1969
*June 11, 12
June 30

GLENS FALLS INSURANCE COMPANY (*Defendant*) ..... APPELLANT;

AND

ETHEL EPSTEIN *et al.* (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Automobile—Class action to have proceeds of policy applied in satisfaction of judgments and claims against insured—Transfer of registration of insured's vehicle prior to accident little more than sham—Policy in force at time of accident—Judgment in personal injuries action assigned to Minister of Transport as result of payment from Unsatisfied Judgment Fund—Validity of payment and assignment—The Motor Vehicle Accident Claims Act, 1961-62 (Ont.), c. 84, s. 21—The Insurance Act, R.S.O. 1960, c. 190, s. 223(1).

In a class action brought pursuant to the provisions of *The Insurance Act*, R.S.O. 1960, c. 190, to have the proceeds of a policy of motor vehicle liability insurance, issued by the defendant, applied in satisfaction of judgments and claims against the insured, judgment at trial was given in favour of the plaintiff. The Court of Appeal unanimously affirmed the trial judgment, and the defendant then appealed to this Court.

The plaintiff had recovered judgment for $1,500 against the insured and P in respect of damages suffered by her motor vehicle in a collision with one operated by the insured and at least partly owned by him. The plaintiff and her son recovered a further judgment against the insured for the sum of $10,500 for injuries received by the son in the accident and for expenses incidental thereto.

No question was raised as to the liability of the insured, but the records of the Ontario Department of Transport disclosed that the registration of the insured's vehicle was transferred to P on a date prior to the day of the accident. The defendant contended that the registration of the transfer was evidence of the fact that the insured sold the vehicle on the said date and that the policy thereupon lapsed and thus was not in force at the time of the accident. However, the record in the case revealed that the transfer did not disclose the true situation and was little more than a sham. P was not really a beneficial owner of the vehicle but had the care of it to accommodate the insured who had lost his licence.

Held: The appeal should be dismissed.

The Court did not find it necessary to consider the question of whether or not the policy would have lapsed if there had been a genuine sale or transfer of ownership because the record showed that there was never any such sale or transfer. The policy in question was, therefore, in force at the time of the accident and the insurance moneys payable thereunder should be applied in or towards the satisfaction of the claims made by the plaintiff.

*PRESENT: Judson, Ritchie, Hall, Spence and Pigeon JJ.

The disposition ordered by the trial judge of the moneys payable in satisfaction of the judgment in the personal injuries action was occasioned because that judgment was assigned to the Minister of Transport for Ontario as the result of a payment having been made from the Unsatisfied Judgment Fund. The Court rejected the defendant's contention that the payment so made was illegal as being in contravention of s. 21 of *The Motor Vehicle Accident Claims Act*, 1961-62 (Ont.), c. 84, and that the assignment which was made in consequence thereof was also illegal.

APPEAL from a judgment of the Court of Appeal for Ontario, dismissing an appeal from a judgment of Morand J. Appeal dismissed.

J. P. Bassel, Q.C., and *R. A. O'Donnell*, for the defendant, appellant.

W. S. Wigle, for the plaintiff, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal brought by the Glens Falls Insurance Company from a unanimous judgment of the Court of Appeal of Ontario rendered without recorded reasons which dismissed an appeal from a judgment rendered by Mr. Justice Morand wherein he declared that the respondent was entitled to have the insurance moneys, payable by the appellant under an "owner's policy" of automobile liability insurance in which Trifun Cvetkovics (hereinafter called the insured) was the named insured, applied in or towards satisfaction of two judgments recovered against him; one such judgment having been recovered at the suit of Ethel Epstein alone and the other by her and her son.

This is a class action brought pursuant to the provisions of s. 223(1) of *The Insurance Act*, R.S.O. 1960, c. 190, by Ethel Epstein on behalf of herself and all other persons having judgments or claims against Trifun Cvetkovics arising out of an automobile collision in respect of which it is alleged that indemnity is provided under a motor vehicle liability policy issued by the appellant. Section 223(1) of *The Insurance Act* reads as follows:

223. (1) Any person having a claim against an insured, for which indemnity is provided by a motor vehicle liability policy, is, notwithstanding that such person is not a party to the contract, entitled, upon recovering a judgment therefor against the insured, to have the insurance money payable under the policy applied in or towards satisfaction of his

1969

GLENS FALLS INSURANCE CO. v. EPSTEIN et al.

Ritchie J.

judgment and of any other judgments or claims against the insured covered by the indemnity and may, on behalf of himself and all persons having such judgments or claims, maintain an action against the insurer to have the insurance money so applied.

The effect of this section as it occurs in the Saskatchewan *Insurance Act* is succinctly stated by Judson J. in *Canada Security Assurance Co. v. Joynt*[1], at p. 113 where he says:

> The question in the statutory action is not whether the judgment in the liability action is correct but whether the plaintiff has a judgment against the insured for which indemnity is provided in the motor liability policy. A plaintiff in such an action proves his case by putting in the judgment against the insured, the insurance policy and proof of non-payment. All else is a matter of defence with the onus of proof on the insurance company.

The respondent in the present action has put in evidence a judgment which she recovered in the amount of $1,500 and costs against the insured and Borivoje Pesic in respect of damages suffered by her motor vehicle in a collision with one operated by the insured and at least partly owned by him, and she also put in evidence a further judgment against the insured in the sum of $10,500 recovered by herself and her son arising out of the same accident and relating to injuries suffered therein by her son and expenses incidental thereto.

The respondent also put in evidence the "owner's policy" of automobile liability insurance, hereinbefore referred to, by which the appellant agreed (*inter alia*) to indemnify the insured against liability imposed upon him by law to the limit of $100,000 for loss or damage arising from his ownership, use or operation within Canada of the automobile which was operated by the insured at the time of the accident in question. The policy purported to cover a period from February 28, 1959, until February 28, 1960, and the accident occurred on January 10, 1960.

"Owner's Policy" is defined by s. 198 (*g*) of *The Insurance Act* as follows:

> "owner's policy" means a motor vehicle liability policy insuring a person named therein in respect of the ownership, operation or use of an automobile *owned by him* and specifically described in the policy and in respect of the *ownership,* operation or use of any other automobile that may be within the definition thereof appearing in the policy.

The italics are my own.

[1] [1967] S.C.R. 110.

No question is raised as to the liability of the insured, but the records of the Ontario Department of Transport disclose that the registration of the vehicle in question in his name "was transferred March 18, 1959 to Borivoje Pesic. . ." and the appellant contends that the registration of this transfer is evidence of the fact that the insured sold the vehicle on March 18, 1959, and that the policy thereupon lapsed and thus was not in force at the time of the accident. The transfer on the records of the Department of Transport was proved by introduction of a copy of a statement required to be kept under *The Highway Traffic Act* and purporting to be certified by the Registrar of Motor Vehicles. In this regard s. 152(2) of *The Highway Traffic Act* reads as follows:

> A copy of any writing, paper or document filed in the Department pursuant to this Act, or any statement containing information from the records required to be kept under this Act, purporting to be certified by the Registrar under the seal of the Department, shall be received in evidence in all courts without proof of the seal or signature and is *prima facie* evidence of the facts contained therein.

It will be noted that the production of the certified copy of the transfer to Pesic provides only *prima facie* evidence of the facts contained therein and in my view the following circumstances appearing from the record in this case make it clear that the transfer so recorded did not disclose the true situation and was little more than a sham:

In the action brought by Mrs. Epstein against the insured and Pesic for damage to her motor vehicle, the defendants were both represented by a lawyer named N. Pasic who prepared a statement of defence in which it was admitted that at all material times both defendants were the owners of the motor vehicle and that the insured was the operator thereof. At the trial of that action Mr. Pasic appeared on behalf of the defendants and stated:

> I feel that the only problem I have in front of me is the position regarding these two defendants, there will be a certain conflict of interests between them. In my defence I stated that both defendants were owners of this motor vehicle. Subsequently, I found that the defendant, Pesic, was not really a beneficial owner of this vehicle, but he had care of this motor vehicle to accommodate the other defendant who had lost his licence. There are other proceedings involved in this action in Hamilton. There are, unfortunately, injuries to the driver of the other vehicle. However, the only other thing I would like to straighten up is the error that the defendant, Cvetkovics is the owner—the other defendant, Pesic, is not really an owner, he was merely an accommodating party.

1969

GLENS FALLS INSURANCE CO. v. EPSTEIN et al.

Ritchie J.

Mr. Pasic later said:

> The only worry was Cvetkovics, he told me he was worried about his friend in Hamilton who was merely an accommodating party, and I told them that if they did not give me instructions I would withdraw, so I have to be struck off the record.

When the action was later brought against the same two defendants in respect of the injuries sustained by David Epstein and the expenses incidental thereto, a defence was filed containing the following allegations:

> 2. The defendant Borivoje Pesic denies that he was the owner of the motor vehicle mentioned in the Statement of Claim and the fact is that the said motor vehicle was transferred by the defendant Cvetkovics to Borivoje Pesic as a matter of convenience and that the defendant Cvetkovics retained at all material times ownership of the same.
>
> 3. At the material time of the accident the defendant Cvetkovics was in sole control of the motor vehicle owned by him.

As I have indicated, it was strongly contended that the policy lapsed immediately upon the transfer of registration being filed in the records of the Department of Transport but, like the learned trial judge, I do not find it necessary to consider the question of whether or not the policy would have lapsed if there had been a genuine sale or transfer of ownership because the record of the cases before us satisfies me that there was never any such genuine sale or transfer and I am therefore of opinion that the policy here in question was in force at the time of the accident and the insurance moneys payable thereunder should be applied in or towards the satisfaction of the claims made by the respondent herein.

In the judgment of the learned trial judge, which was affirmed on appeal, it is declared that the respondent is entitled to have the insurance moneys payable under the policy in question applied in or towards the satisfaction of the judgments hereinbefore referred to in manner following:

(*a*) The Judgment of Ethel Epstein dated the 22nd day of September, 1961, in the sum of $1,500.00 with interest at five (5%) percent per annum from the date thereof and the sum of $453.50 with interest at the said rate from the 6th date of November, 1961;

(*b*) Her Majesty the Queen represented by the Minister of Transport for the Province of Ontario pursuant to the Judgment in favour of Ethel Epstein and David Epstein dated the 28th day of May, 1962, together with interest at five (5%) per annum from the 28th day of May, 1962, the said Judgment being in the sum of $10,500.00 inclusive of costs.

The disposition of the moneys payable in satisfaction of the judgment obtained in the personal injuries action was occasioned because that judgment was assigned to the Minister of Transport for the Province of Ontario as the result of a payment having been made from the Unsatisfied Judgment Fund, and the appellant contends that the payment so made was illegal as being in contravention of s. 21 of *The Motor Vehicle Accident Claims Act*, 1961-62 (Ont.), c. 84, and that the assignment which was made in consequence thereof was also illegal. Section 21 of *The Motor Vehicle Accident Claims Act* reads as follows:

> No payment shall be made out of the fund in respect of a claim or judgment for damages or in respect of a judgment against the Registrar of an amount paid or payable by an insurer by reason of the existence of a policy of insurance within the meaning of *The Insurance Act*, other than a policy of life insurance, and no amount sought to be paid out of the Fund shall be sought in lieu of making a claim or receiving a payment that is payable by reason of the existence of a policy of insurance within the meaning of *The Insurance Act*, other than a policy of life insurance, and no amount so sought shall be sought for payment to an insurer to reimburse or otherwise indemnify the insurer in respect of any amount paid or payable by the insurer by reason of the existence of a policy of insurance within the meaning of *The Insurance Act*, other than a policy of life insurance.

In July 1962, when the payment and assignment above referred to were made, the appellant denied, as it did before us, that there was any valid policy of insurance in existence and this issue was not determined by any Court until judgment was rendered herein by the learned trial judge on February 10, 1967. Under these circumstances it does not appear to me that the Minister of Transport was in breach of s. 21 in authorizing payment out of the Fund to Mrs. Epstein and her son. The fact that it was decided more than four years later that the policy in question was in existence and in force at the time of the accident cannot, in my view, be treated as invalidating the payment made out of the Fund or the assignment given to the Minister of Transport for Ontario.

The position therefore, in my opinion, is that at the time when the present action was brought, the Minister of Transport held a valid assignment of a claim for personal injuries which was covered by the indemnity provided in the policy issued by the appellant to which reference has hereinbefore been made. The present action is a class action brought on behalf of all persons having judgments or claims

1969

GLENS FALLS INSURANCE CO. v. EPSTEIN et al.

Ritchie J.

covered by the policy and in my opinion Mrs. Epstein was suing on behalf of the Minister of Transport in so far as the judgment in the personal injuries action was concerned, and the judgment of the learned trial judge should be affirmed in the form in which it was rendered.

For these reasons I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Bassell, Sullivan, Holland & Lawson, Toronto.

Solicitors for the plaintiff, respondent: Hughes, Amys, Wigle, Monaghan, Duke & Harlock, Toronto.