Supreme Court of Canada
North American Accident Insurance Co. v. Newton, (1918) 57 S.C.R. 577
Date: 1918-12-09

The North American Accident Insurance Company (Defendants) Appellants;

and

Charles Henry Newton and Others (Plaintiffs) Respondents.

1918: October 29; 1918: December 9.

Present: Sir Louis Davies C.J. and Idington, Anglin and Brodeur JJ. and Cassels J. *ad hoc.*

Accident insurance—Employer's indemnity—Assignment by insured— Right of assignee against insurer—Payment of claim—Money advanced by outside party—Measure of damages.

By an employer's liability policy N. was insured against loss from liability on account of bodily injuries to, or death of, an employee. N. incurred such liability but made an assignment for benefit of his creditors before he paid his employee's claim. With money advanced by a third party the assignee paid it and brought action against the insurer to be reimbursed.

Held, that the insurance company was liable; that the right of N. to pay his employee and collect the amount from the insurance company passed to his assignee; that payment to the employee before the assignment was not essential; that the insurer could not inquire into the source from which the money came to make the payment; and that the insurer's liability was not limited to the amount of the dividend which the insolvent estate would be able to pay the employee.

APPEAL from a decision of the Court of Appeal for Manitoba affirming the judgment at the trial[1] in favour of the plaintiff.

The facts are stated in the above head-note.

Chrysler K.C. for the appellants.

E. K. Williams for the respondents.

THE CHIEF JUSTICE.—I concur with Mr. Justice Anglin.

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IDINGTON J:—The contract evidenced by the appellant's policy was a chose in action and the benefit thereof clearly passed to respondent by virtue of the assignment of Nelson and

[1] [1917] 2 W.W.R. 1120.

Foster under and pursuant to the provisions of the "Assignments Act," R.S.M. [1913] ch. 12 in the same plight and condition as it was held by the assignor at that time.

The respondent assignee was just as much entitled to comply with the condition which, being complied with, gave vitality and force to the appellant's obligation as his assignor had been and would have had if no assignment had been made.

It matters not then where the money came from— the condition has been fulfilled.

It so turns out that the estate was in an insolvent condition. To-morrow the like case might arise under circumstances in which the insured, although driven to make an assignment, might be possessed of an ample estate which could liquidate all the obligations of the insured.

Are we to hold that such an unfortunate insured was deprived of the right to have his assignee recover on such an obligation? No case has been cited deciding any such thing or anything like it.

The case of *Connolly* v. *Bolster*[2], is the only one counsel claimed as being so. It, on examination, bears no resemblance to this.

What was attempted there was to get a receiver appointed in hope that by such means such steps could be taken as might place the party concerned in funds to raise the money to meet the condition and give force and thereby vitality to the obligation.

That appointment was refused. And I venture with some confidence to think that, in the case of *Collinge* v.

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Heywood[3], had someone been kind enough to lend or give the plaintiff before action the money to pay, and he then had paid the bill of costs there in question, the plaintiff, even if hopelessly bankrupt and his benefactor never likely to receive any return for his advance, must have succeeded. The motive for such generosity could not have been inquired into.

[2] 187 Mass, 266.
[3] 8 L.J.Q.B. 98; 9 A. & E. 633.

I think the case has been rightly decided by the court below, and that in doing so they have not had to rely upon any principles of equity, but upon the rigid common law. Everything nominated in the bond has been complied with.

The appeal should be dismissed with costs.

ANGLIN J.—I am disposed to agree with the appellant's contention that under the terms of the policy sued upon actual payment by the assured of a liability of the class insured against imposed upon him by law was not merely a condition precedent to his right of action, but the very thing against loss from which the insurance was effected. In other words, not only would no right of action against the insurer arise until such payment but no actual or absolute liability on its part would exist.

Nevertheless, when his employee, Fornell, was injured a contingent right arose in favour of the assured against the insurer and there was a corresponding contingent liability on the part of the latter. Upon payment of whatever liability the law imposed in consequence of the injury sustained by Fornell, ascertained by due process, that contingent right, as well as the correlative contingent liability, would become absolute. This was the situation when the insured, having become insolvent, made an assignment for the benefit of his creditors under the "Assignments Act" (R.S.M. [1913],

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ch. 12). I am satisfied that the contingent right of the assured against the defendant company thereupon passed to his assignee. Neither can there be any reasonable doubt that it was the intention of the parties to the insurance contract that this should happen. Condition 1 of the policy provides that, while the policy shall terminate upon an assignment by the insured for the benefit of his creditors,

> such termination shall not affect the liability of the company as to any accident theretofore occurring.

This condition is not limited in its terms to cases in which the assured shall have actually paid the claim of an injured employee before the assignment, and it would, in my opinion, be unwarrantable to place such a restriction upon its application. It follows that the parties to the contract sued upon must have contemplated that the assignee might make the payment (which the assured would by the assignment have divested himself of the means

of making) necessary to convert the contingent right which passed by the assignment into an absolute right and the corresponding liability of the insurer into an absolute liability.

Nor does this view do violence to the condition precedent to his client's liability of payment of the employee's judgment by, and loss thereby to, the assured so much pressed by counsel for the appellant

> An assignee for creditors is a trustee not only for the creditors but also for the debtor. It is his duty to make the most of the estate and pay the debts; but it is the debtor's estate all the time; and when the debts are paid it is his duty to restore the surplus or what is not required for debts, if there be any, to the debtor. The assignee is accountable to the debtor for his dealings with the estate and if he is guilty of any wrongdoing or breach of trust or if he neglects or refuses to do his duty in respect of the estate he can be held to his duty and be compelled to perform it at the debtor's instance. The covenant in question was a counter security which the debtor possessed to protect him against the claim of the plaintiffs and others * * *. The debtor still had an interest in the covenant notwithstanding the assignment

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> and that interest was the right to have it enforced against the defendant the moment anything fell due on the mortgage. That beneficial right he could assign and transfer * * * *Ball* v. *Tenant*[4], *per* Maclennan J.A.

The fallacy in the appellant company's contention is that it ignores the assured-assignor's continued interest in its liability. Because of that interest payment by his trustee to his judgment creditor (Fornell) out of the assigned estate would be payment by the assured-assignor and to his loss. It would diminish the fund to meet his creditors' claims. In the event of a deficiency he would in consequence of such payment remain liable for a larger balance to his other creditors. Should there be a surplus returnable to him it would be less *pro tanto* than it would have been had the Fornell claim not existed.

Nor is the appellant entitled to inquire, or to base a defence upon, the source from which the money paid by the assignee to Fornell came any more than he would be entitled to make a like inquiry or to raise such a defence if the payment had been made by the assured himself. It would be intolerable that a person bound to indemnify or reimburse a judgment debtor should escape liability because the latter had borrowed or had received as a gift from some kindly disposed friend either of himself or of the judgment creditor the money required to meet his obligation. The assignee has paid a judgment against the assured-assignor as he was entitled to do in the interest of all his *cestuis que trustent*—the

[4] 21 Ont. App. R. 602, at p. 610.

other creditors as well as the debtor. He is accountable only to them for the money so expended. The source from which it came is their business but not that of the insurer.

Moreover, the insurer's liability is not measured by the amount of the dividend to which the judgment

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creditor would ultimately have been entitled on a distribution of the debtor's estate had his judgment not been satisfied. It is the full amount of the judgment of which, when satisfied, it covenanted for reimbursement. The assured, as already pointed out, is directly interested in having the entire liability to his judgment creditor discharged. Were it not he would remain personally liable for any unpaid balance of it. Since the payment of the judgment the respective rights and liabilities of the parties in the present case are, in my opinion, indistinguishable from those dealt with in such English cases as *In re Law Guarantee, Trust & Accident Society; Liverpool Mortgage Insurance Company's Case*[5]; *Cruse v. Paine*[6]; *Re Perkins. Poyser* v. *Beyfus*[7].

The appellant's contingent liability for the full amount of Fornell's judgment existed when the assured made his assignment. The correlative contingent right of the assured passed to his assignee and payment of the judgment by him has converted the latter into an absolute right, enforceable for the benefit of the estate in which both creditors and debtor are alike interested, and the former into an absolute liability.

The appeal fails and should be dismissed with costs.

BRODEUR J.—This is an action for the recovery under a contract commonly known as an employers' liability policy. That policy undertook to indemnify Nelson & Foster against loss from the liability for damages on account of bodily injuries suffered by an employee of the company. One condition of that policy was that no action could be instituted against the company to recover unless it shall be brought for

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loss actually sustained and paid in money by the assured in satisfaction of a judgment after trial of the issue.

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[5] [1914] 2 Ch. 617.
[6] L.R. 6 Eq. 641, 653; 4 Ch. App. 441.
[7] [1898] 2 Ch. 182, 189.

An accident occurred to an employee of Nelson & Foster and an action was instituted against them. While the case was pending, Nelson & Foster made an assignment under the provisions of the "Assignments Act" of Manitoba, R.S.M., [1913] ch. 12. Judgment having been rendered against Nelson & Foster in favour of that employee, the assignee paid the amount of the judgment with money which was handed over to him by a man named Brandon, who does not seem to have been a creditor, but who seems to be interested in some way or other in the distribution of the assets of Nelson & Foster or in the discharge of their liability with regard to that employee. An action was then instituted by the assignee, the respondent Newton, to recover from the insurance company for the loss which had been suffered and the reimbursement of the money which he had paid to that employee.

The applicant company claims that it should not be held responsible for a larger sum than the amount of dividend to which that employee was entitled. That question came up in a case which was decided in 1914 in England, viz., the case of *In re Law Guarantee Trust & Accident Society; Liverpool Mortgage Ins. Co's Case*[8]. It was there held that in a contract of insurance or indemnity the insurance company was liable to pay to the liquidator the amount of the deficiency and not merely the amount of dividend payable.

Lord Lindley, in his work on Partnership, 5th ed., page 375, says that:

> where one person has covenanted to indemnify another, an action for specific performance may be sustained before the plaintiff has actually

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> been indemnified; and the limit of defendant's liability to the plaintiff is the full amount for which he is liable; or if he is dead or insolvent the full amount provable against his estate and not only the amount of dividend which such estate can pay.

The contention of the appellant is that this contract is not only a contract of indemnity to but also of previous payment by the insured. But in this case there was a previous payment which had been made and we are not concerned with the question whether that payment has been rightly or legally made by the assignee. The condition of previous payment has been fulfilled and the insurance company cannot pretend now that it is not bound to reimburse the amount which has been paid by the assignee.

[8] [1914] 2 Ch. 617.

A question has been raised also with regard to the power of the assignee under the "Assignment Act" to recover. The contract of assignment disposes of that contention, since it is therein declared that the assignor has handed over to the respondent all his personal estate, rights and credits, choses in action and all other personal estate.

I may say with the learned trial judge, Mr. Justice Prendergast, that the assignee was bound to protect the trust, to save all that could be saved of the estate and to make out of it all that could be made. There was a chose in action that could be left barren or could be made to develop into an actual asset. It was then the assignee's duty to do what was necessary to preserve or to enforce the claim which he now exercises against the appellant company.

The appeal should be dismissed with costs.

CASSELS J.—I concur with Mr. Justice Anglin.

Appeal dismissed with costs.

Solicitors for the appellants: Coyne, Hamilton & Martin.

Solicitors for the respondents: Murray & Noble.