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*Nov. 23, 24
Dec. 19

CANADA SECURITY ASSURANCE COMPANY (*Defendant*) ..... APPELLANT;

AND

DENISE LUCILLE MARIE JOYNT, Administratrix of the estate of Stanley Willard Joynt, Deceased, suing on behalf of herself and all persons having judgments or claims against the insured, Charles Keyworth Topp (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Insurance—Automobile—Judgments obtained by plaintiff against insured —Class action commenced against insurance company—Action by insured against his insurer dismissed—Whether plaintiff bound by judgment in insured's action against insurer—The Saskatchewan Insurance Act, 1960, 1960 (Sask.), c. 77, s. 219(1).

Appeals—Motion to quash—Whether judgment appealed from a final judgment.

In actions arising out of an automobile accident the plaintiff J obtained two judgments against T, one as administratrix of the estate of her husband under *The Fatal Accidents Act,* and one for injuries to her two children. Because there was an appeal and a reassessment of damages, it was not until January 1964 that the damages in the *Fatal Accidents* action were finally ascertained at a sum in excess of $90,000. In March 1963, J had begun a class action against the defendant insurance company under s. 219(1) of *The Saskatchewan Insurance Act, 1960,* suing on behalf of herself and all persons having judgments or claims against the insured T.

An action started by T in June 1962 against his insurer to recover his costs of defence and for a declaration that at the time of the collision he was entitled to be indemnified under his policy was dismissed on December 31, 1963, on the ground that T was in breach of the condition of the policy relating to the consumption of liquor.

In J's action against the insurance company a motion was brought in June 1965 which was designed to end the action. The insurance company sought to have it determined that J was bound by the judgment in T's action against his insurer, asserting that this was a complete defence to J's action in so far as excess coverage was concerned. The judge of first instance dismissed the motion and this dismissal was affirmed by the Court of Appeal. The insurance company then appealed to this Court.

On the opening of the appeal, a motion was made for an order quashing the appeal on the ground that the judgment appealed from was not a final judgment.

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

Held: Both the motion to quash and the appeal should be dismissed.

J was not bound by the judgment in T's action to which she was not a party. T did not stand in any relationship of privy to her. She was entitled to have her right to recover against the insurance company determined in her statutory action under s. 219(1) of *The Saskatchewan Insurance Act, 1960*. T and the insurance company could not determine this right by litigation between themselves and then tell her that it was all over. The insurance company would have to prove its defence under this policy against her in her action and it was reasonable that they should do so. *Global General Insurance Co. v. Finlay and Layng*, [1961] S.C.R. 539, discussed.

With respect to the motion to quash, had the insurance company's motion been granted in the Saskatchewan Courts, this would have finally disposed of the matter as to excess coverage. The liability to pay the statutory limit of $5,000 was never in question. Leave to appeal was, therefore, unnecessary.

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

R. Rees Brock and *Richard J. Scott*, for the defendant, appellant.

James A. Griffin and Harold A. Dietrich, for the plaintiff, respondent.

The judgment of the Court was delivered by

JUDSON J.:—Denise Lucille Marie Joynt sued two motorists, Topp and Ritco, for the death of her husband and injuries to her two children. The husband and children were innocent bystanders at the scene of the accident. Ritco was exonerated but Mrs. Joynt obtained two judgments against Topp, one as administratrix of the estate of her husband under *The Fatal Accidents Act*, R.S.S. 1953, c. 102, and one for injuries to the two children. Because there was an appeal and a reassessment of damages, it was not until January 1964 that the damages in the *Fatal Accidents* action were finally ascertained at a sum in excess of $90,000. In March 1963, Mrs. Joynt had begun the present class action against the insurance company under s. 219(1) of *The Saskatchewan Insurance Act, 1960*, 1960 (Sask.), c. 77, suing on behalf of herself and all persons having judgments or claims against the insured Topp.

In June of 1962, Topp had started an action against his insurer, the present appellant, Canada Security Assurance

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Company, to recover his costs of defence and for a declaration that at the time of the collision he was entitled to be indemnified under his policy. This action was dismissed by Tucker J. on December 31, 1963, on the ground that Topp was in breach of the condition of the policy relating to the consumption of liquor. No appeal was taken from this judgment.

The next step that we are concerned with in the Joynt action against the insurance company is a motion brought in June 1965 which was designed to end the action. The insurance company sought to have it determined that Mrs. Joynt was bound by the judgment of Tucker J. in *Topp v. Canada Security Assurance Company,* asserting that this was a complete defence to Mrs. Joynt's action in so far as excess coverage was concerned. MacDonald J. dismissed this motion. This dismissal was affirmed by the Court of Appeal. The insurance company now appeals to this Court.

I do not think that Mrs. Joynt is bound by the judgment in the *Topp* action to which she was not a party. Topp did not stand in any relationship of privy to her. She is entitled to have her right to recover against the insurance company determined in her statutory action under s. 219(1) of *The Saskatchewan Insurance Act, 1960.* Topp and the insurance company cannot determine this right by litigation between themselves and then tell her that it is all over. The insurance company will have to prove its defence under this policy against her in her action and it is reasonable that they should do so. If they had been prudent they would have seen to it that both actions were on the list together at the trial. Then there would not have been the present difficulties.

Counsel for the appellant submitted that *Global General Insurance Company v. Finlay and Layng*[1] was authority for his proposition that Mrs. Joynt is bound by the judgment in *Topp v. Canada Security Assurance Company.* I do not think that this submission is sound.

At the trial on the question of liability for the accident in the *Global* case the insurance company refused to defend. The car was originally owned by Rheta Campbell. She died and ownership of the car became vested in Margaret Jean Campbell, her executrix. Layng was the driver of

[1] [1961] S.C.R. 539.

the car at the time of the accident. He had the car with the consent of the executrix. The judge found that Layng was negligent and responsible for the accident, and that Margaret Jean Campbell was responsible as owner. The trial judge was not concerned with the terms of any insurance policy. He simply decided that Margaret Jean Campbell was the owner as executrix and, as owner, was responsible for the damages under *The Highway Traffic Act*.

Both Margaret Jean Campbell and Layng then sued the insurance company for indemnity. For the first time the question arose whether Margaret Jean Campbell was covered as executrix. The insurance company pleaded that she was not and that the policy covered Rheta Campbell and only during her lifetime. The trial judge in this action decided that the third party liability coverage terminated upon the death of Rheta Campbell.

In the Court of Appeal and in this Court it was held that where a policy provides for indemnity against third party liability to "the insured, his executors and administrators and. . .every other person who with the insured's consent personally drives the automobile", the insurer's obligation of indemnity continues during the policy period, even though the insured owner has died, where title to the car passes to the executrix and third party liability was incurred by a person driving the car with the executrix's consent.

So far there is nothing in the *Global* case to assist the appellant. The second point in the *Global* case deals with what must be proved in the statutory action. The insurance company had urged that the whole cause of action against the insured had to be proved. This was rejected at trial, on appeal and in this Court. 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.

Counsel for Mrs. Joynt moved at the opening of the appeal for an order quashing the appeal on the ground that

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the judgment appealed from was not a final judgment. The motion to quash and the appeal were argued together and no additional costs were incurred. Had the insurance company's motion been granted in the Saskatchewan Courts, this would have finally disposed of the matter as to excess coverage. I think that counsel for the insurance company is right in saying that the liability to pay the statutory limit of $5,000 was never in question. Leave to appeal was, therefore, unnecessary.

I would dismiss the motion to quash but without costs and would dismiss the appeal with costs.

Motion to quash dismissed without costs; appeal dismissed with costs.

Solicitors for the defendant, appellant: Thompson, Dilts & Co., Winnipeg.

Solicitors for the plaintiff, respondent: Pearce, Dietrich & Co., Regina.