishee, declared that it owed nothing and the appellant contested the declaration.

Held that the contestation of the declaration as garnishee by the respondent company should have been maintained.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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Per Davies C.J. and Duff, Anglin, Brodeur and Mignault JJ.—The seizure in garnishment should have been declared *tenante;* as, although the respondent's obligation would not be payable until the defendant company had itself paid under the appellant's judgment, the appellant was nevertheless entitled to have the seizure remain binding until this condition should be fulfilled.

Per Idington J.—The respondent's obligation was payable at the time of the seizure under the clauses of the indemnity policy.

Judgment of the Court of King's Bench (Q.R. 32 K.B. 146) reversed.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1), reversing the judgment of Weir J. and dismissing the contestation of the declaration of the respondent made in answer to a writ of seizure in garnishment.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Dessaulles K.C. and *Morris K.C.* for the appellant.

Lafleur K.C. and *De Witt K.C.* for the respondent.

THE CHIEF JUSTICE.—For the reasons stated by my brother Mignault, in which I concur, I would allow this appeal.

IDINGTON J.—The appellant is the widow of a man who when working for the Asbestos & Asbestic Co. Ltd. on the 3rd February, 1915, was accidentally killed under such circumstances as entitled her to recover on behalf of herself and children from his said employers (hereafter referred to as the "company") damages arising therefrom.

(1) Q.R. 32 K.B. 146.

At that time the said company held an insurance policy issued to it in the next previous 29th December by respondent assurance corporation (hereinafter referred to as the "corporation") to indemnify the said company against such risk to the extent of $2,000, out of a total of $10,000 provided for in the policy.

The corporation was, immediately after the said accident, notified by the company of the same and the death of appellant's husband resulting therefrom.

Nothing having been done by either the company or the corporation, the appellant brought on the 21st January, 1916, an action against the company to recover damages arising from the said accident.

On the 16th July, 1916, the company was put into liquidation under the "Winding Up Act" of Canada.

In November, 1916, the liquidator was granted by the court at Sherbrooke authority to pay a dividend of 10%.

On the 31st January, 1917, the liquidator also obtained from the court authority to retain a sum of $2,000 to cover the appellant's claim in the event of the said action being maintained.

By an order of the court on the 23rd January, 1917, the corporation, which had elected to defend appellant's action, was permitted to plead thereto in the name of the company and, accordingly, on the 28th April, 1917, filed a defence.

The action came for trial on the 26th of June, 1917, and resulted in judgment for the appellant of $5,000 with interest and costs against the company.

On or about the 9th of January, 1918, the respondent corporation paid the appellant's costs of the action but, notwithstanding the foregoing history and the attendant circumstances, refused to meet its obligation

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under the policy to pay the $2,000 indemnity thus established as clearly its duty, so far as I can see, falling back on the condition that the company before being entitled thereto must first hand over to appellant the two thousand dollars.

This I will presently revert to and deal with the legal aspects thereof in light of other conditions in the policy.

The appellant thereupon applied to the court for authority to issue a writ of execution by means of attaching the money in the hands of the respondent corporation as garnishee and, on the 14th September, 1917, was granted same but the said corporation made its declaration to the effect that it owed nothing to the company. Thereupon an order was made, after notice to the liquidator requiring him to contest same and his failing to do so, in the following terms:—

> Doth therefore grant the said motion to the extent following, namely, the said plaintiff is hereby authorized to take in the place and stead of the defendant and liquidator the necessary suits and proceedings to recover from the said Employers' Liability Assurance Corporation Limited the amount of the judgment rendered in favour of the plaintiff against the company defendant and liquidator bearing date the 29th June, 1917: and, further, the said plaintiff is authorized on her own behalf and for and on behalf of her minor children to contest the said declaration of the said garnishee, the whole with costs to follow the final result of such litigation.

Hence the proceedings which ensued whereunder Mr. Justice Weir found entirely in the appellant's favour notwithstanding that the respondent corporation set up the condition F. indorsed on the policy, reading as follows:—

> Condition F: No action shall lie against the corporation to recover for any loss under this policy unless it shall be brought by the assured for loss actually sustained and paid in money by the assured in satisfaction of a judgment after trial of the issue; nor unless such action is brought within ninety (90) days after final judgment against the assured has been so paid and satisfied. The corporation does not prejudice by this condition any defences against such action it may be entitled to make under this policy.

The sole part of the said condition upon which said corporation now relies, or can rely, is that the defendant company had not paid the judgment by reason of the manifest impossibility of its doing so after going into insolvency and liquidation, though everything else for which the condition provided was duly fulfilled and the interest of the corporation fully protected as it stipulated for.

The Court of Appeal, however, reversed Mr. Justice Weir's judgment on this ground alone.

Neither court seems to have had its attention drawn to Condition "I" which reads as follows:—

> Condition I:—If the business of the assured is placed in the hands of a receiver, assignee or trustee, whether by the voluntary act of the assured or otherwise, this policy shall immediately terminate, but such termination shall not affect the liability of the corporation as to any accidents theretofore occurring. If the assured is a corporation, a change of title, or if a firm or individual a change of title or of ownership, shall in like manner terminate this policy, unless such change is consented to by the corporation, by an indorsement thereon, signed by the manager.

I think this must be read along with condition F., and so read I fail to find how effect can be given to the words in condition I, just quoted,

> but such termination shall not affect the liability of the corporation as to any accidents theretofore occurring,

unless the ceremony of the actual payment by the company itself of that established to be due is thereby impliedly to be held as dispensed with. They expressly reserve the liability. How can that liability be pretended to be reserved, if effect is to be given to the present contention, that the mere non-payment by the defunct company of the money is, under such impossible circumstances, to be held as a barrier in the way?

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I can hardly imagine that the corporation deliberately contrived a trick by holding out a continued liability as being assured when in fact the term relied on had become simply impossible.

The non-payment might properly be relied upon as a protection against a dishonest scheme on the part of the insured, but when the personality of the insured had passed away I cannot think it either honest or the true meaning of the policy read as a whole.

I agree that all else designed in condition F. may well be needed for the protection of the corporation and must be observed, but this latter part as to the actual payment of the amount by the company I think has been eliminated or must be so if the stipulation in condition I for liability is to be given effect to.

I would allow the appeal with costs throughout against the corporation and give judgment for the $2,000 with interest thereon from the date of the judgment given the appellant.

DUFF J.—The responsibility of the respondent under the policy is conditional in the sense at all events that no action lies against them until loss has been actually sustained and paid in money. It may of course be argued that the loss insured against, that is to say, the loss in respect of which the respondents agreed to indemnify the Asbestos Company was a loss arising by reason of payment in money to the assured in satisfaction of a judgment; that payment, in other words, is not strictly a mere condition of the obligation but part of the substratum of fact out of which the obligation arises. It does not, however, seem to me to be seriously open to doubt that the obligation constitutes a conditional indebtedness within the con-

templation of Art. 675 C.P.C. and that the insurance moneys were "due under conditions * * * not yet fulfilled" when the seizure was made.

That being so it would follow that the appellant must succeed unless it should appear that the condition is one which could not be realized. I do not think this can be affirmed. A payment in part satisfaction would clearly I think give rise to a right of indemnity and that is a contingency which can not be put aside as beyond the bounds of practical possibility.

ANGLIN J.—I concur with Mr. Justice Mignault.

BRODEUR J.—J'en suis arrivé à la conclusion que la contestation de la déclaration de la tierce-saisie était bien fondée et qu'elle devrait être maintenue.

La demanderesse-appelante avait jugement contre la compagnie Asbestos-Asbestic pour dommages résultant d'un accident qui avait causé la mort de son mari lorsque ce dernier était à l'emploi de cette compagnie.

La compagnie Asbestos-Asbestic avait, lorsque cet accident est arrivé, un contrat d'assurance ou d'indemnité avec la compagnie intimée "The Employers Liability Assurance Corporation" par lequel cette dernière s'engageait de l'indemniser

against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death accidentally suffered while this policy is in force by any employee or employees of the assured.

Ce contrat d'assurance contenait plusieurs conditions: par exemple, l'indemnité ne devait être que de deux mille dollars si l'ouvrier se faisait tuer (clause A); si un accident survenait, l'assuré devait immédiate-

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ment en avertir l'assureur (clause C); et il n'était pas permis à l'assuré d'assumer aucune responsabilité vis-à-vis la victime de l'accident ou de régler la réclamation de cette victime sans l'assentiment formel de l'assureur (clause E); si une poursuite était instituée contre l'assuré pour cet accident, il devait remettre l'action à l'assureur pour que ce dernier puisse lui-même conduire la défense (clause D); l'assuré ne pouvait pas poursuivre l'assureur pour les dommages qu'il avait subis, à moins qu'il n'ait au préalable payé la victime (clause F); dans le cas de faillite de l'assuré, la police

shall immediately terminate, but such termination shall not affect the liability of the corporation as to any accidents theretofore occurring

(clause J).

Voilà le résumé de quelques-unes des conditions qui tendent toutes à restreindre les obligations de la compagnie d'assurance et à diminuer les droits de l'assuré.

Il est fort possible que les contrats d'assurance en général peuvent prêter à des fraudes; mais dans une assurance comme celle-ci, on peut présumer difficilement qu'un ouvrier se ferait mutiler de propos délibéré pour donner à son patron l'avantage de faire une réclamation frauduleuse contre son assureur, et surtout quand il s'agit d'un cas où la victime a perdu la vie.

La compagnie Asbestos-Asbestic ayant été poursuivie par la demanderesse-appelante, elle a confié l'action à la compagnie d'assurance qui a, au nom de l'Asbestos-Asbestic, fait les défenses qu'elle a jugé à propos de faire contre cette réclamation; mais ces défenses ont été rejetées et jugement a été rendu en faveur de la demanderesse contre la compagnie Asbestos-Asbestic pour $5,000.

Un bref de saisie-arrêt après jugement a été émis entre les mains de la compagnie d'assurance en exécution de ce jugement et cette dernière est venue déclarer sous le serment de l'un de ses principaux employés qu'elle ne devait rien et qu' *elle ne devrait rien plus tard à la défenderesse.*

Cette déclaration était faite sous les dispositions de l'article 685 C.P.C. qui se lit comme suit:

685. Le tiers-saisi doit déclarer les choses dont il était débiteur à l'époque où la saisie lui a été signifiée, celles dont il est devenu débiteur depuis, la cause de la dette et les autres saisies faites entre ses mains.

Si la dette n'est pas échue, il doit déclarer l'époque où elle le sera.

Si le paiement de la dette est conditionnel ou suspendu par quelque empêchement, il doit également le déclarer.

Il doit donner un état détaillé des effets mobiliers qu'il a en sa possession appartenant au débiteur, et déclarer à quel titre il les détient.

Cette déclaration était absolument fausse et mensongère, car la compagnie d'assurance était débitrice de la compagnie Asbestos-Asbestic en vertu du contrat d'assurance qu'elle avait avec elle jusqu'à concurrence d'une somme de $2,000. Cette dette n'était peut-être pas exigible parce que la défenderesse n'avait pas sous la clause F du contrat payé elle-même le jugement qui avait été rendu. Mais à tout évènement la compagnie d'assurance, qui était bien au courant de toute la cause puisque c'est elle-même qui avait défendu l'action principale, aurait dû déclarer qu'il y avait une dette conditionnelle. Espérait-elle qu'avec cette déclaration mensongère elle empêcherait cette pauvre étrangère qu'était la demanderesse de se mettre un nouveau procès sur les bras? Heureusement que les autorités consulaires du pays d'origine de la demanderesse sont venues à son secours, qu'il s'est trouvé des avocats assez dévoués pour se charger de cette nouvelle cause, et elle a contesté la déclaration de la tierce-saisie.

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Si la tierce-saisie avait fait une déclaration véridique des faits, jugement aurait pu de suite être rendu déclarant la saisie-arrêt tenante jusqu'à l'avènement de la condition de sa police d'assurance qui exigeait paiement préalable par l'assuré (art. 690 C.P.C.). L'avocat de la demanderesse, suivant qu'il en avait le droit, a transquestionné l'officier de la compagnie qui a fait la déclaration (art. 686 C.P.C.). Et la demanderesse a obtenu par ce moyen des informations suffisantes pour établir qu'il y avait une obligation conditionnelle de la tierce-saisie en faveur du saisi.

Il me semble qu'après cela la tierce-saisie aurait dû de suite demander à amender sa déclaration de façon à la mettre conforme aux faits et aux prétentions qu'elle a émises plus tard sur la contestation de sa déclaration. Mais non. Elle n'a pas jugé à propos de ce faire; et alors la demanderesse a été obligée de contester la déclaration, ainsi qu'il a été jugé par la Cour de Revision.

Que les réponses d'un tiers-saisi aux questions qui lui sont posées par le saisissant et qui sont écrites à la suite de sa déclaration, ne forment pas partie de sa déclaration, et qu'un jugement ne peut être rendu sur ces réponses *de plano:* le saisissant doit contester la déclaration. (*Laframboise* v. *Rolland*) (1).

Par sa contestation la demanderesse a conclu à ce que la déclaration de la tierce-saisie soit déclarée fausse et mensongère et à ce que cette dernière soit condamnée à lui payer la somme de $2,000 qu'elle devait à la compagnie Asbestos-Asbestic par son contrat d'assurance; et elle s'est fait autoriser en même temps par le juge à exercer non-seulement ses droits comme la demanderesse mais aussi les droits de la compagnie Asbestos-Asbestic.

(1) [1885] M.L.R. 2 S.C. 75.

Je dois dire que pendant le procès sur l'action originaire la compagnie défenderesse a été mise en liquidation. Nous ne savons pas exactement la raison pour laquelle elle a été mise en liquidation; mais il est à supposer que l'était dû à son insolvabilité. Aucune preuve directe cependant n'a été faite de ce fait.

La cour supérieure a maintenu la contestation de la déclaration de la tierce-saisie. En appel ce jugement a été renversé. On y a déclaré que la tierce-saisie devait une dette conditionnelle. Tout de même, le dispositif du jugement est à l'effet que la contestation de la déclaration de la tierce-saisie est rejetée et que la saisie-arrêt est renvoyée avec frais, mais sans frais en cour supérieure.

Ce jugement ne me parait pas logique. En effet, du moment que la cour reconnaissait qu'il y avait une dette conditionnelle de due elle aurait dû maintenir la contestation de la déclaration et déclarer que la saisie-arrêt aurait été tenante. En effet, l'article 690 du code de procédure civile énonce formellement que si les deniers dus par le tiers-saisi ne sont dus que sous des conditions qui ne sont pas encore accomplies le tribunal peut ordonner que la saisie-arrêt soit déclarée tenante jusqu'à l'avènement de la condition.

Il y avait en cour d'appel, ainsi qu'en cour supérieure, sur cette contestation de la déclaration, deux points en litige, savoir si la dette était exigible dès maintenant ou si elle ne serait due que lorsque la défenderesse aurait elle-même payé le jugement qui avait été rendu contre elle en faveur de la demanderesse.

La cour supérieure a été d'avis que la dette était due et exigible.

La cour d'appel, au contraire, a été d'opinion que la dette ne devenait exigible que lorsque la défenderesse l'aurait payée à la demanderesse.

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En acceptant cette opinion de la cour d'appel je dis tout de même que le dispositif de son jugement est erroné en ce qu'au lieu de renvoyer la saisie-arrêt elle aurait dû la déclarer tenante et maintenir la contestation de la déclaration de la tierce-saisie.

J'en suis venu à la conclusion que la demanderesse avait eu raison de contester la déclaration de la tierce-saisie et que sa contestation devait être maintenue et que la saisie-arrêt devrait être déclarée tenante jusqu'à ce que la condition stipulée au paragraphe F de la police d'assurance ait été déclarée remplie par la cour supérieure.

L'appel doit être maintenu avec dépens de cette cour et des cours inférieures contre l'intimée, moins les frais de la cour du Banc du Roi où chaque partie paiera ses frais.

MIGNAULT J.—The appellant obtained, on June 29th, 1917, a judgment for $5,000.00 for damages against the Asbestos and Asbestic Company, Limited, as civilly responsible for the death of her husband while in its employment. During the proceedings, and before the filing of a plea, the company was placed in liquidation and William J. Henderson was appointed its liquidator. The respondent, thereunto obliged by an indemnity policy issued by it in favour of the company, contested the appellant's action in the name of the company, and several months after the judgment paid the appellant's costs of action. The present proceedings are to force the respondent to pay to the appellant the amount for which the respondent by its policy promised to indemnify the Asbestos and Asbestic Company, which, in the case of any one employee of the latter, was restricted to $2,000.00.

The appellant proceeded against the respondent by way of seizure in garnishment and the latter declared that it had not and was not aware that it would have hereafter in its hands, possession or custody, or in any manner whatsoever, any money, movable effects or other things due or belonging to the Asbestos and Asbestic Company, the defendant.

The declaration was contested by the appellant and her contestation was maintained by the Superior Court, Weir J. The Court of King's Bench, Guerin J. dissenting, reversed the judgment of the Superior Court, and dismissed the contestation without costs in the Superior Court, stating however that the respondent had not disclosed in its declaration that it was subject to a conditional obligation towards the Asbestos and Asbestic Company under its policy.

The reason for which the appellant's contestation of the respondent's declaration was dismissed may be briefly explained.

By the conditions of the policy, the insured company, on the taking against it of an action for an accident to one of its employees, was obliged forthwith to hand over the papers served on it to the respondent, and was prohibited from making any settlement or payment to the injured employee or his representatives, and the respondent undertook to defend the action at its own cost. Condition "F" of the policy on which the respondent now relies reads as follows:—

Condition F: No action shall lie against the Corporation to recover for any loss under this policy unless it shall be brought by the assured for loss actually sustained and paid in money by the assured in satisfaction of a judgment after trial of the issue; nor unless such action is brought within 90 (ninety) days after final judgment against the assured has been so paid and satisfied. The Corporation does not prejudice by this condition any defences against such action it may be entitled to make under this policy.

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The respondent successfully contended in the court below that no liability exists on its part until the insured company has actually paid in money the amount which it has been condemned to pay by a judgment, and, the insured not having paid the appellant's judgment, the respondent now argues that it truly declared that it owed and would owe nothing to the company. In my opinion the respondent's liability existed but was a contingent or conditional liability, and under Art. 685 C.P.C. the respondent should have declared that it was conditionally indebted. Had it done so, under Art. 690 C.P.C. the court, on motion of the plaintiff, could have declared the seizure binding pending the fulfilment of the condition. It follows that the respondent's declaration was not the one it should have made. This forced the appellant to contest it. In my opinion, however, the appellant cannot say that the respondent's obligation is payable or demand that the respondent be condemned to pay. So long as the Asbestos Company has not itself paid under the appellant's judgment, no demand of payment can be made against the respondent. But that does not mean that the appellant's seizure in garnishment should be dismissed as the Court of King's Bench dismissed it. Under Art. 690 C.P.C. the appellant, on the contrary, is entitled to have the seizure remain binding until the condition is fulfilled, if it ever be fulfilled.

There seems to be some possibility that it may be fulfilled. In the record there is a judgment of Mr. Justice Hutchinson of the 7th February, 1917, authorizing the liquidator, on his petition, to retain the sum of $2,000.00 to provide for the payment of the claim and costs of this appellant. Should the liquidator pay this money in part satisfaction of the appellant's

judgment, the respondent will thereupon become liable to the Asbestos and Asbestic Company under condition "F" of its policy. This right of the Asbestos Company against the respondent is now being exercised by the appellant by virtue of her seizure in garnishment, so that, if the payment be made by the liquidator, she will be entitled to demand that the respondent make a new declaration under the seizure.

The parties were unable to inform us whether the liquidator still retains the sum of $2,000.00. Under the circumstances, and in view of the fact that the respondent did not make the declaration it should have made, I would give the appellant judgment declaring the seizure binding on the respondent until the condition rendering its obligation payable has been fulfilled. The appeal should therefore be allowed and the record remitted to the Superior Court for such further proceedings as may be necessary. Costs to the appellant in this court and in the Superior Court, and no costs to either party in the Court of King's Bench.

Appeal allowed with costs.

Solicitors for the appellant: *Lawrence, Morris & McGore.*

Solicitors for the respondent: *DeWitt, Tyndale & Howard.*