[IN THE PRIVY COUNCIL]

1963 *Present :* **Lord Evershed, Lord Morris of Borth-y-Gest, Lord Guest, Lord Devlin, and Lord Pearce**

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

PRIVY COUNCIL APPEAL No. 46 OF 1962

S. C. 144/1959—D. C. Colombo, 42073

Motor vehicle—Lorry—Insurance against third party risks—Action instituted by injured third party against owner of lorry—Notice of action given to insurer in terms of s. 134 of Motor Car Ordinance, No. 45 of 1938—Repeal, pending action, of Ordinance No. 45 of 1938 by Motor Traffic Act of 1951—Effect on liability of insurer in a later action—Maximum amount payable by insurer—Motor Car Ordinance, No. 45 of 1938, ss. 127–149—Motor Traffic Act of 1951, ss. 99–121—Interpretation Ordinance (Cap. 2), s. 6 (3) (b).

By section 6 (3) (*b*) of the Interpretation Ordinance it is provided :

" (3) 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*) . . . . . ;

(*b*) any offence committed, any right, liberty or penalty acquired or incurred under the repealed written law ;

(*c*) . . . . . "

An insurance policy against third party risks was issued in respect of a lorry for one year from the 22nd February, 1948. The liability of the insurance company to the assured (owner of the lorry) in respect of any one accident was limited to the sum of Rs. 20,000. On the 29th March 1948 an accident occurred in consequence of the negligent driving of the lorry, and the respondent, who was driving the motor car with which the lorry collided, suffered substantial bodily injuries. On the 27th March 1950 the respondent instituted action against the assured for recovery of damages and, two days later, gave the insurance company notice of action in terms of section 134 of the Motor Car Ordinance, No. 45 of 1938. On the 24th September 1951 he obtained judgment from the District Court for Rs. 15,000 damages, which sum was increased on the 27th May 1956 by the Supreme Court, on appeal, to Rs. 30,000. On the 17th September, 1957 the respondent commenced the present action against the appellants (the insurance company) and, in due course, obtained judgment for Rs. 30,000 and costs.

Shortly before the decree of the District Court was obtained by the respondent against the assured, the Motor Car Ordinance No. 45 of 1938 was repealed on the 1st September 1951 and replaced by the Motor Traffic Act of 1951. The latter Act contained no transitional provisions designed to preserve or capable of preserving the rights or claims originating under the 1938 Ordinance.

It was contended on behalf of the appellants (1) that having regard to the repeal of the Ordinance in force at the time of the accident and before the decrees in favour of the respondent in the action brought by him against the assured, the appellants were not under any liability to the respondent ; and (2), that if the appellants were liable to the respondent, then their liability was limited to the sum of Rs. 20,000.

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Held, (i) that the respondent had, prior to the date when the 1951 Act came into force, "acquired a right" against the appellants within the meaning of section 6 (3) (*b*) of the Interpretation Ordinance. The respondent was immediately after the accident an injured third party entitled to recover damages against the assured. His service upon the appellants of the notice of his claim pursuant to section 134 of the 1938 Ordinance was an assertion by him of his statutory right against the appellants; and nonetheless effectively so because the quantum of his claim was dependent upon the finding of the court in a decree made in his favour in his action against the assured.

(ii) that, under sections 128 and 133 of the Ordinance of 1938 (sections 100 and 105 of the Act of 1951), the liability of the appellants to the respondent should be limited to Rs. 20,000.

APPEAL from a judgment of the Supreme Court reported in (*1961*) *63 N. L R. 529.*

Michael Kerr, *Q.C.*, with *R. A. MacCrindle*, *Q.C.*, and *Christopher Owen*, for the defendants-appellants.

No appearance for the plaintiff-respondent.

Cur. adv. vult.

December 16, 1963. [*Delivered by* LORD EVERSHED]—

This appeal arises out of a road accident in Ceylon which took place more than 15½ years ago. On 29th March 1948 a lorry driver, being an employee of one A. M. Appuhamy, collided with a motor car driven by Mr. A. E. Ranasinghe (the respondent before the Board) as a result of which the respondent suffered substantial bodily injuries. It is not now in doubt that the collision was occasioned by the negligence of the lorry driver and the damages eventually awarded by the Supreme Court of Ceylon against Mr. Appuhamy amounted to Rs. 30,000. Their Lordships cannot but feel a considerable sympathy for the unfortunate respondent who (so far as their Lordships know) has so far received nothing whatever in respect of the damage which he suffered and who, whether for financial reasons or otherwise has not been represented before the Board on this appeal.

It was at the relevant date and is the law in Ceylon (as it was and is in England) that the user of a motor vehicle must be insured as regards injuries resulting to third parties from accidents of the kind which occurred in this case—what are generally called third party risks. At the date in question Mr. Appuhamy was so insured with the appellant insurance company for one year from 22nd February 1948 by virtue of a policy dated 15th March of that year; but the liability of the appellants to the assured in respect of any one accident of the kind which in this case occurred was, in due accordance with the terms of the relevant Ceylon legislation, limited to the sum of Rs. 20,000.

Under the relevant Ceylon legislation (as under the corresponding English legislation) a third party injured by the insured person is given upon certain terms and conditions the right to claim payment of the amount of his damages direct from the insurance company concerned and the claim in the action from which the present appeal arises was such a claim by the respondent. Before the Board, as in the courts below, two distinct points were taken by the appellants, namely (1) that having regard to the repeal of the relevant Ceylon legislation in force at the time of the accident and before the decrees in favour of the respondent of the District Court and the Supreme Court in the action brought by him against Mr. Appuhamy, the appellants were not under any liability to the respondent; and (2), that if the appellants were liable to the respondent then their liability was limited to the sum of Rs. 20,000. Both these questions were decided adversely to the appellants by the District Court and also by the Supreme Court in Ceylon.

It becomes now necessary to refer to the relevant provisions of the Ceylon legislation. At the date of the accident there was in force the Motor Car Ordinance No. 45 of 1938, Part VIII of which (sections 127 to 149 inclusive) related to insurance against third party risks. This Ordinance was replaced by the Motor Traffic Act of 1951, the date upon which the repeal of the Ordinance took effect and the 1951 Act came into operation being the 1st September 1951. The subject of insurance against third party risks was covered by Part VI of the 1951 Act (sections 99–121 inclusive). The language of the relevant sections in the 1951 Act was however, for all practical purposes, identical with that of the replaced sections in the 1938 Ordinance. It will therefore only be necessary for their Lordships to refer to the sections in the 1938 Ordinance giving where necessary the number of the corresponding section in the 1951 Act. It may be noted—and the point is of some relevance upon the second of the questions above formulated—that the relevant language of the Ceylon legislation followed closely that of the English Road Traffic Act 1934.

Section 127 of the 1938 Ordinance (section 99 of the Act of 1951) required users of motor cars to be insured against third party risks. By section 128 of the 1938 Ordinance as amended at the relevant date (section 100 of the 1951 Act) it was provided (subsection 1) that "in order to conform with the requirements of this Part a policy of insurance in relation to the use of a motor car must be a policy which . . . (*b*) insures in accordance with the provisions of paragraph (c) [the insured person or persons] . . . in respect of any liability which may be incurred by him or them in respect of . . . bodily injury to any person caused by or arising out of the use of the motor car on a highway; and (c) . . . (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 Rs. 20,000". The proviso to the subsection excepted from the requirements of the section liabilities in respect of employed persons, contractual liabilities

and (save as stated) liabilities for injury to persons getting in or out of the motor car. Subsection 4 of the section provided that for the effectiveness of a policy there must be issued by the insurers to the assured "a certificate in the prescribed form" containing *inter alia* particulars of any conditions to which the policy was subject. It may here be observed that so far as is known no regulations were ever made under either the 1938 Ordinance or the 1951 Act prescribing the precise form of the certificate last mentioned but it is not in doubt that in the present case the appellants had in 1948 issued to Mr. Appuhamy a certificate in the form which was accepted in Ceylon as proper and appropriate.

It was section 133 of the 1938 Ordinance (section 105 of the 1951 Act) which imposed liability upon insurers direct to injured third parties. In the circumstances the section should be set out in full:

> "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, 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.
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> (2) In this section 'liability covered by the terms of the policy' means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled, the policy."

By section 134 of the 1938 Ordinance (section 106 of the 1951 Act) the insurers were not liable to an injured third party in respect of the decree unless within seven days after the commencement of the action in which the decree was entered notice had been given to the insurer by a party to the action.

There follow two sections absolving the insurer from liability to third parties in certain events. Section 138 of the 1938 Ordinance (section 110 of the 1951 Act) must also be set out in full:

> "138. If the amount which an insurer becomes liable under section 133 to pay in respect of a liability of a person insured by a policy exceeds the amount for which he would, apart from the provisions of that section, be liable under the policy in respect of that liability, he shall be entitled to recover the excess from that person."

Finally, by section 140 of the 1938 Ordinance (section 112 of the 1951 Act) provision is made in the event of the assured becoming insolvent or compounding with his creditors whereby the rights of the assured against the insurer should vest in an injured third party.

Their Lordships turn now to the first point taken by the appellants. As already stated the accident occurred on the 29th March 1948. On the 27th March 1950 the respondent began his action against Mr. Appuhamy and two days later (viz., on the 29th March 1950) he gave formal notice to the appellants of that fact enclosing a copy of his plaint in the action. A defence to the respondent's claim was put in by Mr. Appuhamy on the 4th August 1950 but it may be observed that there is nothing to show that Mr. Appuhamy's defence was handled in fact by the appellants. On the 24th September 1951 the respondent obtained judgment from the District Court for Rs. 15,000 damages. The respondent appealed against the quantum of damages awarded and on the 17th May 1956 the Supreme Court allowed his appeal increasing his award to Rs. 30,000. It appears that in January 1957 the respondent obtained leave to levy execution for his damages against Mr. Appuhamy but it is not known whether anything has ever in fact been recovered thereunder. On the 17th September 1957 the respondent commenced his action against the appellants obtaining judgment for Rs. 30,000 and costs from the District Court on the 6th March 1959 ; and the appellants' appeal to the Supreme Court against that judgment was dismissed on the 27th September 1961.

From the dates which their Lordships have been given it will be observed that shortly before the decree of the District Court was obtained by the respondent against Mr. Appuhamy, namely on the 1st September 1951, the Ordinance of 1938 was repealed and replaced by the Act of 1951 and and it is upon this fact that the appellants' first point is founded.

It has been strenuously contended on their part that the only right which the respondent has to claim direct against the appellants for the damage he has suffered is one exclusively based on statute ; that at the time of the accident and at the time when he gave notice of his action against Mr. Appuhamy the matter was governed by the Ordinance of 1938 ; that since the 1938 Ordinance had been repealed (and was repealed before any decree was obtained by him against Mr. Appuhamy) he cannot now assert any statutory right under that Ordinance ; and that he must therefore claim exclusively under the Act of 1951 the terms of which cannot upon the fair meaning of the words used in the relevant section cover his claim. The relevant section for the purposes of the respondent's claim is s. 105 of the 1951 Act which replaced s. 133 of the 1938 Ordinance and, it is claimed, by the terms of that section the essential condition of a claim is that a certificate of insurance should have been " issued under s. 104 (1) " of that Act ; whereas in fact the only relevant certificate in the present case was one issued in 1948 and therefore in no sense " under " the Act of 1951 which did not come into force until 3½ years later. Finally it is (with truth) pointed out on the appellants' part that the 1951 Act contains no transitional provisions designed to preserve or capable of preserving the rights or claims of the kind involved in the present case originating under the 1938 Ordinance.

Their Lordships would indeed be sorry if they were compelled to hold that the terms of the Ceylon legislation were such as to deprive the respondent in the present case of any right to claim against the appellants; but notwithstanding the arguments addressed to them they are satisfied that the Supreme Court (and the District Court) were entitled to reject the appellants' claim by an invocation of the terms of section 6 (3) of the Ceylon Interpretation Ordinance (Cap. 2) of 1900. By that subsection it is provided :

> " (3) 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 ;
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> (*b*) any offence committed, any right, liberty, or penalty acquired or incurred under the repealed written law ;
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> (*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 Board respectfully agrees with the Supreme Court in thinking that the respondent had on the 1st September 1951 " acquired a right " against the appellants within the meaning of para. (*b*) of that subsection. The attention of their Lordships was drawn to a number of cases including those referred to in the judgment of Gunasekara J. in the Ceylon Supreme Court and including also the case in the House of Lords of the *Central Electricity Board v. Halifax Corpn.* [1] The distinction between what is and what is not " a right " must often be one of great fineness. But their Lordships agree with Gunasekara J. in thinking that on the 1st September 1951 the respondent had as against the appellants something more than a mere hope or expectation—that he had in truth a right, within the contemplation of section 6 (3) (*b*) of the Interpretation Ordinance, under section 133 of the Ordinance of 1938 although that right might fairly be called inchoate or contingent. In the case of *Director of Public Works v. Ho Po Sang* [2] the Board was concerned with an analogous problem under the language (closely approximating to that of the Ceylon Interpretation Ordinance) of the Interpretation Ordinance of Hong Kong. Their Lordships are well content to accept and adopt the language used by Lord Morris of Borth-y-Gest in the judgment of the Board in that case (see page 922 of the Report). " It may be . . . that a right has been given but that in respect of it some investigation or legal proceeding is necessary. The right is then unaffected or preserved. It will be preserved even if a process of quantification is necessary. But there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given ". In the present case, as it seems to the Board, the appellants cannot now be

[1] *1962 3 W. L. R. 1313.*

[2] *[1961] A. C. 901.*

heard to say that the respondent was not immediately after the accident an injured third party entitled to recover damages against Mr. Appuhamy and, as they think, his service upon the appellants of the notice of his claim (together with a copy of his plaint) pursuant to section 134 of the 1938 Ordinance was an assertion by him of his statutory right against the appellants; and nonetheless effectively so because the quantum of his claim was dependent upon the finding of the court in a decree made in his favour in his action against Mr. Appuhamy.

Their Lordships are therefore of opinion that, for the reasons given by Gunasekara J. the Supreme Court was justified in holding as it did upon the first of the questions raised by the appellants that the case fell within the terms of section 6 (3) (*b*) of the Interpretation Ordinance and they do not find it necessary to express any view whether, as the District Judge held, the service by the respondent of his notice upon the appellants might not also fairly be treated as constituting a "proceeding" within the terms of section 6 (3) (*c*) which was "incompleted" when the repeal of the 1938 Ordinance took effect. Their Lordships add that even if the case were not covered by section 6 of the Interpretation Ordinance it does not necessarily follow that the appellants should succeed upon this point. The vital words of section 105 (1) of the Act of 1951 (section 133 (1) of the 1938 Ordinance) are "if a certificate of insurance has been issued under section 100 (4)". The latter subsection however does no more (as did not the corresponding subsection (4) of section 128 of the 1938 Ordinance) than require the issue of a certificate in "the prescribed form". As already stated there appear never to have been any regulations under either piece of legislation prescribing the form to be used. It may therefore well be said that the words "under section 100 (4)" should be construed as meaning no more than "as contemplated by" that subsection and, if so, that the relevant certificate issued by the appellants in 1948 satisfied the statutory requirement under the 1951 Act. Indeed, unless it were so, the remarkable result would seem to flow from the coming into force of the 1951 Act that all motor car users would be instantly disqualified by virtue of section 99 of the Act from using their motor cars because there was not in force a policy of insurance in respect of third party risks in conformity with the requirements "of this Part" of the Act. But in the circumstances it is unnecessary for their Lordships to express a final conclusion upon this point.

Upon the second question—whether the liability of the insurers should be limited to Rs. 20,000—their Lordships have felt much greater difficulty and have in the end come to the conclusion that in this respect the appellants' argument is well founded. True it is that the terms of sections 133 and 138 of the 1938 Ordinance (sections 105 and 110 of the 1951 Act) seem at first sight to provide the answer; for the latter section undoubtedly contemplates a payment by the insurer to a third party in excess of the insurer's liability to the person insured and section 133 requires that the insurers "shall . . . pay to the persons entitled to the benefit of the decree any sum payable thereunder" (that is under

the decree) "in respect of the liability"; and it may be forcibly contended that the Rs. 30,000 awarded by the Supreme Court was awarded "in respect of the liability" of Mr. Appuhamy to the respondent. Their Lordships have not had the advantage of hearing any argument on the part of the respondent but in the end have felt compelled to reject this view. In approaching the problem their Lordships are impressed by the reflection that it would appear as a matter of principle unlikely that a third party having no contract with the insurers should yet be entitled to recover from the insurers a sum greater than the limit imposed by the insurer, properly in accordance with the Ordinance, in the policy of insurance. Second they note that the "liability" referred to in section 133 is by the terms of subsection (1) a "liability *required* by section 128 (1) (*b*) to be covered by a policy of insurance." It is therefore necessary to turn back to section 128 and it is to be observed that the terms of paragraph (*b*) of sub-section (1) expressly incorporate the succeeding paragraph (*c*). It therefore follows that in the case of a lorry the liability "required" to be covered is a liability which shall not be less than Rs. 20,000 but need not exceed that figure—so that any liability in the present case (having regard to the terms of the policy) in excess of Rs. 20,000 was not one "required" to be covered by the policy.

There remains however the language of section 138; and if it were shewn that a payment by the insurer to a third party cannot within the contemplation of the provisions of Part VIII of the Ordinance of 1938 (Part VI of the 1951 Act) be in excess of the insurers' liability under his policy of insurance save in a case such as the present it would be a very strong, if not a conclusive, argument against the view for which the appellants contended. But in truth there are undoubtedly other cases which might arise under the relevant Part of the Ordinance (or of the Act) where the insurer's statutory obligation to a third party might exceed his contractual liability under the Policy. One such instance may be found to arise from the proviso already noticed to section 128 of the Ordinance itself (section 100 of the Act) which exempts from what is "required" by the section to be covered, liability in respect of persons in the employment of the insured, contractual liabilities and certain liabilities in respect of persons getting in or out of the motor car. Another instance may be derived from section 130 of the Ordinance (section 102 of the Act) which provides that certain conditions may be made in policies effectively limiting the insurers' liability to the assured under section 128 of the Ordinance (section 100 of the Act) namely the conditions indicated in subsection (4) thereof; for example by excluding the use of the motor car for certain business purposes. One effect of the subsection therefore is that liability which may be excluded by the conditions therein mentioned is not liability "required" to be covered by section 128 of the Ordinance. In their Lordships' view it would be strange—and indeed capricious—if though in cases arising under section 137 the insurer may limit his liability to the third party to the amount of his liability to the assured, there were no corresponding escape for the insurer in cases such as the present or in cases arising

under the proviso to section 128. In their Lordships' opinion these anomalies are avoided if proper effect be given to the essential word "required" in section 133 of the Ordinance and the corresponding use of the word "requirements" in section 128. A third instance may be found in section 137 of the Ordinance (section 109 of the Act) which excuses the insurer from liability to a third party (for example) if he has within a stated period of time given notice of a declaration duly obtained by the insurer from a court of competent jurisdiction that there has been a breach by the insured of one of the conditions above mentioned in section 130 (4); for the case may well occur where an insurer has failed to give notice in due time. Finally their Lordships observe that paragraph (*b*) of the proviso to subsection (3) to section 140 already referred to (relating to the vesting in the third party of the rights under his policy of an assured who is insolvent) in terms contemplates the case where the resulting liability of the insurer to the third party is greater than his liability under the policy.

Their Lordships add to what they have already said one further consideration. As already observed the language of the Ordinance of 1938 (and of the Act of 1951) generally follows closely that of the English Road Traffic Act of 1934; and this is clearly true of section 138 of the Ordinance (section 110 of the Act) the general purpose and sense of which are identical with those of section 10 (1) of the English Road Traffic Act of 1934, the language being also closely followed. Yet in the English Act there is no power conferred for limiting the liability of the insurer to the insured person under a contract of insurance as regards third parties to some specific figure for any one accident corresponding to the power contained in section 128 (1) (*c*) of the Ordinance (section 100 (1) (*c*) of the Act).

From the examples given (and their Lordships do not think they are exhaustive) it seems to the Board clear that circumstances may well arise, apart altogether from the case of limitation of liability in respect of a lorry, in which the insurer might be ordered to pay to a third party sums in excess of the insurer's liability to the assured. It is then necessary to look again at section 128 of the Ordinance—the vital section for the purposes of the present argument; and having regard to the use of the words "required to be covered" in section 133 of the Ordinance (section 105 of the Act) their Lordships find it impossible to reject the appellants' argument that the latter section does not render in such a case as the present the insurer liable to the third party for a greater sum than that for which he is liable (in due accordance with section 128 of the Ordinance) to the assured.

Their Lordships therefore while rejecting the appellants' argument on the main point presented on their behalf think that the appeal should be allowed to the extent of reducing the amount payable by the appellants to the respondent to Rs. 20,000 and they will humbly advise Her Majesty accordingly. In the circumstances of the case no order is made as to the costs of this appeal.

Appeal partly allowed.