1961 *Present :* **Gunasekara, J., and Sinnetamby, J.**

FREE LANKA INSURANCE CO., LTD., Appellant, *and* A. E. RANASINGHE, Respondent

S. C. 144 of 1959—D. C. Colombo, 42073

Motor vehicles—Lorry—Insurance against third party risks—Action instituted by injured person against owner of lorry—Notice to insurer in terms of s. 134 of Motor Car Ordinance, No. 45 of 1938—Repeal, pending action, of Motor Car Ordinance, No. 45 of 1938, by Motor Traffic Act, No. 14 of 1951—Effect on liability of insurer in a later action—Maximum amount payable by insurer—Motor Car Ordinance, No. 45 of 1938, ss. 127 (1), 128 (1), 128 (4), 133 (1), 134, 138—Motor Traffic Act, No. 14 of 1951, ss. 99 (1), 100 (1), 100 (4), 105 (1), 106—Interpretation Ordinance (Cap. 2), s. 6 (3)—Courts Ordinance (Cap. 6), s. 36.

Plaintiff instituted action No. 22727 on the 27tb March 1950 against the owner of a lorry for recovery of damages in respect of the bodily injury sustained by him in consequence of the negligent driving of the lorry. An insurance company had previously issued a policy insuring the owner of the lorry against third party risks up to the limit of Rs. 20,000. On the 29th March 1950 plaintiff gave the insurance company notice of action in terms of section 134 of the Motor Car Ordinance, No. 45 of 1938. Pending the action and before he obtained decree in his favour awarding damages for the sum of Rs. 30,000 and costs of action, the Motor Car Ordinance, No. 45 of 1938, was repealed by the Motor Traffic Act, No. 14 of 1951, which, however, contained no relevant transitional provisions applicable to pending actions.

On the 17th September 1957 plaintiff instituted the present action seeking to recover from the insurance company the amount payable to him under the decree obtained by him against the owner of the lorry in Case No. 22727.

Held, (i) that, at the time of the repeal of the Motor Car Ordinance No. 45 of 1938, the plaintiff had acquired a right to be paid by the insurer any sum that might be payable to him under the decree in Case No. 22727, which was then pending, and by virtue of section 6 (3) of the Interpretation Ordinance that right was not affected by the repeal.

(ii) that the fact that, in the case of a lorry, the liability of the insurer need be covered only up to Rs. 20,000 in respect of any one accident has no bearing on the question of the amount payable under the decree in respect of it.

(iii) that it was open to the trial Judge to order that the defendant company should pay whatever sum was taxed in Case No. 22727 as being payable by way of costs but that the plaintiff would not be entitled to obtain a writ of execution until he furnished a certified copy of the bill of costs as taxed.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *H. W. Jayewardene, Q.C.*, and *A. C. M. Uvais*, for Defendant-Appellant.

D. S. Jayawickreme, Q.C., with *K. N. Choksy*, for Plaintiff-Respondent.

Cur. adv. vult.

September 27, 1961. GUNASEKARA, J.—

The defendant appellant, an insurance company, had issued a policy insuring the owner of a lorry, one A. M. Appuhamy, against any liability that he might incur in respect of death or bodily injury to any person caused by or arising out of the use of the lorry on a highway. On the 29th March 1948, while the policy was in force, the lorry, which was being driven on a highway by a servant of its owner acting within the scope of his employment, collided with a motor car that was being driven by the plaintiff respondent and caused bodily injury to him. The collision had been due to the negligence of the driver of the lorry. On the 27th March 1950 the plaintiff respondent instituted an action against Appuhamy, Case No. 22727 of the District Court of Colombo, for the recovery of damages in respect of the bodily injury he had sustained, and on the 29th March 1950 gave the appellant notice of that action. On the 24th September 1951 the District Court gave judgment awarding him damages in a sum of Rs. 15,000 and the costs of the action. On the 17th May 1956 the Supreme Court varied the decree of the District Court by enhancing the amount of the damages to Rs. 30,000, and awarded him the costs of the appeal. Thereafter, on the 17th September 1957, he instituted the action that has given rise to this appeal seeking to recover from the appellant the amount payable to him under the decree obtained by him against Appuhamy in Case No. 22727. The District Court gave judgment in his favour, ordering the defendant appellant to pay him a sum of Rs. 30,000 together with whatever sum might be taxed in Case No. 22727 as the costs payable to him by Appuhamy. It is contended on behalf of the appellant that he was under no legal liability to pay the respondent any sum at all, that if he was liable his liability must be held to be limited to Rs. 20,000, and further that it was not open to the learned district judge to order the payment of an unspecified sum as the costs payable in Case No. 22727.

The question whether the appellant is liable to pay the respondent the amount of the decree obtained by the latter against Appuhamy turns on the effect of the repeal of the Motor Car Ordinance, No. 45 of 1938, which was in force on the 29th March 1948 and was repealed by the Motor Traffic Act, No. 14 of 1951, when that Act came into operation on the 1st September 1951. The Ordinance of 1938 was still in force when Case No. 22727 was instituted and when notice of that action was given to the appellant company, but it had been repealed and the Act of 1951 was in force when the decree was entered.

The provisions of the 1938 Ordinance relevant to this question occur in a group of sections contained in Part VIII, which is entitled Insurance Against Third-Party Risks. They read as follows :—

S. 127 (1). . . . no person shall use or drive, or cause or permit any other person to use or drive, a motor car * on a highway unless there is in force in relation to the use of the car by that person or that other person, as the case may be, a policy of insurance, or a security, in respect of third-party risks, in conformity with the requirements of this Part.

S. 128 (1). In order to conform to the requirements of this Part a policy of insurance in relation to the use of a motor car must be a policy which—

(*a*) . . .

(*b*) insures, in accordance with the provisions of paragraph (*c*), such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor car on a highway ; and

(*c*) (i) . . .

(ii) in the case of a lorry, covers any liability which is referred to in paragraph (*b*) and which may be incurred in respect of any one accident, up to an amount which shall not be less than twenty thousand rupees ;

S. 128 (4). A policy of insurance shall be of no effect for the purposes of this Part unless and until there is issued by the insurer to the person by whom the policy is effected a certificate in the prescribed form containing such particulars of any conditions subject to which the policy is issued and of such other matters as may be prescribed.

S. 133 (1). If after a certificate of insurance has been issued under section 128 (4) to the persons by whom a policy has been effected, a decree in respect of any such liability as is required by section 128 (1) (*b*) to be covered by a policy of insurance (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of sections 134 to 137,

* *The term "motor car" is defined in the Ordinance so as to include a lorry.*

pay to the persons entitled to the benefit of the decree any sum payable thereunder in respect of that liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum under such decree.

S. 134. No sum shall be payable by an insurer under the provisions of section 133—

(*a*) in respect of any decree, unless before or within seven days after the commencement of the action in which the decree was entered, notice of the action had been given to the insurer by a party to the action ; or

(*b*) in respect of any decree, so long as execution thereof is stayed pending appeal.

These provisions are re-enacted, practically *verbatim* and without any material difference of language, in sections 99 (1), 100 (1), 100 (4), 105 (1) and 106 respectively of the Act of 1951.

The Act contains no relevant transitional provisions. The learned district judge holds, however, that " the rights of the plaintiff as against the defendant under section 133 were kept alive by virtue of section 6 (3) (*c*) of the Interpretation Ordinance ". Section 6 (3) of the Interpretation Ordinance (Cap. 2), reads :

Whenever any written law repeals either in whole or part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected—

(*a*) the past operation of or anything duly done or suffered under the repealed written law ;

(*b*) any offence committed, any right, liberty, or penalty acquired or incurred under the repealed written law ;

(*c*) any action, proceeding, or thing pending or incompleted when the repealing written law comes into operation, but every such action, proceeding, or thing may be carried on and completed as if there had been no such repeal.

The learned judge takes the view that Case No. 22727 " was a proceeding which automatically would give rights to the plaintiff as against the defendant immediately the decree was entered ", and that " on the entering of the decree automatically a statutory obligation is cast upon the defendant by virtue of section 133 of the 1938 Ordinance to satisfy that decree and costs ".

It is contended for the appellant that the learned judge has taken an erroneous view of the effect of section 6 (3) of the Interpretation Ordinance. The argument is that section 133 of the Motor Car Ordinance of 1938 had no provision for a " proceeding " and it could operate only if there

was a decree, so that its repeal while Case No. 22727 was still pending prevented the respondent from acquiring any right against the appellant. He could acquire no right under section 105 (1) of the Act of 1951, which corresponds with section 133 (1) of the Ordinance of 1938, for a condition precedent that had to be satisfied was that there was a decree obtained by him after a certificate of insurance had been issued under section 100 (4) of the Act, and no relevant certificate could have been issued under the Act before the 1st September 1958.

It is not now in dispute that there was in existence on the 29th March 1948 a certificate of insurance duly issued by the appellant to Appuhamy under section 128 (4) of the Ordinance of 1938 in connexion with the policy that was in force at the time of the accident. On that day Appuhamy incurred a liability to pay the respondent damages for the bodily injury suffered by him, and the liability was one that was required by section 128 (1) (*b*) of that Ordinance to be covered by a policy of insurance and was in fact covered by the policy in question. Under these circumstances, once the respondent obtained a decree against Appuhamy in respect of that liability, then, if the provisions of section 133 of the Ordinance continued to be operative, the appellant was under an obligation to pay to the respondent any sum so payable under the decree, provided that the respondent had given him notice of the action against Appuhamy as required by section 134. At the time of the repeal of the Ordinance the action against Appuhamy had been instituted and due notice of it had been given to the appellant. In my opinion the respondent therefore had at that time an accrued right to be paid by the appellant whatever sum might be decreed to be payable to him by Appuhamy in respect of the liability that was covered by the terms of the policy. The obtaining of a decree was, to adopt the language of Scrutton L.J. in *Hamilton Gell v. White* [1], a condition not of the acquisition of the right but of its enforcement.

In the case just cited the landlord of an agricultural holding, being desirous of selling it, gave his tenant notice to quit. Such a notice given in view of a sale entitled the tenant to compensation upon the terms and subject to the conditions of section 11 of the Agricultural Holdings Act, 1908. One of these conditions was that he should within a specified period give the landlord notice of his intention to claim compensation, and another was that he should make his claim within three months after quitting the holding. He gave due notice of his intention to claim compensation, but before the tenancy expired section 11 of the Act was repealed. He nevertheless made his claim within three months after quitting. It was held that notwithstanding the repeal of section 11 of the Act of 1908 he was entitled to claim compensation under that section by virtue of section 38 of the Interpretation Act, 1889, which provides that where any Act repeals any other enactment the repeal shall not affect any right acquired under any enactment so repealed. What gave

[1] *(1922) 2 K. B. 422 at 430.*

him the right to compensation was the fact of the landlord having given a notice to quit in view of a sale. " The conditions imposed by section 11 were conditions, not of the acquisition of the right, but of its enforcement. "

The decision in the case of *Hamilton Gell v. White* (*supra*) appears to me to support the view contended for by counsel for the respondent. At the time of the repeal of the Ordinance of 1938 the respondent had acquired a right to be paid by the appellant any sum that might be payable to him under the decree in Case No. 22727, which was then pending before the court, and by virtue of section 6 (3) of the Interpretation Ordinance that right was not affected by the repeal.

Our attention has been called by the learned counsel for the appellant to the decision of the Privy Council in the case of *Director of Public Works v. Ho Po Sang* [1] as one that throws light on the present question. Under certain provisions of the Hong Kong Landlord and Tenant Ordinance a Crown lessee was enabled to evict his tenants if he had been given a rebuilding certificate by the Director of Public Works, but a tenant could appeal by way of petition to the Governor against a proposal of the director to give a certificate and the landlord could present a cross-petition. The Governor, after consideration of every such petition and cross-petition, could direct that a certificate be given or be not given " as he may think fit in his absolute discretion ". These provisions were repealed on the 9th April 1957, but there was no express provision in the repealing Ordinance which enabled consideration to be given to any pending petitions or cross-petitions or which permitted the subsequent giving of any rebuilding certificate. By section 10 of the Hong Kong Interpretation Ordinance the repeal of any enactment was not to affect any right acquired under any enactment so repealed. At the time of the repeal of the provisions in question there were before the Governor pending petitions from the tenants of a Crown lessee and a cross-petition from him. In October 1957 the Governor ordered that a rebuilding certificate be given and a certificate was issued by the director. The lessee then served his tenants with a notice to quit, and they thereupon sued him and the director for a declaration that after the repeal the director had no legal authority to issue a rebuilding certificate. It was held that on the 9th April 1957 the lessee had no accrued right to be given a rebuilding certificate ; for the director was under no obligation to issue a certificate in accordance with his declared intention even if there had been no appeal to the Governor against his proposal, and if there had been no repeal of the relevant provisions there had to be an exercise of discretion by the Governor.

The present case is distinguishable. Under the repealed Motor Car Ordinance the injured third party could acquire a right to recover from the insurer any sum payable under a decree obtained against the insured

[1] *(1961) 2 All E. R. 721 (P. C.).*

and the acquisition of that right was not dependent on the exercise of a discretion vested in some authority. In *Ho Po Sang's Case* (*supra*) " the lessee had no *right*. He had no more than a *hope* that the Governor in Council would give a favourable decision " [1].

The insurance policy limited to Rs. 20,000 in respect of any one accident the appellant's liability to indemnify Appuhamy in respect of third-party risks. It is contended on the appellant's behalf that that is the maximum amount that he could become liable to pay to a third party under section 133 of the Ordinance. What that section requires the insurer to pay to the third party is any sum payable under the decree in respect of a liability such as is required by section 128 (1) (*b*) to be covered by a policy of insurance and is in fact a liability covered by the terms of the policy. The kind of liability in respect of which insurance is required by section 128 (1) (*b*) is liability in respect of the death of or bodily injury to any person caused by or arising out of the use of a motor car on a highway. If the vehicle is a lorry, the policy must—in terms of the same provision read with paragraph (*c*) which is incorporated in it by reference—cover that liability up to an amount of at least Rs. 20,000 in respect of any one accident. It is contended that in the use of the term " covered " in section 133 there is a reference to the quantum and not merely the kind of liability that is contemplated in the section and that it is implied that the insurer's liability under it is restricted to the amount of the cover, apart from the costs of the action.

I do not agree. The quantum that is contemplated in the use of the term " covered " is the amount of the insurer's liability to the insured. The liability to which the decree relates is that of the insured to the third party. It is the amount payable under the decree in respect of this liability that section 133 requires the insurer to pay to the third party. The fact that the liability need be covered, and is in fact covered, only up to Rs. 20,000 in respect of any one accident has no bearing on the question of the amount payable under the decree in respect of it. The possibility that an insurer may become liable under section 133 to pay to a third party a sum in excess of the amount of the cover is recognized in the Ordinance ; for section 138 provides that in such an event he shall be entitled to recover the excess from the insured.

In Case No. 22727 A. M. Appuhamy was ordered to pay the present respondent's costs in both courts. In terms of section 133 of the Ordinance the appellant company is liable to pay to the respondent any sum payable under the decree in that case, " including any amount payable in respect of costs ". At the time of the trial of the present case these costs had not been taxed. The learned district judge made order that the appellant should pay whatever sum was taxed in Case No. 22727 as being payable by way of costs, but that the respondent would not be entitled to obtain a writ of execution until he furnished a certified copy of the bill of costs

[1] *(1961) 2 All E. R. at p. 730.*

as taxed. It is contended for the appellant that the " amount payable in respect of costs " can only be the amount ascertained after taxation, and that the respondent, having failed to have his costs taxed, was not entitled to recover any sum on that account. The order made by the learned judge ensures that the respondent will not be able to recover more than the taxed costs and that no prejudice will be caused to the appellant. In terms of section 36 of the Courts Ordinance (Cap. 6), no judgment, sentence or order pronounced by any court shall on appeal or revision be reversed, altered, or amended on account of any error, defect, or irregularity which shall not have prejudiced the substantial rights of either party. There appears to be no sufficient ground for interfering with the learned judge's order on this point.

In my opinion the appeal must be dismissed with costs.

SINNETAMBY, J.—I agree.

Appeal dismissed.