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* May 5.
* June 1.

JOSEPH HALLÉ (PLAINTIFF IN WARRANTY) ..... APPELLANT;

AND

THE CANADIAN INDEMNITY COMPANY (DEFENDANT IN WARRANTY).... RESPONDENT;

AND

ROLLAND HALLÉ, MIS-EN-CAUSE.

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

Insurance—Automobile—Public liability—Undertaking by insurance company to indemnify other persons than the insured—Automobile driven by third person with consent of owner—Accident—Action in warranty against insurance company by driver sued for damages by person injured—Liability of company—Stipulation in favour of third person valid under civil law of Quebec—Insurable interest—Articles 1029, 2468, 2472, 2474, 2476, 2480 C.C.

The respondent company issued an automobile insurance policy in favour of the *mis-en-cause* whereby it undertook to indemnify the latter for all losses and damages resulting from his legal responsibility towards third persons as a consequence of bodily injuries or of the death sustained by the latter and caused to them through the maintenance or the use of a certain automobile described in the policy; and, under another clause of the same policy, the respondent company also undertook "à indemniser, en la même manière et aux mêmes conditions auxquelles l'assuré y a droit, d'après les présentes, toute personne transportée dans l'automobile ou la conduisant légitimement ainsi que toute personne légalement responsable de la conduite du dit automobile, à condition que permission en soit donnée par l'assuré." On August 27, 1934, the *mis-en-cause* lent his automobile to his brother, the appellant, and while the latter was driving the automobile on that day, having with him two passengers, he met with an accident in the course of which his two companions were seriously injured. One of them brought an action against the appellant to recover the damages sustained by him as a result of the accident which he attributed to the fault and negligence of the appellant. The appellant, alleging that he was protected against the liability thus incurred under the policy above mentioned, brought, in his own name, an action in warranty against the respondent insurance company.

Held that, under the terms and conditions of the insurance policy, the respondent company was liable to indemnify the appellant for all losses or damages resulting from the accident.

The appellant was legitimately in possession of the automobile, was driving it with the permission of the insured and was legally responsible for the manner in which the automobile was being driven. He was, therefore, one of the persons whom, under the terms of the policy and in consideration of the premium paid to it by the *mis-en-cause*, the respondent insurance company undertook to indemnify. He was

* PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Hudson JJ.

not therein mentioned 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. Therefore the respondent company cannot escape the obligation of indemnifying the appellant unless it is shown that its stipulation is prohibited by law. But the clause in favour of third persons invoked by the appellant against the respondent company is valid and enforceable, because stipulations in favour of third parties are valid and enforceable in civil law. They are expressly authorized by article 1029 C.C.; and no special rule exists, in the chapter of the code dealing with insurance, of a nature to exclude insurance contracts from the application of the general principle enacted in article 1029 C.C. And this view is strengthened by the enactments of article 2480 of the above chapter, where the civil code expressly singles out a class of policies which are declared prohibited. —The definition of "insurance" as contained in article 2468 C.C. adapts itself to the policy issued by the respondent company: it applies both to the main obligation undertaken for the benefit of the *mis-en-cause* and to the undertaking towards the other persons ascertainable under the above-cited clause.—The fact that up to the moment of the accident the appellant had not yet signified his assent to the stipulation made in his favour by the *mis-en-cause* is not a bar to the action: his assent was not necessary to bind the insurance company and it was sufficient if he manifested his intention to avail himself of the stipulation as soon as the event happened which made the stipulation effective in his favour. In civil law, a valid stipulation in favour of a third person creates a contract (*viniculum juris*) between the third person and the person who has agreed to be bound by the contract.

Vandepitte v. *Preferred Accident Insurance Corporation* ([1933] A.C. 70) not applicable to this case.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming a judgment of the Superior Court, Laliberté J., and dismissing the appellant's action in warranty with costs.

The respondent is a Casualty Insurance company who had issued to Rolland Hallé, the *mis-en-cause,* an automobile accident liability insurance policy containing the so-called omnibus clause whereby the insurance company agreed to protect from liability persons driving Rolland Hallé's car with his consent. On August 27, 1934, the appellant, who is a brother of Rolland Hallé, was driving the automobile covered by this policy when he met with an accident in which one Louis Bourget was seriously hurt. The latter claiming that this accident was due to the driver's fault, brought on December 26, 1934, an action in damages against Joseph Hallé, the appellant, claiming $14,500. The writ was sent to the respondent, who re-

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turned it to the appellant with a letter disclaiming any responsibility. Thereupon, Joseph Hallé, the appellant, brought an action in warranty against the insurance company, invoking the omnibus clause and praying that the insurance company be declared bound to defend the principal action and indemnify the appellant from any condemnation up to the limit stated in the policy, namely, $10,000 for personal damages and $1,000 for damages to property.

Ls. St-Laurent K.C. for the appellant.

Aimé Geoffrion K.C. and *V. A. De Billy K.C.* for the respondent.

The judgment of the court was delivered by

RINFRET J.—Mr. Rolland Hallé, of the city of Lévis, on the 11th day of May, 1934, took out an insurance policy issued by the company respondent and whereby, in consideration of the payment of the agreed premium, the company undertook to indemnify him for all losses or damages resulting from his legal responsibility towards third persons as a consequence of bodily injuries or of the death sustained by the latter and caused to them through the maintenance or the use of a certain automobile described in the policy.

Under another clause of the same policy (about which more will have to be said later), the company also undertook to indemnify certain other persons in respect of similar liability incurred through their use of the same automobile.

On August 27, 1934, Rolland Hallé lent his automobile so insured by the respondent to his brother, Joseph Hallé, who is the appellant in this case.

While the appellant was driving the automobile on that day, having with him as passengers in the car the Messrs. Louis and Antoine Bourget, he met with an accident in the course of which his two companions were seriously injured. Louis Bourget, one of them, brought an action against the appellant to recover the damages sustained by him as a result of the accident which he attributed to the fault and negligence of the appellant.

The appellant, alleging that he was protected against the liability thus incurred, under the policy issued by the re-

spondent to his brother Rolland Hallé, brought, in his own name, an action in warranty against the respondent insurance company. The company repudiated any obligation towards the appellant in the premises, for several reasons later to be stated in detail. The action in warranty was dismissed by the Superior Court of Quebec, and that judgment was upheld by a majority of the Court of King's Bench in appeal (Bernier, Hall and Barclay JJ.; Sir Mathias Tellier C.J. and Galipeault J. dissenting).

The case is now submitted to this Court; and the decision is of exceptional importance, because the point on which it was rendered in the courts below admittedly affects practically all liability insurance policies on automobiles in the province of Quebec.

Of the several grounds of defence raised by the defendant insurance company, two only were upheld by the trial judge and relied on by one or the other of the judges forming the majority in the Court of King's Bench. In our view, it will be sufficient to deal with those two points, more particularly since, on the other matters, the respondent, for its success, had to depend upon questions of fact which have been decided against it by the trial judge and also inferentially by the appeal court. It may be added that, before this Court, counsel for the respondent did not press these other points.

The first point held against the appellant was that the stipulation in the insurance policy on which the present suit is based was void because the *mis-en-cause* Rolland Hallé, who took out the policy, had no insurable interest in any liability that his brother, the appellant, might incur.

For the purpose of discussing this point, it will be necessary to analyse the insurance policy itself and to quote from it the material clauses having reference to the matter.

The document is called: "Police Automobile Combinée." It begins by reciting in full the application of Rolland Hallé. It then comes to what forms the essential part of the contract ("Conventions d'assurance") upon which the parties have agreed and which reads thus:

En considération du paiement de la prime stipulée et des déclarations contenues dans la proposition, le tout sujet aux limites, termes et conditions des présentes, * * * cette convention fait foi des stipulations suivantes:

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Section A.—L'assureur s'engage à indemniser l'assuré pour toute perte ou dommages entraînant la responsabilité du dit assuré, à la suite de blessures corporelles (y compris mort en résultant) subies par toute personne, à raison du droit de propriété, de l'entretien ou de l'usage de l'automobile.

Section B.—L'assureur s'engage à indemniser l'assuré pour toute perte ou dommages entraînant la responsabilité légale du dit assuré à raison de la destruction ou de dommages (y compris la perte d'usage en découlant) aux biens de toute personne, à raison du droit de propriété, de l'entretien ou de l'usage de l'automobile.

Et relativement aux sections A et B précédentes, l'assureur s'engage de plus:—

(1) Sur réception d'avis de blessures corporelles ou de dommages matériels, de se mettre au service de l'assuré en faisant enquête, négociant avec le réclamant ou réglant toute réclamation en résultant, en la façon que l'assureur jugera appropriée;

et (2) A contester, au nom de l'assuré, toute action au civil intentée contre lui en tout temps, à raison de telles blessures corporelles ou dommages matériels, le tout aux frais de l'assureur;

et (3) A acquitter les frais taxés contre l'assuré dans toute action au civil contestée par l'assureur, ainsi que les intérêts accordés par jugement sur telle partie du dit jugement qui n'excède pas la limite de responsabilité de l'assureur;

et (4) A rembourser l'assuré des dépenses encourues pour tous secours chirurgicaux urgents nécessaires au moment de l'accident causant les blessures corporelles;

et (5) Si l'usage de l'automobile est spécifié par les mots 'Usages privés' ou 'Usage privé et visites d'affaires' (livraison commerciale exceptée) seulement, à indemniser, en la même manière et aux mêmes conditions auxquelles l'assuré y a droit, d'après les présentes, toute personne transportée dans l'automobile ou la conduisant légitimement ainsi que toute personne, société ou corporation légalement responsable de la conduite du dit automobile, à condition que permission en soit donnée par l'assuré, ou si l'assuré est un particulier, que telle permission provienne d'un membre adulte de sa maison autre qu'un chauffeur ou serviteur domestique; 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. * * *

The balance of subsection (5) has no bearing in the circumstances of the case.

Obviously, in support of his right to bring the action in warranty, the appellant relies on that portion of subsection (5) of section B above quoted. And it is that stipulation in his favour which has been declared illegal and void by the judgments appealed from, on the ground that Rolland Hallé, who was held to be the insured (and the only insured) in the policy, had no insurable interest in the liability provided against in the clause in question.

It may be well first to ascertain the purport and the extent of the clause under discussion.

That clause constitutes one of the obligations undertaken by the insurance company (" l'assureur s'engage de plus ") in the contract it has made with Rolland Hallé and in consideration of the premium paid by the latter to the company ("en considération du paiement de la prime stipulée").

The obligation thus assumed by the respondent is:

à indemniser, en la même manière et aux mêmes conditions auxquelles l'assuré y a droit, d'après les présentes, toute personne transportée dans l'automobile ou la conduisant légitimement (which is the case here), ainsi que toute personne * * * légalement responsable de la conduite du dit automobile, à condition que permission en soit donnée par l'assuré

There is no question that, in the insurance policy, Rolland Hallé, who made the application for it, is styled "l'assuré"; and that, wherever the word "assuré" occurs in the document, it is intended to refer to Rolland Hallé ("ci-après dénommé l'assuré"). But, of course, it does not follow that, because the parties adopted that word for the purpose of designating Rolland Hallé in the policy, the other persons who may rightfully come under it are, for that sole reason, to be excluded from the benefits deriving to them, and that they are not to be regarded as insured, merely because they have not been described by that term in the document. The question is not how they have been described, but whether, by force of the stipulations in the policy, they have the rights of insured persons.

Now, the policy expressly states that, in addition to its engagements towards the "assuré," Rolland Hallé, the company obliges itself

à indemniser * * * toute personne conduisant légitimement (l'automobile) ainsi que toute personne * * * légalement responsable de la conduite du dit automobile, à condition que permission en soit donnée par l'assuré.

In this case, there is no doubt that Joseph Hallé, the appellant, was legitimately in possession of the automobile, that he was driving it with the permission of the "assuré," and that he was legally responsible for the manner in which the automobile was being driven. The appellant was, therefore, one of the persons whom, under the terms of the policy and in consideration of the premium paid to it by Rolland Hallé, the respondent insurance company undertook to indemnify. He was one of the persons who, in the intention of both contracting parties, was to be insured against loss or liability from the risks described in the policy. He was not therein mentioned by name; but,

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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 (*Vide:* Pardessus, *Droit commercial,* 6e édition, 1856, tome 2; Colin & Capitant, tome 2, pp. 324 et suiv., referred to by Sir Mathias Tellier, C.J., in his reasons for judgment).

Planiol (*Traité Elémentaire de Droit Civil,* 9e édition, tome 2, p. 418, nos. 1236 & seq.) puts the question:

> Peut-on stipuler au profit de personnes indéterminées? Oui, à la condition que les bénéficiaires de la stipulation, actuellement indéterminés, soient déterminables au jour où la convention doit recevoir effet à leur profit. Ce qui peut mettre obstacle à l'efficacité d'une stipulation pour autrui, ce n'est donc pas, à proprement parler, la simple indétermination actuelle de ces bénéficiaires, si l'on possède un moyen de les reconnaître quand il le faudra; c'est leur indétermination future, devant persister d'une manière indéfinie, autrement dit leur indéterminabilité.

And in the following number 1237, he gives, amongst other illustrations ("applications"):

> 1° l'assurance contractée "pour le compte de qui il appartiendra", qui est assez fréquente, tant en matière d'assurance terrestre qu'en matière d'assurance maritime,

in which he says that

> La jurisprudence a admis dans (ces) hypothèses la stipulation au profit de personnes indéterminées.

We find the same doctrine in Planiol & Ripert, *Traité Pratique de Droit Civil Français* (1930, tome 6, p. 502, no. 367):

> La stipulation au profit de personnes indéterminées n'est pas valable lorsque le contrat ne permet pas de les déterminer au jour où il doit recevoir effet à leur profit. Il n'y a pas d'obligation sans un créancier déterminable. Mais il n'est pas nécessaire que dès le moment du contrat il soit déterminable nominativement. La jurisprudence a admis la validité de stipulations au profit de personnes indéterminées dans de nombreuses hypothèses.

The appellant undoubtedly comes within the description of the persons whose liability is covered by the undertaking of the company. Consequently he is one of the persons insured under the policy and towards whom the respondent has assumed the obligation of indemnifying in accordance with the terms of the policy. The company cannot escape that obligation, unless it is shown that its stipulation is prohibited by law.

And such is the contention of the company. It submits that the stipulation could be valid only if Rolland Hallé,

who took out the policy, had himself an insurable interest in the liability of his brother, the present appellant, or, in other words, that an insurance policy is allowed by the law of Quebec only if the person who applies for the policy and pays the premiums therefor has a personal insurable interest in the subject-matter of the policy. Under that contention, it does not matter if the person really insured has an insurable interest; the argument proceeds on the assumption that the only person who may become insured under the law is the person who applies for the policy and who pays the premiums therefor.

We must say that we cannot admit that contention, as the law stands in the province of Quebec; and our reasons for holding that view are already so well and so ably exposed in the reasons for judgment in this case of the Honourable the Chief Justice of the province that we do not find it advisable to develop them at the same length as we might otherwise have found necessary.

In the Civil Code of Quebec, insurance is defined as follows:

2468. Insurance is a contract whereby one party, called the insurer or underwriter, undertakes, for a valuable consideration to indemnify the other, called the insured, or his representatives, against loss or liability from certain risks or perils to which the object of the insurance may be exposed, or from the happening of a certain event.

We find no difficulty in applying the definition to the policy issued by the respondent. It applies both to the main obligation undertaken for the benefit of Rolland Hallé and to the obligation undertaken towards the other persons ascertainable under subsection 5 of section B. In the terms of the document, the insurer or underwriter, The Canadian Indemnity Company, undertakes for a valuable consideration to indemnify both Rolland Hallé personally and the persons coming within the description in subsection 5 (who may be called the insured)

against loss or liability from certain risks * * * or from the happening of a certain event.

There is nothing in the definition of the code to the effect that the person "called the insured" must be the person who applies for the policy or who pays the premium.

In the article just quoted, we see nothing to prevent a person requesting the issue of an insurance policy for the benefit of another person. And there is nothing to that effect in any other article of the code.

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Article 2472 C.C., pointed to by counsel for the respondent, enacts that

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

and counsel argued from this that only the actual contracting party may take out an insurance policy for his benefit upon objects in which he has an interest.

We cannot agree with that narrow interpretation.

It should be noticed, at first, that the article is permissive only and that it should be construed in accordance with article 15 of the code:

> The word "shall" is to be construed as imperative, and the word "may" as permissive.

Article 2472 C.C. does not mean that only the contracting party may insure objects in which he has an interest, or which are subject to risk. We agree with Chief Justice Tellier, when he says:

> Tout ce que signifie la disposition de l'article 2472, c'est qu'on ne peut avoir d'assurance que sur des objets dans lesquels on a un intérêt assurable et qui sont exposés à quelque risque.
>
> Où prend-on que, lorsqu'il m'est permis de prendre ou d'avoir une assurance, je ne pourrais la recevoir par les soins d'un intermédiaire, c'est-à-dire d'un mandataire, d'un gérant d'affaires, ou, dans un des cas prévus par l'article 1029, d'un parent ou ami bienfaisant ou obligeant, la stipulant à mon profit, comme condition ou charge d'un contrat qu'il fait pour lui-même, ou d'une donation qu'il fait à un autre?
>
> Une telle règle n'existe nulle part dans le Code.

Far from there being in the code a prohibition against a stipulation of the nature stated by the learned Chief Justice, the validity of such a stipulation is expressly recognized in article 1029 referred to by the Chief Justice:

> 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 cannot revoke it, if the third person have signified his assent to it.

The stipulation made by Rolland Hallé and agreed to by the Canadian Indemnity Company in subsection 5 of the policy now in question is a valid stipulation under article 1029 C.C. Rolland Hallé has made it a condition of the contract which he made for himself; and the premium which he paid to the company was the consideration for it. That premium was paid as well for the insurance in his favour as for the insurance for the benefit of the third persons. It is well understood in the legal doctrine that the word "condition" in the text of article 1029 C.C. is meant to connote a charge imposed upon the other con-

tracting party and which the latter assumes as part of his obligations under the contract. The Chief Justice asserts as being now quite beyond dispute that it is looked upon as a "charge obligatoire et exigible"; and in support of that proposition, he cites Larombière, art. 1121, no. 2; Laurent, t. 15, no. 552; Aubry et Rau, t. 4, par. 343 ter. note 15; Mourlon, t. 2, no. 1075.

No difficulty lies in the fact that up to the moment of the accident Joseph Hallé had not yet signified his assent to the stipulation made in his favour by Rolland Hallé. His assent was not necessary to bind the insurance company. It was sufficient if he manifested his intention to avail himself of the stipulation as soon as the event happened which made the stipulation effective in his favour. The notice of the accident given by him to the insurance company was already an indication to the latter that Joseph Hallé was availing himself of the protection afforded by the policy. In his action in warranty against the company, he expressly declared that intention. It will be noticed that, under article 1029 C.C., the only effect of the assent of the third person is to make the stipulation irrevocable by the person who has made it.

And in civil law a valid stipulation in favour of a third person creates a contract between the third person and the person who has agreed to be bound by the contract. It establishes a *vinculum juris* between the latter and the third person.

Speaking particularly of the present case, the policy confers an independent right upon the third person who is insured under it. Planiol & Ripert (*Traité Pratique de Droit Civil Français,* t. 6, p. 496, no. 362) say on this subject:

> C'est le but et l'effet essentiel de la stipulation. Pour réaliser cette acquisition conformément à l'intention du stipulant qui normalement doit procurer au tiers le bénéfice à l'exclusion de tous autres, on a été amené à dire que le tiers a contre le promettant un droit direct et personnel remontant aux sources du contrat.

This Court has accepted the principle of that doctrine in the case of *The Employers' Liability Assurance Company* v. *Lefaivre* (1).

Article 1029 of the Civil Code is of general application in the law of contracts in Quebec; and it applies as well

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to the contract of insurance, unless some special rule should be found in the particular chapter specifically dealing with insurance.

Together with the learned Chief Justice of Quebec, we have already stated that no such special rule exists excluding from the insurance contract the application of the article. We have also observed that article 2472 C.C. is merely permissive. Incidentally it may be pointed out that this article, in terms, would appear to contemplate only insurance upon objects, while, by force of the definition of insurance given by article 2468 C.C., not only the perils to which an object may be exposed are stated to be valid subject-matter of an insurance contract, but also the "liability from certain risks * * * from the happening of a "certain event."

Be that as it may, the true interpretation of article 2472 C.C. is that one may become insured against loss or liability from certain risks or perils only if he has an interest in the objects exposed to such risks or perils, or in the happening of the event from which such risks or perils result. For article 2472 C.C. must necessarily be read together with article 2468 C.C.; and they must complete one another. In the insurance world as well as in legal parlance, the rule laid down in article 2472 C.C. is that, in order to be legally and validly insured, one must have an insurable interest in the object or the risk insured against for his benefit. That rule is, of course, rudimentary in insurance law; and it is significant that, in the Civil Code, it is nowhere stated as essential to the validity of a policy, unless it is to be found in article 2472 C.C., and, in our view, that is precisely where the codifiers and the legislature intended to lay down the rule.

"Insurable interest" is defined in article 2474 C.C. as follows:

> 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.

There, again, it may be pointed out, the article speaks only of insurance upon an "object" ("la chose"), while it must be beyond dispute that the definition also applies to an insurance against the risks resulting "from the happening of a certain event," and that here also article 2474 C.C. must be read with article 2468 C.C.

It cannot be questioned that, so far as insurable interest is concerned, the third persons described in subsection 5 of section B of the policy now in issue, and Joseph Hallé in particular, have such interest in the risks insured against, within the definition given by article 2474 C.C. Joseph Hallé has so much an insurable interest in the risk against which he was insured by Rolland Hallé that he might well have taken out a valid insurance policy in his own name against that risk.

So far, therefore, we find that the clause in favour of third persons, invoked by the appellant against the respondent, is valid and enforceable, because stipulations in favour of third parties are valid and enforceable in civil law. They are expressly authorized by article 1029 C.C. of the Civil Code; and no special rule exists, in the chapter of the Civil Code dealing with insurance, of a nature to exclude insurance contracts from the application of the general principle enacted in article 1029 C.C. But we think article 2480 C.C., of the same chapter, serves to strengthen the view already stated; for, in that article, the Civil Code expressly singles out a class of policies which are declared prohibited. The article begins by reciting that the contract of insurance is usually witnessed by an instrument called a policy of insurance; that 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. The article then prescribes:

Wager or gaming policies, in the object of which the insured has no insurable interest, are illegal.

It is better, we think, to quote also from the French version; for it appears to be susceptible of a clearer meaning of the intention of the legislature:

Les polices d'aventure et de jeu, sur des objets dans lesquels l'assuré n'a aucun intérêt susceptible d'assurance, sont illégales.

In connection with that article, it is interesting to read the report of the codifiers (vol. 3, p. 240) concerning that section of the Title of Insurance embracing articles 2468 to 2484 C.C. The report says:

This section consists of seventeen articles.

Article 1 is a definition of the contract of insurance, prepared upon the authority of the best writers, under the several systems of law, indicated by the citations. There is an advantage in giving a clear and precise definition in this instance, in order to make prominent the essential characteristic of insurance, viz: that it is a contract of indemnity for loss or liability; thus distinguishing the legitimate contract from that class of

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transactions which sometimes assume its form, but are in their nature mere bets or wages.

The passage is illuminating in that it distinguishes that class of transactions which sometimes assume the form of insurance but which, states the report, "are in their nature mere bets or wagers," from what the codifiers call the "legitimate contract," which they describe as "a contract of indemnity for loss or liability."

And, in order to define the "legitimate contract" of indemnity for loss or liability, the codifiers have, in their own words, made "prominent the essential characteristic of insurance," which is that the insured must have an insurable interest (articles 2472 and 2480 C.C.) and that the contract should otherwise comply with the requirements of the definition contained in article 2468.

The wager or gaming policies are those which are prohibited by the code: The policies issued in conformity with the definition proposed by them (and which has been embodied in the code) against risks in respect to which the insured has an insurable interest are those which the codifiers call the "legitimate contracts," because they contain the "essential characteristic" exposed in the "seventeen articles" of the section.

This result would seem also to follow from article 2476 C.C., whereby

> Insurance may be made against all losses by inevitable accident, or irresistible force, or by events over which the insured has no control; subject to the general rules relating to illegal and immoral contracts.

In our view, the policy issued by the respondent, including the clause invoked by the appellant, well comes within the definition of the code; it contains the essential characteristics prescribed by the legislature; it is not prohibited by any article of the code; and the particular stipulation in favour of the third persons (and in favour of Joseph Hallé amongst others) is well grounded on and well justified by article 1029 C.C.

It may be interesting to note further that article 1121 of the French Civil Code corresponds to article 1029 of the Quebec Civil Code and that, in the French doctrine and jurisprudence, the stipulation for the benefit of the third person in insurance policies is held to be valid and enforceable. May we quote from the *Pandectes françaises,* vbo *Assurances en général,* no. 361:

> Mais il va soi que l'assurance est valable s'il établi que le tiers a agi comme gérant d'affaires et pour le compte du principal intéressé.

Elle le serait également si elle était faite conformément à l'article 1121 C.C., c'est-à-dire, pour une personne stipulant à la fois, tant en son propre nom pour un risque personnel, qu'au nom du tiers exposé à un autre risque.

The second objection upheld by the Superior Court against the action of the appellant is only subsidiary. Indeed, it does not go to the merits of the claim. It is only to the effect that the action was brought prematurely. The point was not discussed by Bernier and Barclay JJ. because, in the view they took of the first question, it was unnecessary for them to pass upon this second one. Sir Mathias Tellier C.J., and Galipeault J., both rejected it; Hall J. alone approved the trial judge upon it.

The objection is the following: Subs. (5) of section B of the policy, after having provided that the company undertakes to indemnify, "en la même manière et aux mêmes conditions auxquelles l'assuré y a droit, d'après les présentes," the third persons described in the section, contains the following proviso:

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.

In this case, the "assuré," Rolland Hallé, has given no such written instructions; and it was argued on behalf of the respondent that the giving of these instructions was a condition precedent to its liability towards third persons under the policy, and that, failing those instructions, the rights of the appellant had not yet accrued.

But the proviso must be construed in light of the law of Quebec, as we understand it, in accordance with the views already expressed in our discussion of the first point raised in this appeal; and it must also be construed in light of the tenor and purport of the whole insurance policy envisaged from the viewpoint of that law.

From that standpoint, 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 right, 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.).

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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 become "payable"; and it is in the distribution of 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."

The insurer is liable under the policy only up to a certain limited amount for each accident. The proviso declares how that amount is to be distributed if the limit of that liability be reached as a result of each accident. The contracting "assuré" is to be paid first. Then, the other person, out of the balance, if any. And if there are several other persons and they cannot all be paid out of the balance, the distribution is to be made "en conformité aux instructions que l'assuré en donnera par écrit."

That interpretation agrees with that of Chief Justice Tellier and of Mr. Justice Galipeault.

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.

But, moreover, Rolland Hallé was *mis-en-cause*. The *mise-en-cause* is resorted to either for the purpose of securing a judgment personally against the third party so called in, or

> en déclaration de jugement commun, quand on ne le cite que pour voir dire qu'il y a chose jugés, à la fois, contre lui et contre le défendeur principal.

(Garsonnet, *Traité de Procédure*, 3e. édi., tome 3, p. 197, no. 574). The latter purpose was obviously the reason here for adding Rolland Hallé as a party. He has not raised a word of objection. He shall be bound by the judgment ordering that the indemnity be paid to his brother, Joseph Hallé. That consequence, in the premises, meets any purpose derived from the proviso with regard to written instructions.

Now, the policy further contains some statutory conditions; and one of them reads as follows:

Aucune action aux fins de recouvrer le montant d'une réclamation en raison de cette police ne pourra être intentée contre l'assureur à moins que les exigences ci-haut n'aient été observées et que telle action ne soit entamée après détermination du montant de la perte soit par un jugement contre l'assuré après audition du litige, soit par convention entre les parties avec le consentement écrit de l'assureur, et, de toute façon, aucune telle action ne pourra être intentée à moins qu'elle ne soit entamée avant l'expiration d'une année subséquemment.

When the action in warranty was brought by the appellant, no judgment had yet been recovered against him on the principal action, nor of course had any amount been determined by agreement with the written consent of the insurer. And the respondent, therefore, contends that, for this second reason, the action in warranty was premature.

It will be observed that the restriction put upon the right of the insured by the statutory condition, is that he may not bring an action to recover the amount of his claim under the policy, before the measure of his liability towards the victim has been determined by judgment or by agreement. The right to bring an action in warranty is not touched. Under the policy, the insurer is obliged

à indemniser en la même manière et aux mêmes conditions auxquelles l'assuré y a droit, d'après les présentes, toute personne etc.

That provision gave "toute personne" (and, therefore, Joseph Hallé) all the rights of Rolland Hallé. The words are most comprehensive and they are wide enough to include all the obligations enumerated in subsections 1, 2, 3 and 4 of section B. The respondent was, therefore, obliged to contest, on behalf of Joseph Hallé, the action brought against the latter by Louis Bourget, and to do so at its own costs. As the respondent refused to comply with that obligation, the appellant rightly brought the action in warranty to compel it to fulfil its undertaking.

As for the incidental demand, it was not probably necessary, for we think, as already stated, that the statutory condition above quoted does not prevent the insured from bringing the action in warranty at once—though, in practice, the occasion for it will rarely happen, because the insurer generally takes up the *instance* and contests the principal action in the name of the insured. However, the incidental demand appears to have been justified, in the circumstances; it was filed after judgment rendered in the principal action and it has been regarded in the provincial courts as a procedure rightly taken under paragraphs 2 and

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3 of art. 215 of the Code of Procedure. This is not a circumstance where this Court may be asked to interfere.

We have purposely avoided in these reasons to refer to the case of *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* (1) expressly relied on by the trial judge and also, to a certain extent, by one of the learned judges forming the majority in the Court of King's Bench.

It will not be necessary to repeat that the courts ought always to be careful, even when the texts are apparently the same, in accepting as authority for a proposition of law under one system, a judgment rendered under a different system of jurisprudence.

As pointed out by the Honourable the Chief Justice of the province of Quebec in the present case:

> Le jugement du Comité Judiciaire du Conseil Privé de Sa Majesté, dans la cause *Vandepitte* (1) ne peut nullement être opposé au demandeur: d'abord parce que cette cause-là était bien différente de celle-ci, et ensuite parce qu'elle dépendait d'une loi différente de na nôtre.

With those remarks we fully and completely agree. The *Vandepitte* case (1) was decided under the *Insurance Act* of British Columbia. The statutory law and the general legal principles to be applied differed in most material respects. Even where certain language of the statutes or of the policies might in some respects have appeared to correspond with the language now in issue, it had to be interpreted and to be applied according to different conceptions of the legal doctrine. Moreover, in the *Vandepitte* case (1), the victim of the accident was himself suing the insurance company. Neither the insured nor his daughter (as third person) was asserting any right. We ought to repeat what was said in this Court *re Desrosiers* v. *The King* (2):

> 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.

The appeal ought to be allowed, and the action in warranty and the incidental demand should be maintained with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *St-Laurent, Gagné, Devlin & Taschereau.*

Solicitors for the respondent: *Dupré, De Billy, Prévost & Home.*

(1) [1933] A.C. 70.

(2) (1920) 60 S.C.R. 105, at 119.