THE CENTURY INDEMNITY COMPANY (DEFENDANT GARNISHEE)..... APPELLANT; 1931 *Nov. 20.

AND

W. G. ROGERS (PLAINTIFF)..... RESPONDENT; 1932 *Mar. 15.

AND

ANNA FITZGERALD (DEFENDANT).

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Garnishment—Insurance—Motor vehicles—Automobile liability insurance policy indemnifying against loss from legal liability to pay damages to others—Recovery of judgment against insured by person damaged by collision with insured's automobile—Garnishment proceedings against insurance company—R. 590 of Ontario Rules of Court—Whether the insurance company was a "person within Ontario" and "indebted to the judgment debtor"—Terms of policy—Whether alleged debt attachable in Ontario.

Appellant, in May, 1928, issued in the United States an insurance policy to F., an American subject, by which it agreed to indemnify F. against loss by reason of her legal liability to pay damages to others arising out of the ownership, operation or use of her automobile within the

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United States or Canada. In October, 1928, near Kingston, Ontario, F.'s automobile collided with that of respondent, who sued F. in the Ontario courts and, on November 26, 1929, recovered judgment against her for damages and costs. A writ of execution was returned *nulla bona,* and respondent, on December 31, 1929, obtained an order attaching all debts owing or accruing due from appellant to F. under the policy, which was still in force. Subsequently a trial of an issue was directed to settle what amount, if any, appellant must pay to respondent on account of the judgment against F. At the trial, respondent put in evidence the policy, his judgment against F., F.'s deposition admitting the collision, the action against her, her presence at the trial, that judgment had been given against her for $8,000 and costs, that no part of the judgment had been paid, and that, at the time of the accident, she carried liability insurance on the automobile with appellant. Respondent testified that the judgment was in respect of $829 damage to his car, and the balance in respect of his personal injuries, as the result of the collision. Respondent also adduced evidence that on March 23, 1929, appellant was licensed to carry on the business of automobile and other insurance in Ontario, and shewing its head office for the province, and its assets in Ontario (moneys in bank) and its assets deposited with the Receiver General of Canada for the protection of Canadian policy holders, as shewn by its annual statement filed as required by law. A clause (F) in the policy read: "No recovery against the Company by the Assured shall be had hereunder until the amount of loss or expense shall have been finally determined either by judgment against the Assured after actual trial or by written agreement * * *."

Held: (1) Appellant was a "person within Ontario" and was "indebted to the judgment debtor," within the meaning of R. 590 of the Ontario Rules of Court. By above quoted clause (F), appellant impliedly agreed that the insured would be entitled to recover on the policy when the legal liability against which she had been insured was determined as to amount by a judgment against her after trial. The amount of her loss in this case having been determined by judgment, the right of the insured to recover that amount under the policy could no longer be disputed by appellant. Appellant was, therefore, under obligation to pay a fixed and definite sum to the insured at the time the attaching order was made.

(2) The fact that the policy was not issued in Ontario or received by the insured in Ontario was immaterial, in view of the fact that the agreement to indemnify was expressly made to cover loss incurred by the insured when operating her automobile in Canada.

(3) The debt was attachable in Ontario.

(4) Appellant's contention that the evidence put in did not, as against it, amount to proof of legal liability on F.'s part for the damage caused by the accident, in that the judgment recovered was not evidence that the damage was caused by her negligence (*Continental Casualty Co.* v. *Yorke,* [1930] Can. S.C.R. 180), was not open on this appeal, as it had not been raised in the courts below.

Judgment of the Appellate Division, Ont., [1931] O.R. 342, holding respondent entitled to recover against appellant, affirmed, subject to a slight variation as to amount.

APPEAL by the defendant garnishee from the judgment of the Appellate Division of the Supreme Court of Ontario (1), which (reversing the judgment of Jeffrey J.) held that the present respondent (plaintiff) was entitled to recover against the present appellant (garnishee), in an issue which had been directed in certain garnishment proceedings.

The material facts of the case and the questions in issue are sufficiently stated in the judgment now reported, and are indicated in the above head-note. The appeal was dismissed with costs, with a slight variation (in reduction) of the amount.

R. S. Robertson K.C. and *T. J. Rigney K.C.* for the appellant.

A. B. Cunningham K.C. for the respondent.

ANGLIN C.J.C.—I concur in the judgment of my brother Lamont dismissing this appeal. In fact, the only difficulty I have had in connection with this case arises from the decision of this Court in *Continental Casualty Co.* v. *Yorke* (2), where a somewhat similar appeal was dismissed on the ground that

> the defendant, to escape liability under the condition, must shew that the boy was driving with the knowledge, consent or connivance of S., and this it had failed to do. Such consent could not be presumed as against the plaintiff by reason of the judgment obtained by plaintiff against S.; it did not necessarily follow that because judgment was given against S., the latter had any knowledge that her son was driving her automobile, or that she consented thereto.

This case, however, I am inclined to regard as *sui generis—un arrêt d'espèce,* and it should not be allowed to govern in the case now before us. Indeed, in my opinion, it is too clear to admit of argument to the contrary that the appellant was bound by the judgment against Anna Fitzgerald, both as to the fact of her liability and the amount thereof.

The judgment of Rinfret, Lamont, Smith and Cannon JJ. (Anglin C.J.C. also concurring therein) was delivered by

LAMONT J.—Two questions arise in this appeal:

1. Are the appellants "a person within Ontario indebted

(1) [1931] O.R. 342; [1931] 3 D.L.R. 225.

(2) [1930] Can. S.C.R. 180.

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to the judgment debtor" Anna Fitzgerald, within the meaning of Rule 590 of the Ontario Rules of Court? and

2. If so, is that indebtedness attachable by the respondent to satisfy in whole or in part his judgment?

On or about May 23, 1928, the appellants, in consideration of the premiums therein stated, issued in the United States a policy of automobile liability insurance to Anna Fitzgerald, an American subject, by which they agreed to indemnify her against loss by reason of her legal liability to pay damages to others,

(*a*) For bodily injuries to the extent of $5,000, and

(*b*) damages to property to the extent of $1,000,

arising out of the ownership, operation or use of her automobile within the United States of America or the Dominion of Canada.

On October 5, 1928, Miss Fitzgerald, in operating her automobile near Kingston in the province of Ontario (a friend of hers at her request being at the wheel), collided with another automobile belonging to the respondent with the result that the respondent was seriously injured and his car badly damaged. He brought an action for damages against Miss Fitzgerald in the Ontario courts for the injuries received by him and the damage done to his car, and, on November 26, 1929, recovered judgment against her for $8,000 and costs. The $8,000 was made up as follows: $829 damages to his car, and the balance for personal injuries suffered by himself. The costs were, on December 2, 1929, taxed at $495.60, and were, by the judgment, made payable forthwith after taxation. The respondent immediately issued execution on his judgment, but the sheriff made a return of *nulla bona* to the writ. The respondent, on December 31, 1929, obtained from the local judge at Kingston, Ontario, an order attaching all debts owing or accruing due from the appellants to the judgment debtor, Anna Fitzgerald, under the above mentioned policy, which was still in force. On February 24, 1930, a further order was made:—

> that the Judgment Creditor and the Garnishee do proceed to trial of an issue to settle what amount if any the Garnishee must pay to the Judgment Creditor on account of the aforesaid judgment dated the 26th day of November, 1929.

Pleadings on both sides were delivered. The appellants rested their defence upon their refusal to admit the allega-

tions contained in the statement of claim, and the following two paragraphs:—

3. This Defendant pleads that if there was a contract of insurance issued by this Defendant to the Defendant Anna Fitzgerald, which this Defendant does not admit, such contract of insurance was not issued in the Province of Ontario by this Defendant nor was it received in the Province of Ontario by the Defendant Anna Fitzgerald.

4. This Defendant further pleads that if there is a debt owing by this Defendant to the Defendant Anna Fitzgerald, which this Defendant does not admit, such debt is not subject to attachment in the Province of Ontario.

At the trial of the issue the respondent put in evidence the policy of insurance of the appellant to Anna Fitzgerald; his judgment for $8,000, and costs, and the certificate of taxation. He then put in the deposition of Anna Fitzgerald in which she admitted the collision on October 5, 1928; that action had been brought against her by the respondent; that she was present at the trial and that judgment had been given against her as a result thereof for $8,000 and costs; that no part of the judgment had been paid and that, at the time of the accident, she carried liability insurance on her automobile with the appellants. She was not asked in so many words if the judgment obtained against her was on account of personal injuries received by the respondent and damage to his car caused by her automobile through the negligence of her driver or herself, but that, in our opinion, was the basis upon which her examination proceeded, and all parties so understood it, and the appellants, in their defence, did not allege otherwise. Apart from that, however, the respondent testified that the judgment recovered was in respect of $829 damage to his car, and the balance in respect of personal injuries to himself, as the result of the collision.

The respondent also called R. W. Warwick, Senior Actuarial Examiner of the Department of Insurance, Ottawa, who testified that, on March 23, 1929, the appellants were licensed to carry on the business of Accident, Burglary, Automobile and other insurance in the province of Ontario, and that the head office of the company for the province was at 15 Toronto street, Toronto. He also testified that, according to the annual statement filed by the appellants with the Department of Insurance at Ottawa, as required by law, the appellants, on December 31, 1929, had assets in Ontario amounting to $26,367.74, in the form of money

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deposited in the Dominion Bank at Toronto; they had also $388,000 of assets deposited with the Receiver General of Canada for the protection of Canadian policy holders. The appellants tendered no evidence.

The trial judge found the issue in favour of the appellants, holding that the insurance moneys could not be attached, as the defendant's claim against the appellants under the policy was merely a claim for unliquidated damages and not a debt due or accruing due. On appeal, the first Appellate Division (1) reversed the trial judge and entered judgment for the respondent for $6,000, the amount of the policy, with interest thereon at 5% from November 26, 1929; and for $495 for taxed costs, together with the costs of the issue and appeal. The appellants now appeal to this court.

With the exception of a slight variation to which reference will later be made, the judgment of the first Appellate Division, in our opinion, is well founded.

Rule of Court 590 reads in part as follows:—

(1) The Court, upon the *ex parte* application of the judgment creditor, upon affidavit stating that the judgment is unsatisfied and

(*a*) that some person within Ontario is indebted to the judgment debtor, or

(*b*) * * * *

may order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor, shall be attached to answer the judgment debt.

That the appellants constituted "a person within Ontario" when the attaching order was served upon them seems to admit of no doubt. As pointed out by the court below, section 31 of the *Interpretation Act*, R.S.O., 1927, ch. 1, declares that a "person" includes a body corporate or politic, which the appellants are. They were then doing business in Ontario with a provincial head office there and with considerable sums of money on deposit in a bank in the province. We, therefore, see no reason why they cannot properly be designated "a person within Ontario" within the meaning of the rule.

Then were they indebted to the judgment debtor, Anna Fitzgerald? Under the contract of insurance the appellants agreed to indemnify Anna Fitzgerald against loss by reason of her legal liability to pay damages for injuries

(1) [1931] O.R. 342; [1931] 3 D.L.R. 225.

caused to a person or his property arising out of the use of her automobile in the Dominion of Canada, and to pay the costs taxed against her in any legal proceedings to enforce a claim therefor. They did more, they fixed the time when recovery under the policy might be had, by inserting in the policy the following clause:—

F. Right of Recovery. No recovery against the Company by the Assured shall be had hereunder until the amount of loss or expense shall have been finally determined either by judgment against the Assured after actual trial or by written agreement of the Assured, the Claimant, and the Company, nor in any event unless suit is instituted within two years thereafter.

Whether apart from this clause the claim of the insured under the policy would have been a claim for unliquidated damages, it is unnecessary to inquire. By this clause the appellants impliedly agreed that the insured would be entitled to recover on the policy when the legal liability against which she had been insured was determined as to amount by a judgment against her after trial. This, in our opinion, is the meaning which the parties intended the clause to bear. The amount of her loss in this case having been determined by judgment, the right of the insured to recover that amount under the policy could no longer be disputed by the appellants. They were, therefore, under obligation to pay a fixed and definite sum to the insured at the time the attaching order was made.

This view is not, in our opinion, in conflict with what was held in *Luckie* v. *Bushby* (1). In that case the policy did not contain an express or implied undertaking to pay whatever amount the parties might agree upon as the extent of the loss. Their agreement, therefore, as to the amount at which the loss should be adjusted was only evidence by which to fix the amount for which judgment should be given.

A somewhat similar case came before this court in *Melukhova* v. *The Employers' Liability Assurance Corporation* (2), where the court held that, under garnishee proceedings taken under the Rules of Practice of the province of Quebec, the obligation of the garnishee to pay the insurance money under a policy of indemnity, constituted an indebtedness, although, under the facts of that case, it was only a conditional one.

(1) (1853) 13 C.B. 864.

(2) (1922) 63 Can. S.C.R. 511.

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That the contract of insurance was not issued in Ontario, or received by the insured in that province, is, in our opinion, immaterial in view of the fact that the agreement to indemnify was, by express provision, made to cover loss incurred by the insured when operating her automobile in the Dominion of Canada.

The only other defence set up was that, if the appellants were indebted to Anna Fitzgerald, such debt was not attachable in the province of Ontario. Since the appellants are a " person within Ontario " and the claim of Anna Fitzgerald to the insurance moneys constitutes a present indebtedness, the attachment, it seems to us, comes squarely within the rule.

On the argument before us Mr. Robertson for the appellants took the point that the evidence put in on behalf of the respondent did not, as against the appellants, amount to proof of legal liability on the part of Anna Fitzgerald for the damage caused by the accident, in that, the judgment recovered was not evidence that the damage was caused by her negligence, and he cited *Continental Casualty Company* v. *Yorke* (1). Mr. Cunningham for the respondent, however, stated that this point was not raised either before the trial judge or the Appellate Division, but that before these courts the whole issue between the parties was whether the claim for indemnity under the policy constituted a claim for debt or one for liquidated damages, and, if for a debt, was it attachable in Ontario? That this was so would appear from the judgment of the Appellate Division, written by Mr. Justice Hodgins, in which we find the following:—

> The only question therefore to be determined is whether at the date of the attaching order there was a debt, and if there was whether that debt is attachable here in Ontario.

The parties having fought out the issue before both courts below on these grounds and having taken it for granted that the respondent's judgment against Anna Fitzgerald determined the measure of the appellants' liability to her under the policy, the appellants are bound by the manner in which they have conducted their case.

The first Appellate Division gave judgment for $6,000 and interest, and costs of $495.60, together with the costs

(1) [1930] Can. S.C.R. 180.

of the issue and of the appeal. We think there was a slight oversight in these figures: the judgment recovered by the respondent for damage to his car was only $829, and the liability of the appellants under the policy for personal injuries is limited to $5,000. The appellants' total liability under these two items is, therefore, $5,829, instead of $6,000. With this slight variation we would dismiss the appeal with costs.

Appeal dismissed with costs, with a slight variation in amount of the judgment.

Solicitors for the appellant: *Rigney & Hickey.*

Solicitors for the respondent: *Cunningham & Smith.*

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*PRESENT: Duff, Rinfret, Lamont, Smith and Cannon JJ.

(1) [1931] Ex. C.R. 188.