IN THE SUPREME COURT OF SIERRA LEONE

Coram:

Hon. Mr. Justice S.C.W. Betts - Justice of the Supreme Court
Hon. Mr. Justice Philip Bridges - Chief Justice of the Gambia
Hon. Mr. Justice E. Livesey Luke - Justice of the Supreme Court
Hon. Mr. Justice S.J. Forster - Justice of the Supreme Court
Hon. Mr. Justice N. E. Browne-Marke - Justice of Appeal

Civ. Appeal
No.1/72

17th October, 1973

Royal Exchange Assurance Limited - Appellants

and

Toufic Bazzy - Respondent

JUDGMENT

Cyrus Rogers-Wright Esq.
S. H. Harding Esq.
S. N. K. Basma Esq. } For the Appellants

J. H. Smythe Q.C.
Miss Olive Taylor
A. L. O. Metzger Esq. } For the Respondent

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Judgment Delivered on the 17th day of October 1973.

BETTS, J.S.C.:- This is an appeal from the Court of Appeal against the judgment of that Court (Cole, C.J., Harding and Davies - JJ.A.) confirming a grant of an award of Le9,490.41 cents (damages and costs) together with interest of 6% per annum from the date of the accident, 14th July, 1966 to 21st August, 1970 the date of judgment. This action arose from a motor traffic case which started in the Magistrate's Court, Kono, in which Sahr Kissi Kondewa was charged with several offences including driving a vehicle "without first obtaining a licence to do so". He pleaded guilty to that charge and was fined Le100 or three months imprisonment in default. After Kondewa's conviction Toufic Bazzy who was injured as a result of the accident brought an action for damages against one Sorie Mansaray, the insured, and the driver Kondewa in the High Court then Supreme Court. On the date of the accident 14th July 1966, the vehicle WU 809 was insured with the Royal Exchange Assurance Company Limited. Judgment was given for the Plaintiff in the sum of Le6,500 (Six thousand five hundred leones) with costs which were taxed at Le2,990.41 (Two thousand nine hundred and ninety leones and forty-one cents) and interest. The Plaintiff notified the defendants about the judgment against the insured and the driver. The judgment remaining unsatisfied, the Plaintiff thereupon successfully sued the Royal Exchange Assurance Company

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Limited for the recovery of the judgment debt. The Royal Exchange Assurance Company Limited appealed to the Court of Appeal which dismissed the appeal. It is this decision that the Royal Exchange Assurance Company appealed against to this Court. The Appellants/Defendants argued that the Court of Appeal was wrong in law in their construction of Sections 9 and 11 of the Motor Vehicle (Third Party Insurance) Act, Chapter 133 of the Laws of Sierra Leone. They argued in effect that in the particular circumstances of the accident, they are not obliged in law to satisfy the judgment in favour of the Respondent. Chapter 133 of the Laws of Sierra Leone (hereinafter referred to as the Act) makes provision for a Third Party who suffers death or injury as a result of a motor vehicle accident, or his dependants in the former case, to seek redress, if necessary in the Courts of the land against the owner of the vehicle and/or an insurance company. The provision is entitled "An Act to make provision against third party risks arising out of the use of motor vehicles."

The effect of the argument on behalf of the Appellants/Defendants is that on a proper interpretation of Section 9 of the Act, the Respondent/Plaintiff should not have been caught by the condition contemplated by Section 9 and therefore ought to be outside the scope of the policy under this Act and not entitled to the benefits arising out of an independent right of action against the Appellants/Defendants' Company, contained in Section 11(1).

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The Act provides in Section 3(1) "that no person shall use, or cause or permit any other person to use a motor vehicle unless there is in force in relation to the user of that motor vehicle by such person or such other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the provisions of this Act." The Act imposes a criminal sanction for a contravention of this provision in order to impress the imperative and comprehensive character of its specific requirement. Imperative conditions are also set out in Section 7(1)(a) and (b) of the Act. (a) Provides that the insurer must be approved by the President and (b), which is more immediately relevant to the issue states that, for the purpose of this Act, the insurance policy must "insure such person or classes of person 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 a motor vehicle covered by the policy." This is a statutory mandatory condition and I think it is relevant to point out here that impliedly the law empowers the insurers to exercise a right of restricting the persons or classes of person they would cover. To achieve the purpose of the Act there are certain fundamentals necessary. Those outlined are:- No motor vehicle is to be used on the highway without an insurance policy

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covering its use; the policy should be issued by a recognised insurer; and a cognisable person or classes of person to be covered by the policy. The policy required under the Act is not, quite prudently, left exclusively with the insured and the insurers, some restraints being statutorily brought to bear on their normal capacity to contract. One of the conditions is set out in Section 9 of the Act. It is of great moment in this case and I think it is necessary to set it out in extenso. It states that "Any condition in a policy or security issued or given for purposes of this Act, providing that no liability shall arise under the policy or security or that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security shall, in respect of such liabilities as are required to be covered by a policy or security issued for the purposes of this Act, be of no effect."

Counsel for the Appellants/Defendants strenuously argued against the interpretation given to this Section by the Court of Appeal which held that "Any condition in a policy or security whether considered as precedent or subsequent if caught within the ambit of that section, Section 9, shall be of no effect." The judgment of the Court of Appeal went on to spell out the material portions of the section and ended with the words "In other words

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the section in my view embraces two separate and distinct types of conditions, namely, those which have the effect of negativing liability ab initio upon the breach of a condition and those which make the negativing of the condition conditional upon the doing or omitting to do some specified thing after the happening of the event giving rise to a claim under the policy or security." Obviously the construction applied is disjunctive with each type of condition being independently "of no effect" and completely ignoring the appropriate time when that provision should take effect.

It is important at this stage to enquire what effect such a construction will have on Sections 10 and 11(1) of the Act. Section 10 lists certain events which if included in a policy purporting to restrict the insurance of a person insured should be considered of no effect where a certificate of insurance has been issued. Section 11(1) while conferring a right on third parties to institute independent action against insurers that right can only be exercised after judgment is obtained against the insured. According to the construction referred to before, any condition in a policy of insurance will be absolutely void (and Section 10 giving specified exceptions would be unnecessary.) If this construction was correct Section 11(1) would not have made it obligatory on insurers to satisfy a judgment only after a successful action against the insured.

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Counsel for the Appellants/Defendants argued that the construction which ought to be given to Section 9 should be conjunctive. The words "any condition in a policy or security issued or given for the purpose of this Act providing that no liability shall arise under the policy or security" and "that any liability so arising shall cease in the event of some specified thing being done or omitted to be done," should be controlled by the words "after the happening of the event giving rise to a claim under the policy or security". Construed in this way one particular class of events, if included in the policy will be avoided statutorily. That class of events, is all conditions arising "after the event giving rise to a claim." In point of time those conditions become operable ~~be~~ only after the accident and have no reference to events occurring either before or contemporaneously with the event giving rise to the claim. There also appears grammatical support. Black's Law Dictionary, 4th Edition at p.334 defines a comma as "A point used to mark the smallest structural division of a sentence, or a rhetorical punctuation mark indicating the slightest possible separation in ideas of construction." As against similar legislation in Kenya and the United Kingdom the use of the comma in Section 9 is most restrictive coming for the first time after the words "or security shall" suggesting not even the slightest separation in ideas or construction as conceivable in

the Kenya and United Kingdom Legislations. This view is supported by McGillvray on Insurance Law, Vol.2 5th Edition p. 1010 paragraph 2030. It is stated at p.1011 "in the event of some specified thing being done or omitted" apply to "no liability shall arise" as well as to "any liability so arising shall cease." See Gray v. Blackmore (1934) 1 K.B. 95.

In the United Kingdom legislation there are three commas whilst there are four in the Kenya. For further support I make reference to the case in the Court of Appeal, Ghana - Civ. Appeal No. 165/71. Adjoa Pokua - Plaintiff/ Appellant v. State Insurance Corporation, Kumasi, Defendants/Respondents. I borrow the words of A.N.E. Amissah J.A. used in the course of his judgment, on the construction of Section 8 of their Act which is similar to our Section 9 of the Act. He stated "HARDY v. MOTOR INSURERS' BUREAU (1964) 2 Q.B. 745 teaches us no more than this that where the user of the vehicle is covered by compulsory insurance a victim of an intentional criminal act may recover under the policy even though the perpetrator of the act himself cannot as a matter of public policy take advantage of his act." He goes on to say that "Hardy's case does not, and cannot be taken to say that where the user is not covered, as it was not in the instant case, the third party can get on to the Insurance Company. Our duty in this case calls for the construction of an Act, not a non-existent agreement (Motor Insurance Bureau in

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England)". Further along he said "There is, to my mind no reason why the legislature should not choose to distinguish between conditions excluding liability dependent on occurrences after an accident on the one hand and those where the occurrences are before the event takes place." Later he said "I am convinced that this simple distinction determines the approach of Section 8 of the Act - (our Section 9 of Chapter 133) to the issue. It must be remembered that though the objects of the Act as set out is to 'make provision for the protection of third parties against risks arising out of the use of motor vehicles and for purposes incidental thereto' it did not in fact provide a comperhensive cover for third parties in all cases." In addition Halbury's Laws of England 3rd Edition Vol. 22 at p. 372 paragraph 763 states that "Accordingly it was provided that certain conditions in the assured's policy were to be of no effect in relation to claim by a person to whom an assured was under a compulsorily insurable liability. The conditions to that extent avoided are <u>any condition providing that no liability shall arise, or that any liability which has arisen shall cease,</u> in the event of some specified thing being done or omitted to be done, <u>after the occurrence of the event giving rise to the claim.</u>" Halbury goes on to say that "If, therefore any admission of liability is made after an accident contrary to a condition in the policy or if contrary to any condition in the policy,

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proper notice of the accident is not given to the insurers, the injured party is not affected so far as his claim is concerned. REVEL v. LONDON GENERAL INSURANCE COMPANY (1934) All E.R. Report p.744." These references indicate that the construction given to Section 38 of the R.T.A. (1930) of the United Kingdom which is similar to Section 9 of the Act tends to stress a continuity instead of a separation of ideas. In the circumstances it would seem to me more appropriate in view of the logical - in terms of the relationship and sequence of the provisions - grammatical and textual support that such a construction should be the one applicable to all and any conditions which do not occur after the happening of the event giving rise to a claim. I am inclined to accept the reasoning and construction founded upon it.

Counsel for the Respondent/Plaintiff contended that with regard to Section 9, the argument advanced by the Appellants/Defendants was that "Any condition in a policy issued etc." was not a definition but what it says - a condition - and in that case would be caught by Section 9. He relied on the dictum of the learned Chief Justice in the instant case and the case of NEW INDIA INSURANCE COMPANY v. CROSS (1966) E.A.L. Report page 90, and particularly on the judgments of Newbold V.P. and Crabbe J.A. He further argued that this section should not be given a narrow construction but one which will accord with the intention of the legislature.

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With respect I have already stated that I accept and adopt the reasoning advocated on behalf of the Appellants/Defendants and therefore I do not support the construction put on the Section by the learned Chief Justice. It is my opinion that the construction advanced by both Newbold V.P. and Crabbe J.A. are substantially based on a complete disregard of the history of the development of the Insurance (Motor Vehicle Third Party Risks) provisions. It appears to me that the several United Kingdom Acts dealing with the problem - 1930, 1934, 1946 and 1960 constitute a gradual progressive improvement of the rights of third party and corresponding incursions into the preserves of a sector of the commercial world. The several Acts are in fact an admission of the inadequacy in providing an omnibus set of legislation for the protection of third parties which will at one and the same time afford a reasonable measure of contractual freedom for investors and those engaged in the business of insurance. It is obvious that those acts are not absolute and in the nature of the circumscribing circumstances they cannot be. It also appears to me that so far there is some degree of disinclination to grapple with the fundamental questions which arise. These are, 'if the provisions of the third party risks are not absolute in the sense that they cover every and any liability incurred by the use of motor vehicles on the highway, how far short are they from affording complete protection for third parties?' 'What compensatory risks will be accorded insurance companies

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for their total surrender?' The answers, in my opinion, are matters for the legislature. The duty of the Courts is to construe Acts as they find them and not to substitute their considered opinions for the intention of the legislature however deserving and humanitarian the cause may be.

Having determined the construction of Section 9 in this way I should now proceed to examine Section 11(1) in order to discover to what extent, if at all, that section enures to the benefit of third parties. Counsel for the Respondent/Plaintiff in the course of his address in reply to Counsel for the Appellants/Defendants observed that his learned friend did not attempt to construe Section 11(1) of the Act. In spite of the observation he himself did not over-reach his attempt to do so. He however said that to get at the real meaning of Section 11(1) it should be read together with Subsection 5 of the same section. Reproduced 11(1) says "If after a certificate of insurance has been issued in favour of a person by whom a policy has been effected or a certificate of security has been issued in favour of the person whose liability is covered by such security judgment in respect of any such liability as is required to be covered by a policy or security issued for the purposes of this Act, being a liability covered by the terms of the policy or security, is obtained against any

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person insured by the policy or whose liability is covered by the security, as the case may be, then notwit standing that the insurer or the giver of the security may be entitled to avoid or cancel or may have avoided or cancelled the policy or security, as the case may be, the insurer or giver of the security shall, subject to the provisions of this section, pay to the persons entitled to the benefit of such judgment any sum payable thereunder in respect of the liability including any sum payable in respect of costs and any sum payable by virtue of any law in respect of interest on that sum or judgment." Sub-section 5 says: "In this section 'liability covered by the terms of the policy or security' means a liability which is covered by the policy or the security, as the case may be, or which would be so covered were it not that the insurer or the giver of the security is entitled to avoid or cancel or has avoided or cancelled the policy or the security, as the case may be."

To my mind Section 11(1) is extremely important; so important that it can be maintained to be the focal point of the Act. It turns on practically every functional aspect connected with the Act. For example 7(b) ensures that "such person or classes of person as may be specified in the policy must be insured against any liability which may be incurred by him or them. The liabilities of course arise from the terms and conditions which together with other requirements constitute the aggregate of the policy.

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7(b) would therefore cover those liabilities in respect of the death or bodily injury caused by a designated person or designated class of persons specified in the policy and whose vehicle is covered by the policy as well. It is however not unusual that despite this mandatory demand of the sub-section some policies issued contained provisions limiting those to whom the privilege of the designation or class extend and thus attempting to frustrate the intention of the Act. As a result, the Courts have had to be resorted to determine whether these exclusion clauses should be construed subject only to the intention of the Act or, when the occasion arises, independently of it. Some Courts have favoured deciding that such exclusion clauses should not frustrate the intention of the legislature as in the case of NEW GREAT INDIA ASSURANCE v. CROSS while others have approached it as a simple contractual arrangement between the parties. There are two cases from Ghana holding the latter view. This state of uncertainty is very disturbing especially as it vitally effects the rights of the innocent third party. There is no doubt that the legislature has done practically everything to protect him from the wiles of the insurers but the calamity which could befall him could, as in this case come from the other end of the spectrum - the insured, and generated by, one could say, a not un-natural human factor.

Section 11(1) contemplates also other provisions contained in the Act and fuses all the various elements making them functional. The section makes reference to the

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Act in relation to the satisfaction of a judgment. It says - "the person whose liability is covered by such security, judgment in respect of any such liability as is required to be covered by a policy or security issued for the purposes of the Act." The Section then goes on to the liability covered by the terms of the policy and also refers to those matters which are "subject to the provisions of this Section." The liability as is required to be covered by a policy or of security issued for the purposes of the Act and that covered by the terms of the policy are both subject to provisions of avoidance and cancellation. The similarity however ends there. Liability arising under the provisions of the Act are fixed and unalterable, except of course by legislation and avoidance or cancellation is generally applicable. A liability which arises under the terms of the policy on the other hand would necessitate a distinction between a liability to which the words "subject to the provisions of this section", does not apply and that to which the words "subject to the provisions of this section", does apply. We find that whenever a liability arising under the policy to which the words "subject to the provisions of this section" apply such a liability could be avoided or cancelled. Where for instance, some arrangement is made between the insured and the insurer by which the jurisdiction of the Court to enforce the rights conferred on Third parties by this section is ousted, such agreement, being

in violation of the provisions of the section, could be declared void. The Court has a duty to satisfy judgments obtained by persons duly insured against third party risks. Any condition therefore contained in a policy, to deprive a third party from obtaining a judgment by the Court for injury or death suffered would be liable to be avoided or cancelled and could even be avoided or cancelled if the agreement had taken effect. On the other hand we find some claims giving rise to liabilities not caught within the scope of this section which though they are made on a party and party basis are not restricted by the section but are allowed to be construed in the same way as any ordinary contract. I am of opinion that though Section 11(1) empowers the third party as distinct from the insured, to institute an independent action, this right is subject to conditions already stated which impose a reasonable amount of restriction on the exercise of the right. If there is no limit in any manner as to how the vehicle is used, or in other words if there is no condition governing the kind of liability which might arise out of the use of the vehicle as there was in the case of IN RE Williams (Deceased), Kenneh (Deceased) v. Official Administrator, Williams, Kargbo and Caledonian Insurance Company, reported in 1964-1966 A.L.R. S.L. 511 at p.516, in which Sir Samuel Bankole-Jones, President Court of Appeal, held that the Caledonian Insurance Company was not liable where the driver was driving outside of the scope of his employment

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as contained in the policy. If this were not so the liability of the insurer will be inescapable. This to my mind is obviously not the intention of the section which seeks to provide order and not chaos in the community.

It was conceded by both sides that a certificate of insurance was in fact issued to the insured although it was not produced at the trial. There is no contention on that point. A judgment has also been obtained against the insured and the usual notification given to the insurers. Those conditions having been satisfied the Third Party under the Act has acquired an independent right of action against the insurers. The Appellants/Defendants have argued, quite rightly in my opinion, that before a liability for which a judgment has been obtained arising under this section can be sustained, two conditions in the nature of conditions precedent must be fulfilled

(a) satisfaction of the conditions as required by the Act

(b) satisfaction of the conditions or terms of the policy.

While Section 11(1) highlights the conditions under the Statute, Sub-section 11(5) stresses those under the policy by defining them. It appears to me that this distinction advocated above by the Appellants/Defendants is inherent in the Act and much difficulty might have been avoided by looking at the Act itself. The case of SULAIMAN SEISAY v. WHITE CROSS INSURANCE (1961) S.L.L.R. p. 162 at p. 164 was cited in support of this proposition. It was further urged

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that this section should be read together with Section 7(1)(b) to ascertain those who are covered by the policy. The case of JUBILEE ASSURANCE CO. LTD. v. OIBAKE Civil Case 548 of the Kenya High Court based on Sections 8 and 10 of their Insurance (Motor Vehicle Third Party Risks) Act, reveals that the provisions of those sections are similar to our Sections 9 and 11 respectively. In the course of his judgment Farrell J. supported the proposition advocated by the Appellants/Defendants. He said "such being the facts, the issued which arise fall to be decided in the light of the construction to be given to the terms of the policy and to the provisions of the Act." In that case obtaining a judgment, as under Section 11(1) of our Act is a pre-condition to the settlement of any liability which might arise under the Act. The Plaintiffs settled the claim without a judgment having been obtained when there was no compulsion on them to pay the third party and the Plaintiffs had no right under the policy to settle the third party's claim after repudiating liability to the Defendant. I would draw particular attention to the ultimate portion of Farrell J.'s judgment that "the plaintiffs had no right under the policy to settle after repudiating liability to the Defendant." The Appellants, in this case, have consistently denied liability on the ground that the insured was in breach of a term of the policy. According to the construction which I have placed on Section 11(1) and Sub-section 11(5) the conditions in the policy vis-a-vis the parties must be,

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that could be the result of a strict interpretation of Section 207(1) of the United Kingdom Road Traffic Act (1960). As we have no provision whatsoever acting as a palliative in this respect the insured may sometimes be exposed to the inflexibility of the construction which could be put on our 11(1) of the Act. Kenya and Ghana suffer the same disability as Sierra Leone because none of us enjoy the coverage offered by the Motor Insurance Bureau of the United Kingdom. Our Legislations (the three mentioned states), dealing with third party risks, emanate from the same source and are similar among themselves and with the original. Sections 8 and 10 of the Insurance (Motor Vehicle Third Party Risks) Act of Kenya and Sections 8 and 10(1) of the Motor Vehicle (Third Party Insurance) Act of Ghana are similar to our Sections 9 and 11(1). I have already referred to the case Jubilee Assurance Co. Ltd. v. Ombake in which it was held that the "plaintiffs had no right under the policy to settle after repudiating liability to the defendants". In Ghana, quoting a reference made by Amissah, J.A. in his judgment in the case of Adjoa Pokua v. State Insurance Corporation 165/71, he cited The State Insurance Corporation v. Afua Mensah, (civil appeal No. 76/67). He said in the course of his judgment, "the liability must in fact be covered by the terms of the insurance policy but for the fact that the insurers are entitled to avoid or cancel or have avoided or cancelled the policy. If

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though the liability is one which should be covered by insurance it is not in fact so covered no insurance company is liable." The passages of the decisions referred to, do do support the submission advocated by Counsel for the Respondent/Plaintiff.

In further support of his argument he again referred to the case of New Great India Assurance Co. and cited the case of John T. Ellis v. Hinds (1947) 1 A.E.L.R. pp.337 and 338 to establish that his submission is and had been for some time in the past viewed with approval by the Court. In my view that case has not a complete applicability to the instant case. The dominant considerations in that case were the criminal aspect and the application of constructive knowledge. In the instant case the question is whether or not the policy covered a driver not holding a current driving licence. The user of the vehicle was never a point of contention as was in the case cited. I am of opinion that where a policy has been obtained covering the use of a vehicle on the highway, prudence would dictate that the insured having determined the manner in which he intends to use his vehicle should take out a policy to cover that particular use. Branson J. observed in GRAY v. BLACKMORE "I see nothing in the statute which prevents an under-writer and an assured from agreeing to a policy with any conditions they choose; but if the assured takes the car upon the road in breach of those conditions it cannot throw a greater obligation upon the under-writer."

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To my mind the construction which the Respondent/Plaintiff seeks to put on Section 11, that if the statutory provisions in favour of a person whose liability is covered by a policy or security for the purposes of this Act, already referred to, are satisfied, then the insurers are obliged to make payment for that judgment together with costs and incidentals, cannot be maintained. McGillvray on Insurance Law 5th Edition Vol. 1 at page 340 states "Policies of Insurance are to be construed like other written instruments. There are no peculiar rules of construction applicable to the conditions and clauses in a policy which are not equally applicable to the terms of other contracts. The conditions are to be construed fairly between the parties, and the Court will endeavour to ascertain their meaning by adopting the ordinary rules of construction. HART v. STANDARD MARINE (1889) 22 Q.B.D. 499, 501."

Halsbury's Laws of England, 3rd Edition Vol. 22 at page 212 reads, para. 401

> "It is not the function of the Court to make for the parties, by a process of construction, a reasonable contract which they have not made for themselves. If the words are clear, precise, and unambiguous, effect must be given to them, however unreasonable the result may be."

It cites the case of Joel v. Law Union and Crown Insurance Company (1908) 2 K.B. 863 in support.

Bearing these basic requirements in mind I am to observe that four conditions emerge as a result of the construction of the Act. By condition I mean whatever the Act requires and whatever is agreed between the parties to be

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incorporated in the policy. They are:-

(1) The conditions contemplated by Section 9 of the Act, that is liability arising after an event giving rise to a claim, excluding conditions precedent or contemporaneous.

(2) Conditions void ab anitio arising under Section 10 of the Act, which restrict but do not avoid the policy.

(3) Conditions in the policy which are not caught by (1) and (2). These are those conditions which the law does not preclude from being made on a party and party basis and not subject to the provisions of Section 11(1), including conditions precedent or contemporaneous.

(4) A policy which is inter-party and subject to the provisions of Section 11(1) and may be conditions precedent or contemporaneous."

The provisions contained in Conditions (1), (2) and (4) above have been examined. Those coming under Condition (3) will now be considered.

The policy produced at the trial, Exhibit 'B', prepared in the usual form, contains, as part of the policy and which comes under (3) above, a schedule with a proviso stating who a DRIVER is. Driver therein is (a) "The insured; the insured may also drive a motor car not belonging to him and not hired to him under a hire purchase agreement. (b) Any other person who is driving on the policy-holder's order or permission - provided that the person driving is permitted in accordance with the licensing or other laws or regulations to drive the motor car or has been so permitted and is no disqualified in that behalf from driving such motor car." Counsel for the Respondent/Plaintiff argued that the provision of a disqualification having been included in the exclusion clause in the policy all the various alternatives must

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be proved before the avoidance could come into operation. This is a point which has arisen ex improviso and was taken at the latest possible stage of the proceedings. It could have been canvassed at an earlier stage of the proceedings but even then I am inclined to doubt its efficacy in the civil sector. What to my mind is important is that up to the Supreme Court stage the case had been fought on the basis that the driver was unlicenced; a fact which had been conceded by the Counsel for the Respondent/Plaintiff himself. It is significant that the attitude adopted by Counsel for the Plaintiff both at the High Court and Court of Appeal was that there was no contention that the driver was unlicenced and I would think that it is not only too late to change stance before the Supreme Court but rather unfair to all concerned.

What is commonly referred to in policies as avoidance clause is unusually found in that portion where the law does not forbid an exercise of contractual freedom between the parties, that is under condition (3) referred to above. As a result of the interpretation given by me to Section 9 of the Act, I have excluded as applicable any condition which gives right to a liability either precedent to or contemporaneous with an event not happening after the occurrence which gives right to a claim. It is however necessary, again, in relation to this construction, to refer to the case of NEW GREAT INDIA

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INSURANCE CO. v. CROSS in which both Newbold V.P. and Crabbe J.A. gave a wide interpretation to, "Any condition in a policy or security issued or given for the purpose of this Act, providing that no liability shall arise under the policy or security etc. as being independent of the qualifying phrase "after the happening of the event giving rise to a claim etc." The effect of such a construction was to give efficacy to "Any condition" which would in fact include the avoidance clause and render the insurance company liable even though the driver was unlicenced. That case originally came up for hearing in Nairobi on the 17th and 18th June and the 30th July, 1965. Crabbe J.A. was then uncompromising in his attitude. He said "I agree with the conclusion of the learned Vice-President but as there is a difference of opinion among us on a matter of such public importance, I feel I ought to state my reasons in my own words." What he says next is very important. "The sole point turns entirely on the exception clause in the policy." He concluded by saying, "Therefore since the use of the car on the road in the particular circumstances of the case was a user covered by a policy of insurance in respect of third party risks which complied with the requirements of the Insurance (Motor Vehicle Third Party Risks) Act, I think that the relevant exception clause does not relieve the defendant company from the liability of satisfying a claim brought under Section 10(1). There is no doubt that the use of a

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vehicle insured under the Act is almost sacrosanct but it is, in my view, amazing that conditions governing that use can be so consistently overlooked as a result of our Section 11(1). What is most significant is the complete change of attitude of Crabbe J.A., who in 1971 was Acting Chief Justice, Ghana. This change of attitude is manifested in the decision of the Court of Appeal, Ghana in the case of Thomas Sosu (2) Madam Yaa Akyaa, Plaintiffs/ Respondents v. Royal Exchange Assurance, Defendants/ Appellants and Another. The Plaintiffs were passengers on a bus travelling from Manpong to Kumasi. The vehicle ran off the road, landed in a ditch and the two plaintiffs were injured. The trial judge found the 2nd defendant who was the driver of the said vehicle negligent - that he drove too fast in the middle of the road. On seeing a vehicle, the driver, one Kwame Ampofo, coming from the opposite direction, he swerved suddenly and applied his brakes. The vehicle as a result ran off the road and landed in a ditch. The two plaintiffs were injured. The first defendant in that suit was the owner of the vehicle. Judgment was given against the 1st and 2nd Defendants jointly and severally. The 1st Plaintiff was awarded damages in the sum of ¢1200 and the 2nd Plaintiff ¢2400. By an originating summons brought under Section 10(1) of the Vehicles (Third Party Insurance) Act, 1958, the Plaintiffs/Respondents sought to recover the damages awarded by the Court from the Defendants/Appellants as insurers

of the bus in question. There was an agreement for the hire-purchase of this vehicle between one Kwasi Addae who was insured with the Defendants/Appellants and one Kwame Ampofo. The purchase price had been paid less ¢10. The Defendants/Appellants did not know of this agreement neither did they know or had any contractual relationship with Ampofo. Under the policy the only person entitled to drive was Kwasi Addae. The Insurers repudiated liability and said that they were responsible only when Kwasi Addae was driving. The Court held that the Plaintiffs/Respondents could recover under the policy only when Kwasi Addae was driving and referred to HERBERT v. RAILWAY PASSENGERS ASSURANCE COMPANY (1938) All E.R. p. 650. The Court went on to point out that the learned trial Judge failed to consider that the owner's right under the policy ceased once the vehicle, which was the subject matter of the policy, was sold. See also ROGERSON v. SCOTTISH AUTOMOBILE AND GENERAL INSURANCE CO. LTD. L.T.R. Vol. 146, p. 25 and p.27. The Judges who sat over that case were Crabbe Ag. C.J., Lassey J.A. and Juaggo J.A. The decision was unanimous and as far as Crabbe Ag. C.J. was concerned his outlook had completely reversed. McGillvray on Insurance Law 5th Edition Vol. 2 p. 1001 put the position very clearly at paragraph 2065 as follows: "Motor vehicle policies frequently contain clauses restricting the liability of insurers in various ways; e.g. the indemnity afforded may be limited by reference to the driver of the vehicle or

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the purpose for which it is used. After some conflict of opinion it has now become clear that such a policy complies with the Act pro tanto; that is to say, that provided that the liability provided against is that specified by the Act, the vehicle may lawfully be used within the limits laid down by the policy, although an offence will be committed by any one who uses it, or causes it to be used outside those limits." The portion I would like to stress is "provided that the liability provided against is that specified by the Act, the vehicle may lawfully be used within the limits laid down by the policy." In the course of his judgment A.N.E. Amissah, J.A. cited the recent cases of OWUSU v. ROYAL EXCHANGE ASSURANCE and STATE INSURANCE CORPORATION v. AFUA MENSAH, both of which I have not had the privilege of reading, and THOMAS SOSU & ANOTHER v. ROYAL EXCHANGE ASSURANCE of 4th May 1970. The case in which these citations were made was ADJOA POKUA v. STATE INSURANCE CORPORATION of 20th December, 1972. The appellant in an action for damages against one Bandoh had obtained judgment for ¢2600. At the time he had an insurance policy issued by the respondents, the State Insurance Corporation, covering the use of the vehicle. The appellant, as in this case, sued the respondents for the payment of the ¢2600 awarded against Bandoh. The Respondents disclaimed liability on the ground that the vehicle was being driven at the time of the accident by some person other than Bandoh's driver, Kwame Amoah who

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who was the named driver in the policy. Judgment was given by the Circuit Court for the respondents. The point at issue was that the policy was inoperative if the term naming a driver was not observed. In the Court of Appeal, Ghana, as against the judgment of Bentsi-Enchill J.S.C. both Amissah J.A. and Sowah J.A. confirmed the decision of the Circuit Court. In the instant case there has been a breach of a term included in the schedule to the policy by permitting an unlicenced driver to be the driver of the vehicle WU 809 at the time when the accident occurred; and which gave rise to the liability the subject matter of this claim. In the case ADJOA POKUA v STATE INSURANCE COMPANY referred to before, the Court held that the policy involved was rendered inoperative as the vehicle was being driven at the time of the accident by some person other than Bandoh's driver Kwame Amoah who was the named driver in the policy. In the Pokua case and also in the instant case the underlying principle is that a breach of an exclusion or exception clause had occurred resulting eventually in an action in each case. As a result of the breach in the Pokua case the policy was declared inoperative. I am of opinion that that decision should be followed in this case and my opinion is further strengthened by the decisions in the cases of REVELL V. GENERAL COMPANY LTD. (1954) 1 A.E.R. p. 573 Jones v. Kenyon (1952) 2 All E.R. p. 726 and Passmore v. Vulcan (1956) L.T.R. The Appellants/Defendants are urging this appeal

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on the ground that the award to the Respondent/Plaintiff of damages, cost and interest amounting to £9,490.41 cents was wrong because the insured was in breach of a term of the policy by allowing an unlicenced driver to drive the vehicle WU 809 which was involved in an accident as a result of which Toufic Bazzy was injured. I agree and for reasons already stated I would allow the appeal, and reverse the judgment of the Court below with costs in this Court and the Courts below to be taxed against the Respondent/Plaintiff.

I would wish to observe that this is no indication of lack of sympathy or even or harshness towards the Respondent/Plaintiff. It is in my opinion that no legislation, however generously devised, can provide total and absolute protection for third parties. The insurance business is one which is characterised considerably by the element of chance. When once that element is removed by the introduction of an Act which is absolute then the whole exercise becomes nugatory and the humanitarian service which the legislature intends to provide will be completely destroyed. This, I think, is the conclusion arrived at in the United Kingdom where the Motor Insurance Bureau has been created to relieve hardship in the nature of that which has currently engaged the attention of our Supreme Court. I do not think it could be over emphasized that if the present position requires improvement the remedy lies with the Legislature and not with the Judiciary.

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Singer C. W. Betts -
~~Acting Chief~~ Justice of the
Supreme Court.

— (Sgd) Sir Philip Bridges, Chief Justice of the Gambia (Concurring)
agree (Sgd) F. Wesley Luke - Justice of the Supreme Court
agree (Sgd) S.J. Forster — — — — — —
agree (Sgd) N.E. Browne-Marke — — — — —

LIVESEY LUCE J.S.C. The issues raised in this appeal are of considerable importance to Insurers, Insured and the general public.

The Appellant Company are approved Insurers for the purposes of the Motor Vehicles (Third Party Insurance) Act, Cap. 133 (hereafter referred to as "the Act"). One Sorie Mansaray insured his Motor Car WU 809 (hereafter referred to as "the car") with the appellants for the period 6th December 1965 to 5th December, 1966 against inter alia "accident caused by or arising out of the use of the Motor Car against all sums including claimants costs and expenses which the Insured shall become legally liable to pay in respect of death of or bodily injury to any person." The terms and conditions of the insurance were set out in a Policy of Insurance dated 4th January, 1966. The car was involved in an accident in Koidu Town, Kono on 14th July, 1966 as a result of which Toufic Dazzy the respondent sustained bodily injuries. At the time of the accident the car was being driven by one Sahr Kissi Kondewa. It is agreed by both parties that at the time of the accident Sahr Kissi Kondewa was an "unlicensed driver". On 30th April, 1968, the respondent instituted proceedings against Sorie Mansaray and Sahr Kissi Kondewa claiming damages for the injuries sustained in the accident and on 21st August, 1970 the High Court gave judgment in favour of respondent for Le6,500 damages and costs which were later taxed at Le2,990.41c. Having failed to recover the judgment debt from Sorie Mansaray and Sahr Kissi Kondewa, the respondent issued a Writ of Summons against the appellants on 22nd June, 1971 claiming the judgment debt plus interest. In

their Defence, the appellants disputed liability on the ground that Sahr Kissi Kondowa was an "unlicensed driver" and therefore the liability was not covered by the terms of the policy. The action was tried by Tejan J. (as he then was). The learned Judge gave judgment for the respondent and he gave what appears to be a summary of his reasons at the end of his lengthy judgment. He said

> "In the present case, the driver had no driving licence but at the time he drove the vehicle which injured the plaintiff, there was a policy of insurance which covered the use of the vehicle. Since the use of the vehicle in the particular circumstances of this case was a user [illegible] covered by a policy of insurance in respect of third party risks which complied with the requirements of "The Motor Vehicles (Third Party Insurance) Act, Cap. 133 (An Ordinance to make provision against third party risks arising out of the use of motor vehicles) and following the principles in the authorities cited and particularly the case of THE NEW GREAT INSURANCE CO. OF INDIA LTD. v. LILIAN CROSS AND ANOTHER. I think that the exception clause in the schedule of exhibit "B" i.e. The Insurance Policy does not relieve the defendants company from the liability of satisfying the claim under section 11 of Cap. 133."

The appellants appealed to the Court of Appeal against the decision of Tejan J. The appeal was heard by the Court of Appeal (Cole C.J., C.A. Harding J.A. and P.K. Davies J.A.) and judgment was delivered on 19th May, 1972 dismissing the appeal. The judgment was delivered by the learned Chief Justice and the other two Justices agreed with him.

The Court of Appeal held that at the time of the accident the car was being driven by a person (i.e. Sahr Kissi Kondowa) "caught within the ambit of the proviso to the definition of "Driver" in the schedule

to Mr. B. ..... in that the driver was an unlicensed driver", but that the proviso was a condition, that section 9 of the Act inter alia rendered "any condition in a policy providing that no liability shall arise under the policy" of no effect, that the proviso was such a condition and therefore the proviso was of no effect. Put succintly, the Court of Appeal said in effect that although Sahr Kissi Kondewa was caught by the proviso yet the appellants could not rely on the proviso to repudiate liability because the proviso was a condition rendered of no effect by section 9 of the Act.

The important issues in this Appeal may be summarized thus:-

(i) Whether all conditions in a Policy of Insurance whether relating to events occuring before or after the happening of the event giving rise to a claim under the Policy, for death or bodily injury caused by or arising out of the use of the motor vehicle covered by the policy, are of no effect as against third parties.

(ii) Whether a third party claimant against an Insurer for the recovery of a judgment debt obtained against the Insured in respect of death or bodily injury caused by or arising out of the use of a motor vehicle covered by the Policy which also covers liability in respect of death or bodily injury, is entitled to succeed irrespective of the terms of the policy.

Compulsory Third Party Insurance of Motor vehicles was introduced in Sierra Leone in 1951. The legislation introducing it, the Motor Vehicles (Third Party Insurance) Act Cap, 133, was passed in 1949 but it did not come into force until 1st April, 1951. The Act incorporated certain provisions of two British Acts of Parliament i.e. the Road Traffic Act, 1930 and the Road Traffic Act, 1934 (hereinafter referred

to as "the 1930 Act" and "the 1934 Act" respectively). The answer to the first question formulated above turns on the construction of section 9 of the Act, which is in the following terms:-

> "Any condition in a policy or security issued or given for the purposes of this Act providing that no liability shall arise under the policy or security or that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security shall, in respect of such liabilities as are required to be covered by a policy or security issued for the purposes of this Act, be of no effect:
>
> Provided that nothing in this section shall be so construed as to render void any provision in a policy or security requiring the person insured or secured to repay to the insurer or the giver of the security any sums which the insurer or the giver of the security may have become liable to pay under the policy or the security and which have been applied to the satisfaction of the claims of third parties."

This section is substantially the same as section 36 of the 1930 Act. The material difference between the two sections is that in the British section there are commas after the word "ACT" where it first appears, and after the word "cease".

The contention of the respondent is that the provision in the policy, that liability shall only be covered by the policy if the car was being driven at the time of the accident by the Insured or by a driver as defined in the policy, is a condition rendered of no effect by section 9 of the Act. According to this argument, all conditions in a policy are rendered of no effect by the section. On the other hand it was argued by Counsel for the appellant that in the first

place the said provision relating to the driver of the car was not a condition within the terms of section 9 but a classification of persons insured within the terms of Section 7(1)(b) of the Act, and that, in any case, Section 9 of the Act related only to a thing done or omitted to be done after the happening of the event giving rise to a claim under the policy.

The question then arises, is the provision relating to the driver of the car a condition? It is provided in Section III of the Policy under the heading "General Exceptions" that:-

"The Company shall not be liable under this Policy but in respect of

(1) . . . . . .

(2) . . . . . .

(3) any accident loss or damage and/or liability caused sustained or incurred whilst any motor car in respect of or in connection with which insurance is granted under this policy is

(a) . . . . . .

(b) being driven by any person other than a driver."

It is also provided in Section II (headed "Liability to Third Parties"), clause 3 as follows:-

"In terms of and subject to the limitations of the indemnity which is granted by this Section to the Insured the Company will indemnify any Driver who is driving the Motor Car on the Insured's order or with his permission provided that such Driver

(a) is not entitled to indemnity under any other policy

(b) shall as though he were the Insured observe fulfil and be subject to the terms exceptions and conditions of this Policy in so far as they can apply."

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And "Driver" is defined in the Schedule (which, it is not disputed, forms part of the policy) as follows:-

"Any of the following:-

(a) The Insured.

The Insured may also drive a Motor Car not belonging to him and not hired to him under hire-purchase agreement.

(b) Any other person who is driving on the Policy holder's order or with his permission.

Provided that the person driving is permitted in accordance with the licensing or other laws or regulations to drive the motor car or has been so permitted or is not disqualified by order of a Court of Law or by reason of any enactment or regulation in that behalf from driving such Motor Car."

I shall deal first with Mr. Rogers-Wright's argument relating to classification and for that purpose it is necessary to set out the relevant provisions of Section 7(1)(b) of the Act. The relevant part of the section which is copied from section 36 of the Road Traffic Act, 1930 reads -

"7(1) A policy of Insurance for the purposes of this Act must be a policy which

(a) . . . . . .

(b) insures such person or classes of person 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 a motor vehicle covered by the policy."

Mr. Rogers-Wright's argument is that the provision in the policy (including the schedule) relating to the driver of the car merely specifies the "person or classes of person" insured within the meaning of section 7(1)(b) and is not a condition. Quite clearly the "person or classes of person" insured by the policy are (1) the

Insured and (ii) any other person who is driving on the Policy holder's order or with his permission, provided that that person is not caught by the restrictions laid down in the proviso to the definition of "Driver" Clause. And the liability covered by the policy, according to Section II Clause 1 of the Policy, includes "liability in respect of death or bodily injury to any person" in the event of accident caused by or arising out of the use of the motor car, which in my judgment is the liablity required to be covered by section 7(1)(b) of the Act. I agree therefore that the combined effect of the clause headed "General Exception" quoted above, Section II Clause 3, the definition of "Driver" in the Schedule to the policy and Section II Clause 1 of the Policy is to specify the person or classes of person insured by the policy, to use the words of the sub-section, "in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle." But that is not the end of the matter, because to say that a provision in a policy specifies the "person or classes of person" insured by the policy does not mean that that provision is not a condition of the policy. Mr. Rogers-Wright defined a condition as "a term of a contract which qualifies a primary obligation," and submitted that the provision in the policy specifying the "person or classes of person" insured does not qualify the primary obligation under the policy and therefore that provision is not a condition. I do not think that it is necessary to go into the question of whether or not the provision "qualifies the primary obligation", because in my opinion, the definition of "condition" urged by

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Mr. Rogers-Wright is too restrictive. I agree that "condition" is sometimes used in that sense, but it is frequently used in a less restrictive sense. In the recent case of L. SCHULER A.G. v. ICKMAN MACHINE TOOL SALES LTD. (1973) 2 W.L.R. 683 Lord Morris of Borth-y-Gest said p. 694,

> "Just as the word "warranty" may have differing meanings according to the context so may the word "condition". The words "condition precedent "may have a specific meaning. But the "conditions" of a contract may be no more than its terms or provisions. A condition of a contract may according to the context be a term of it or it may denote something to be satisfied before the contract comes into operation or it may denote something basic to its continuing operation."

I think that that is the right approach and I adopt it. In my opinion, the word "Condition" in section 9 of the Act means no more than a "term" or a "provision" of the policy. Viewed in this light, the provision in the policy relating to driver is, in my opinion, a condition. It is a condition specifying the "person or classes of person" insured by the policy.

I now turn to the question whether or not section 9 of the Act renders all conditions in a policy ineffective or affects only conditions relating to acts done or omitted to be done "after the happening of the event giving rise to a claim under the policy." The Court of Appeal construed the section disjunctively and held that the section rendered all conditions in a policy of no effect as against a third party. The learned Chief Justice who delivered the judgment said inter alia:-

"This brings me to a construction of section 9 of the Act. In construing this section I think it is immaterial whether a condition falling within its ambit is precedent or subsequent; for whether it is precedent or subsequent so long as it is caught within the ambit of that section it is of no effect . . .

. . . . . .

Let me now spell out the way I read the material portions of section 9 of the Act.

I read them in this way -

> Any condition in a policy or security issued or given for the purposes of this Act providing -
>
> (i) that no liability shall arise under the policy or security;
>
> (ii) that any liability arising under the policy shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security.

In other words the section in my view embraces two separate and distinct types of conditions, namely, those which have the effect of negativing liability ab initio upon the breach of such a condition and those which make the negativing of the liability conditional upon the doing or omitting to do some specified thing after the happening of the event giving rise to a claim under the policy or security. The section deals with conditions in a policy which seek to prevent liability from arising on the one hand and those which seek to avoid a liability which has arisen on the other. That I think is the only reasonable and proper construction that can be put to section 9 which will not render it either non-sensical or, stronger still, which will not result in defeating the object of the Act, namely, the protection of third parties using the highway against death or bodily injury by the use of a motor vehicle on the highway."

My Smythe, learned Counsel for the respondent, urged us to accept the construction put on the section by the Court of Appeal and also relied on the case of THE NEW GREAT INSURANCE COMPANY OF INDIA LTD. v. LILIAN EVELYN CROSS & ANOTHER (1966) East African Law Reports 90. The facts of that case are in many respects similar to those in the present case. The respondent was injured

in a motor accident and recovered judgment against the owner of the car, the user of which the Insurer (the appellant) had covered by a third party policy. The driver, who had the insured's permission to drive was at the time disqualified from holding a driving licence. The policy contained an Exceptions clause excluding liability of the Insurer "in respect of any claim arising whilst the motor vehicle is being driven by ..... any person other than the Authorised Driver." The Schedule to the policy defined an "Authorised Driver" as "any person driving on the insured's order or with his permission provided that (he has a licence) and is not disqualified ..... from driving." The respondent sued the Insurer. The insurer's defence was that they were not liable because the driver, being disqualified, was not an authorised driver. The East Africa Court of Appeal (Newbold V.P. and Crabbe J.A., Lestrang J.A. dissenting) gave judgment for the respondent.

Dealing with Section 8 of the Kenya Act (which is substantially the same as our section 9 - except for the positioning of commas), Newbold V.P. said at p.97 -

> "The section in the Act differs from the British section, which appears as The Road Traffic Act, 1930 S.36, in that in the Kenya Act the Comma appears after the word "policy" instead of after the word "cease". Grammatically the words "in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to the claim" can, with the comma where it is in the Kenya Act, apply only to the words "any liability so arising shall cease" and not to the words "no liability shall arise."
>
> . . . . . .
>
> I accept that the rule of construction in Britain in relation to old statutes was that the Courts did not have regard to punctuation in interpreting a section. The reason for this was that until about 1850 the punctuation of sections was inserted after the legislation had been enacted, with the result that the

> punctuation had received no legislative authority. Whether that rule of construction would apply in Britain in relation to modern statutes is open to doubt. However, whatever may be the position in Britain, I have no doubt whatsoever that in East Africa the Courts should in construction of a section, have regard to the punctuation of the section just as much as they should have regard to any other part of it. The reason for this is that the section as enacted by the legislature contains punctuation. Indeed, there are a multitude of examples of amendments to sections containing amendments to the punctuation. In any event I cannot see how it is possible to attach the words "in the event of some specified thing being done ..... after the happening of the event giving rise to a claim ....." to the words "no liability shall arise" for the simple reason that liability would already have arisen before the event; therefore, those words clearly attach and attach only to the words "any liability so arising shall cease." This logical construction is merely reinforced by the positioning of the comma in the Kenya Act. . . . . .
>
> The effect, therefore, of this section is that a condition in a policy of insurance providing that no liability shall arise under the policy is ineffective in so far as it relates to such liabilities as are required to be covered by a policy under S.5(b) of the Act and in so far as any such condition is prayed in aid to avoid liability to a third party who has been injured. Insofar, however, as the relationship of the insurer and the insured is concerned, then by virtue of the proviso to the section, if the policy contains a provision requiring the insured to repay to the insurer any amount which the insurer has had to pay to a third party in [illegible] circumstances in which the condition applies, such a provision is perfectly valid."

In view of the fact that the East African Court of Appeal attached so much importance to the commas in the section, it will be useful to set out the relevant part of the section of the Kenya Act. It reads:-

> "Any condition in a policy of insurance, providing that no liability shall arise under the policy, or that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy, shall, as respects such liabilities

as are required to be covered by a policy under S.5 of this Act, be of no effect."

It is important to note that the punctuation of the Kenya section is quite different from the punctuation of ours. In the Kenya section, there are no less than four commas, whilst in our section there are only two commas. I share the view that punctuation marks in a statute may be called in aid in construing the statute. But I would add that they are only aids and as such they should not be allowed to over-ride the clear and unambiguous meaning of a statute when read as a whole. In view of the difference of the punctuation between the Kenya section and ours and in view of the importance attached to the punctuation of the Kenya section by the East African Court of Appeal, we cannot, in my opinion, derive much assistance from the decision in the NEW GREAT INSURANCE COMPANY CASE in construing our section 9.

How then is our section 9 to be construed? The construction put on the section by the Court of Appeal amounts to this:- all conditions relating to something happening before or after the event giving rise to the claim are of no effect. To my mind this construction means that all conditions in a policy are of no effect, because in my opinion all conditions in a policy of Insurance must relate to something done or omitted to be done either before or after the happening of the event. If an unauthorised person drives the vehicle, and an accident occurs that will be something done before the happening of the event (i.e. the accident). If the insured fails to report the accident to the Insurers, that will be something omitted to be done after the happening of the event. It is an important rule of construction of

statutes that a statute must be read as a whole and the intention of the legislature must be gathered from the statute as a whole, each section throwing light on the rest. Applying this rule, it is quite clear that it was not the intention of the legislature to render all conditions in policies of Insurance ineffective. The Act itself recognises that it is perfectly permissible to insert conditions in policies. Sections 7 and 10 of the Act put this beyond any doubt. Section 7(3) provides:

> "A policy shall be of no effect for the purpose of this Act unless and until there is issued by the approved insurer in favour of the person by whom the policy is effected a certificate (in this Act referred to as a "certificate of insurance") in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and of such other matters as may be prescribed."

In my opinion, if it was the intention of the legislature to put a ban on all conditions in policies of Insurance, the words "such particulars of any conditions subject to which the policy is issued," would not have been inserted in the sub-section. Quite clearly those words indicate in no uncertain terms that an Insurer may issue a policy subject to specified conditions. Such specified conditions may include conditions relating to something to be done or omitted to be done <u>before</u> the happening of the event. The relevant part of section 10 of the Act is in the following terms -

> "10. Where a certificate of insurance has been issued in favour of the person by whom a policy has been effected or where a certificate of security has been issued in favour of the person whose liability is covered by such security so much of the policy as purports to restrict the insurance

of a person insured thereby, or, in case of a security, such conditions attached thereto as purport to restrict the liability of the giver of the security, in respect of any of the following matters -

(a) the age or physical or mental condition of persons driving the motor vehicle;or

(b) the condition of the motor vehicle; or

(c) the number of persons that the motor vehicle carries or;

(d) the weight or physical charactoristics of the goods that the motor vehicle carries; or

(e) the times at which or the area within which the motor vehicle is used; or

(f) the horse-power or cylinder capacity or value of the motor vehicle; or

(g) the carrying on the motor vehicle of any particular apparatus; or

(h) the carrying on the motor vehicle of any particular means of identification other than any means of identification required to be carried under the provisions of the Road Traffic Act,

shall, in respect of such liability as are required to be covered by a policy or security issued for the purposes of this Act, be of no effect."

In my opinion the intention of this section is to specify certain conditions, which, if inserted in a policy, would be ineffective against third parties. If the intention of the legislature in enacting section 9 was to render all conditions ineffective, then it would not have been necessary to enact section 10. This conclusion is reinforced by the fact that the equivalent provision in Britain to our Section 10 was first enacted in 1934 by section 12 of the Road Traffic Act, 1934. It seems to me that if section 38 of the 1930 Act, (our section 9) had rendered all conditions in a policy ineffective it would not have been necessary for the legislature to enact section 12 of the 1934 Act providing

that certain specified "conditions" in a policy were ineffective. In my opinion, most, if not all, of the matters set out in section 10(a) to (h) are matters relating to something done or omitted to be done before the happening of the event. If therefore section 9 affected conditions relating to something done or omitted to be done before the happening of the event section 10 would not have been necessary.

In my judgment the intention of the legislature in enacting section 9 was to prevent Insurers defeating claims by injured persons or by the dependants of persons killed as a result of an accident, by relying on conditions in the policy providing that there shall be no liability if something is done or omitted to be done after the accident.

For the sake of clarity, I shall spell out the way I read the section. It is:-

Any condition in a policy or security issued or given for the purposes of this Act providing

(a) that no liability shall arise under the policy or security

or

(b) that any liability so arising shall cease

In the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security

Shall

in respect of such liabilities as are required to be covered by a policy or security issued for the

purposes of this Act

Be of no effect.

In my opinion therefore the words "in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security" govern the words "no liability shall arise under the policy or security" as well as the words "any liability so arising shall cease."

In my opinion this is the logical, grammatical and common sense construction of the section. I am fortified in this opinion by the fact that this has been the construction put on the equivalent section (section 38 of the 1930 Act) by the English courts and Text Book writers. The English Divisional Court considered section 38 of the 1930 Act in BRIGHT v. ASHFOLD (1932) 2 K.B. 153. Lord Hewart C.J. put the point of the decision succinctly at p.158. He said -

> "This case, I think is really too clear for argument. The policy referred to did not cover use whilst carrying a passenger unless a side car was attached to the motor cycle. In those circumstances, which were the circumstances in the present case, there was no policy of insurance in force in respect of third party risks. Reliance was placed by the respondent upon s.38 of the Road Traffic Act, 1930, but I think it is quite clear that that section has no relation to a condition such as is contained in this policy . . . . . This was a condition which circumscribed the operation of the policy from the beginning. There was, therefore, no policy of insurance against third party risks at all in force in relation to the use of the motor cycle by the respondent, where a passenger was being carried otherwise than in the side-car."

In GRAY v. BLACKMORE (1934) 1 K.B. 95, Branson J. said at p. 105 - 107 (and I respectfully adopt his reasoning):-

"Then comes S.38, which is relied upon by the plaintiff in this case as doing away with the provision of the policy under which it is agreed that the policy shall not cover the car when it is being used otherwise that for private purposes ..... The argument is that a provision in a policy that the car shall not be covered if it is being used for a certain purpose is rendered of no effect by this clause. It is said that the clause must be read without a comma in it and, as I understand it, in the following way: "Any condition (a) that no liability shall arise or (b) that any liability so arising shall cease in the event etc shall be of no effect." Now, it seems to me that is an impossible construction to put upon this clause whether you put a comma after "cease" or not. The section seems to me to be perfectly clearly expressed as it stands and to provide that any condition in the policy providing that no liability shall arise under it in the event of some specified thing being done or omitted to be done after the event giving rise to a claim under the policy, shall be of no effect; in other words, the words "in the event of some specified thing being done etc" apply equally to the words "that no liability shall arise ....." as they do to the words, "that any liability so arising shall cease" I think the matter may be tested by leaving out one of the suggested alternatives, and dealing with the other by itself. So treated, the section, according to the plaintiff's argument, would read "Any condition providing that no liability shall arise under the policy shall be of no effect" which is obviously a provision which the statute never meant to enact; and the attempt to break up the words of the section as suggested by the plaintiff leads to what seems to me to be a nonsensical provision in the statute. It is said that there is no logical difference between the enactment which Parliament obviously intended, that the failure to observe conditions as to something to be done or omitted after the happening of an accident should not be allowed to affect the under-writers' liability in cases of third-party claims, and an enactment that, no matter what the parties agreed in the policy, if the car did an injury to a third party the underwriter should have to pay; but it seems to me that there is all the difference in the world between the two positions. A man may agree to have certain cover and he goes forth upon the road covered according to that agreement, before an accident happens, what offence has he committed? He has got a policy which for all that he has hitherto done covers him, and he is saved from S.35; and yet if the policy contains conditions as to something which he must not do after an accident has

> happened, a failure on his part in that respect may enable the underwriter who was on risk at the time when the accident happened to escape, and one can well understand the legislature saying that that shall not be permitted.
>
> If all was in order between the assured and the underwriter when the accident happened, the position cannot be altered by subsequent breaches or by acts or omissions on the part of the assured so as to make him less able to compensate the person who has been injured. But it would be an entirely different matter for the legislature to go back to the time before the accident had happened and to say that, if anyone chooses to underwrite a policy in connection with a motor-car, no limitations as to the time during which or as to the persons by whom, or as to the manner in which, that vehicle can be used can have any avail to save the underwriter from liability."

The English Court of Appeal also construed the section in CROXFORD v UNIVERSAL INSURANCE CO. LTD., NORMAN v. CUTHAM FIRE AND ACCIDENT INSURANCE SOCIETY LTD. (1936) 2.K.B. 253. Slesser L.J. delivered the leading judgment. He said at p. 268

> "It will be noticed that the conditions which are not to exempt the insurance company from liability to a third party, even if they be broken by the assured, in S.36 are limited to cases of "some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy"; in other words, the fact that an assured fails, for example, under the conditions of a policy to give notice of the accident, which might otherwise, as between the assured and the insurance company be a sufficient answer for the insurance company not to pay, shall not avail as against the third party; but it will be noticed that the protection of the third party notwithstanding the fact that the assured has not complied with all the conditions, which is given by Section 36, is limited to things done or omitted to be done after the happening of an event giving rise to a claim."

In MACGILLIVRAY ON INSURANCE LAW, 5th Edition Vol. 2 it is stated at p. 1010 para. 2000:

> "Conditions in a policy issued under Part VI of the Act, relieving the insurers from liability by reason of some act or omission by the insured after the happening of the event giving rise to a claim under the policy, are of no effect against third parties . .
>
> The words "in the event of some specified thing being done or omitted" apply to "no liability shall arise" as well as to "any liability so arising shall cease." The effect of the section is that if all was in order between the assured and the insurers when the accident occurred, the position cannot be altered by subsequent breaches or by acts or omissions on the part of the assured."

In HALSBURY'S LAWS OF ENGLAND 3rd Edition Vol. 22 it is stated at p. 373 para. 764:-

> "A motor policy normally contains a large number of restrictive conditions, qualifications and provisos describing and limiting the scope of the insurance. The only conditions, however, which, as against an injured third party with a compulsorily insurable claim, were rendered void by the foregoing enactment [i.e. S. 38 of the Road Traffic Act 1930] were conditions relating to something being done or omitted after the accident."

To take another example, in Bingham's Motor Claims Cases, 6th Edition p. 635 in a note on section 206(2) of the Road Traffic Act, 1960 (which is the same as our section 9 and S. 38 of the 1930 Act) it is said that:-

> "This section relates to breaches of policy conditions after accident, such as failure to report an accident, but does not affect breaches before or at the time, such as not having a driving licence in force."

And coming nearer home, the Ghana Courts have held in a number of cases that section 8 of their Motor Vehicles (Third Party Insurance) Act, 1958 (which is the equivalent of our section 9) applies only to conditions relating to something done or omitted to be done <u>after</u> the happening of the event giving rise to a claim under the policy.

In ADJOA POKUA v. THE STATE INSURANCE CORPORATION Civil Appeal (Ghana) No. 165/71 decided in December, 1972 Ainsah J.A. in the course of his judgment said:-

> "It seems to me that if the intention of the legislature had been to avoid all conditions excluding liability as is suggested by section 8, section 9 [the equivalent of our section 10] which avoids restrictions in particular cases would not have been inserted. All the restrictions set out in section 9 are in that case already safely incorporated in the ban in section 8. Not only is section 9, in that case unnecessary, the insertion is certainly impliedly contradictory. The enactment of section 9, and especially coming immediately after the section alleged to impose a total ban, strongly argues that that construction put on section 8 is mistaken."

And in the same case, Sowah J.A. said inter alia:-

> "In my view section 8 deals with conditions relating to matters which happen after liability had arisen under section 6(b). A few examples of such conditions would be failure to notify the Insurance Company of an accident, pleading guilty to a driving charge without the consent of the underwriter or failure to commence an action within specified time."

It was also argued by Mr. Smythe that the policy of the Act is to protect third parties using the highway against injuries or death by the negligent use of the highway by users of motor vehicles on the highway. It was said that that policy may be gathered from the long title of the Act and from section 3(1) of the Act. In pursuance of that policy, so the argument went, the legislature by section 9 intended to prohibit as against third parties all conditions in a policy relating to something done or omitted to be done by the insured before or after the accident; otherwise the intention of the legislature would be frustrated. That argument was accepted by the Court of Appeal, for the learned Chief Justice said in

the course of his judgment:-

> "It is beyond dispute that the Act was passed principally for the protection and benefit of third parties using the highway. A close and careful study of the whole structure and provisions of the Act clearly shows this. That being the case, I share most strongly the view that people should be entitled to feel assured, as they walk along the streets or make any other lawful use of the highway that the legislature has protected them against the hazards of motor accidents. It becomes the duty of the Courts therefore to construe the Act in such a way as to suppress all manoeuvres which tend to frustrate the spirit and policy of the Act."

Let me first deal with the argument based on the long title of the Act. The long title is in the following terms:-

> "An Act to make provisions against third party risks arising out of the use of motor vehicles."

In my opinion the Act did achieve that object. The Act did make provision for compulsory third party insurance and went on to make provision relating to who may issue Insurance Policies, the risks to be covered by the policy, the persons to be insured, what may be specified in the policy, conditions which shall not be effective against third parties, a direct cause of action by a third party against the Insurer etc.

The legislature chose to achieve its object stated in the long title by the various provisions made in the body of the Act, in plain and unambiguous language. I do not agree that the legislature did not achieve its stated object. We shall be straining the words of the long title if we were to say that the object of the legislature was to make provision against third party risks irrespective of the terms of the policy and irrespective of the circumstances of the accident. In my opinion, the Act

itself shows quite clearly what the intention of the legislature was, and our duty as a Court of law is to interprete the words used in the Act. But even if the long title had the wide meaning attributed to it by learned Counsel for the respondent, it must be remembered that what we have to interprete are the words used in the Act. If the words are ambiguous, the long title may be looked at to resolve the ambiguity. But if the words are plain and unambiguous, the long title may not be used to modify or control the meaning. It is not always that Parliament achieves its stated object by the words actually used in the body of the statute.

I turn now to the argument based on section 3(1) of the Act which provides as follows:-

> "3(1) subject to the provisions of this Act no person shall use, or cause or permit any other person to use a motor vehicle unless there is in force in relation to the user of that motor vehicle by such person or such other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the provision of this Act."

This section was copied from section 35(1) of the 1930 Act. Section 3(2) of our Act provides for a penalty in case of contravention of section 3(1).

Mr. Smythe submitted that what section 3(1) required the owner of a vehicle to cover by a policy of Insurance was the use of the vehicle on the road and not the person using the vehicle. He relied for that submission on the case of JOHN T. ELLIS LTD. v. WALTER T. HINDS (1947) 1 K.B. 475 which was a decision of the English Divisional Court. I agree with the submission. But Mr. Smythe went further and submitted that since section 3(1) required only the use of the vehicle to be covered and not the

person using the vehicle, any conditions in a policy limiting the use of the vehicle to a named person or to particular class of persons were of no effect as against third parties. With respect, that submission fails to appreciate the object of section 3(1) of the Act. In my opinion, what section 3(1) does is to provide what cover a vehicle owner must take out if he is to escape the consequences of section 3(2). The vehicle owner must cover by insurance the use of the vehicle on the road if he is to escape the consequences of section 3(2). The section does not provide for and says nothing about the liability of Insurers to third parties. In my opinion, when section 3(1) is read with other sections of the Act, it is quite clear that the legislature intended to make provision against third party risks arising out of the use of motor vehicles on the road, but on conditions, not specifically rendered ineffective by the Act, specified in the policy including conditions relating to the "person or classes of person" insured by the Insurer and in respect of whose liability the insurer undertakes to be liable in the event of an accident resulting in death of or bodily injury to any person.

The argument based on the policy of the Act is not new. It was advanced by Counsel for the respondent in BRIGHT v. ASHFOLD (see (1932) 2 K.B. at p. 157) but was rejected by the Court. In his judgment in GRAY v. BLACKMORE, Branson J. had this to say at p. 105:-

> "That is sought in this case is a construction of the section [i.e. S. 35 of the 1930 Act] which should say that any policy issued in respect of any vehicle which may be used on the road must cover that vehicle whenever used on the road for any purpose for which any vehicle can be used on the road. I do not see that the

> Statute says anything of the sort. It is defining the protection which a man must have if he is to escape the consequences of S.35. That that is so, appears from the provisions of S.36 itself. It is obvious from S. 36, Sub-S.5 relating to the certificate of insurance, that the policy may contain conditions the nature of which is left completely open. So it clearly contemplates that the policy may be issued subject to certain conditions, and unless they are to be conditions limiting the liability of the underwriter what possible reason can there be for their inclusion in the certificate, the object of which is to make clear to whom it may concern the conditions, if any, subject to which the policy has been issued."

In my judgment the provision in the policy relating to the "driver" is a perfectly valid condition and it is not rendered ineffective by section 9 of the Act. The argument of Counsel for the respondent based on section 9 therefore fails.

I turn now to the other important question raised in this Appeal. The answer to that question turns on the proper construction of section 11 of the Act, which is copied from section 10 of the 1934 Act. Section 11(1) and (2) provide as follows:-

> "11 (1) If after a certificate of insurance has been issued in favour of the person by whom a policy has been effected or a certificate of security has been issued in favour of the person whose liability is covered by such security judgment in respect of any such liability as is required to be covered by a policy or security issued for the purposes of this Act, being a liability covered by the terms of the policy or security, is obtained against any person insured by the policy or whose liability is covered by the security, as the case may be, then, notwithstanding that the insurer or the giver of the security may be entitled to avoid or cancel or may have avoided or cancelled the policy or the security, as the case may be the insurer or the giver of the security shall, subject to the provisions of this section,

benefit of such judgment any sum payable thereunder in respect of the liability including any sum payable in respect of costs and any sum payable by virtue of any law in respect of interest on that sum or judgment.

"(2) No sum shall be payable by an insurer or the giver of a security under the provisions of sub-section (1)

(a) in respect of any judgment unless before or within fourteen days after the commencement of the proceedings in which the judgment was given the insurer or the giver of the security had notice of the bringing of the proceedings, or;

(b) in respect of any judgment so long as execution thereon is stayed pending an appeal; or

(c) in connection with any liability if before the happening of the event, which was the cause of the death or bodily injury giving rise to the liability, the policy or security was cancelled by mutual consent or by virtue of any provision contained therein and either -

(i) before the happening of such event the certificate of insurance or the certificate of security, was surrendered to the insurer or the giver of the security, as the case may be, or the person to whom such certificate was delivered made a statutory declaration stating that such certificate had been lost or destroyed and so could not be surrendered; or

(ii) after the happening of such event but before the expiration of fourteen days from the taking effect of the cancellation of the policy or of the security the certificate of insurance or the certificate of security, as the case may be, was surrendered to the insurer or the giver of the security or the person to whom such certificate was delivered made a statutory declaration that such certificate had been lost or destroyed and so could not be surrendered; or

(iii) either before or after the happening of the event, but within a period of fourteen days from the taking effect of the cancellation of the policy or the security the insurer or the giver of the security had commenced criminal proceedings under section 15 of this Act in respect of the failure to surrender the certificate of insurance or the certificate of security, as the case may be."

Mr. Smythe contended that when once a certificate of insurance has been issued, if judgment is obtained against any person insured by the policy in respect of liability for death or bodily injury and if the policy covers liability in respect of death or bodily injury the only defences open to an Insurer in an action by a third party under section 11(1) of the Act are those provided by section 11(2)(a)(b) and (c) and section 11(3). Section 11(3) provides that the insurer shall not be liable to pay the judgment debt if before or within three months after the commencement of the proceedings in which the judgment was given he has obtained a declaration that, apart from any provisions contained in the policy, he is entitled to avoid the policy on the ground that it was obtained by the non-disclosure of material fact or by misrepresentation or if he had avoided the policy on that ground that he was entitled to do so apart from any provision contained in it.

The argument amounts to this: that unless the Insurer can avail himself of one of defences provided in section 11(2)(a), (b) and (c) and 11(3) (what Mr. Smythe termed "Statutory Defences") he is liable to pay the judgment debt irrespective of the terms of the policy. In my opinion there is nothing in section11 which supports the view that the Insurer is limited to only the so-called

statutory defences. In construing the section it must be remembered that the third party's rights against the Insurer are maintainable under the section not on the basis of contract, but on the basis of an Insurance Policy in force. If there is no Insurance Policy in force there will be no claim against the Insurers. In my opinion, in a case based on a policy of Insurance, the third party must prove (i) that a certificate of Insurance has been issued in favour of the person by whom the policy was effected (ii) that judgment has been given in his favour in respect of such liability as is required to be covered by a policy (iii) that the liability is in fact covered by the terms of the policy (iv) that the judgment is against any person insured by the policy. There is no dispute that a certificate of Insurance was issued in favour of Sorio Ramsamy, or that judgment was given in favour of the respondent in respect of bodily injury which is a liability required to be covered by a policy of Insurance by virtue of Section 7(1)(b) of the Act, or that the judgment was given against a person insured by the policy i.e. Sorio Ramsamy. The only dispute is as to whether the Insurer is liable irrespective of the terms of the policy. Mr. Rogers-Wright submitted that the terms of the policy must be looked at for the purpose of determining whether the liability to the respondent is actually covered by the "terms of the police".

Section 7(1)(b) provides for the insurance of a "person or classes of person" specified in the policy against liability for death or bodily injury to any person.

The "person or classes of person" insured by the policy in this case against liability for death or bodily injury are Doris Kansaray and any other person coming within the definition of "Driver" in the Schedule to the Policy. In my opinion if Sahr Kisai Kondewa did not come within the definition of "driver" he was not a person insured by the Policy and therefore liability for death or bodily injury when the car was being driven by him was not covered by the "terms of the Policy".

I derive support for this opinion from a number of English decisions, text book writers and Ghanian decisions. In ARGYLL v. ZURICH CENTRAL ACCIDENT AND LIABILITY INSURANCE CO. LTD. (1945) 1 All. E.R. 316, a decision of the English Court of Appeal, Lord Greene M.R. stated his views forcefully at p. 319. He said -

> "There is no question of contract. It is question of a document which, by virtue of a statute, confers a benefit on a third party. How that third party can pick and choose and pick out that part of the document which suits him and omit that part of the document which does not suit him, I am at a loss to understand. He must take it or leave it as he finds it, and, if he claims the benefit, he must suffer the burden."

In my opinion, this statement should be read subject to the provisions of section 38 of the 1930 Act (our section 9) and of section 12 of the 1934 Act (our section 10).

In HERBERT v. RAILWAY PASSENGERS ASSURANCE CO. (1938) 1 All E.R. 650, Wilkinson was insured with the defendant Company against third party risks in respect of a side-car and the policy provided that the defendant company should not be liable in respect of any accident incurred while any motor cycle was being driven by or was for the

purpose of being driven by him in charge of any person other than the insured. Wilkinson, while driving with a friend, fell ill, and allowed the friend to drive the side-car. While being so driven the side-car collided with a lorry with the result that the plaintiff was injured. In an action against Wilkinson the plaintiff recovered damages and then sought to recover them from the Insurance Company. Judgment was given for the Insurance Company. In the course of his judgment Porter J. (as he then was) said at p.652

> "First of all, with regard to the question as to whether the company are protected because they only insured Mr. Wilkinson, their assured, while he was driving himself, I think that they have made a general exception which in sufficiently clear terms indicates that they will cover their assured only if he is driving himself. So far as his knowledge is concerned, if that is material, or so far as the proposal form is concerned, if that is material, that plainly indicates that he only intends to drive it himself. That, of course, even with the incorporation of the proposal form, could not be fatal, unless the exception says that the company do not cover him except when he was driving himself. When I say that, I do not say that as necessarily applying to all cases. In motor-traffic cases, one has to consider the provisions of the Act. In this case, taking the wording of the policy alone, and nothing else, I do not think that one can fairly construe it as meaning anything other than that the insurer shall not be liable while the motor is being driven by any person other than the insured, or is, for the purpose of being driven by him, in the charge of any person other than the insured."

And he continued at p. 653

> "I did raise the question, and Mr. Elkin raised it before me, as to whether there might not be a claim under section 36(1)(b), in that the wording of that section was so wide that it included any case where the assured was liable owing to the use of any motor on the road, and in that section 10 of the Act of 1934 imposed a liability upon the insurers where the assured was liable and could not pay.

> But Section 10 does not, I think, impose any such liability in a case where the insurers have limited their liability by the wording of the policy, but only in a case where there is an apparently valid policy covering the liability, which yet they could have avoided or cancelled because of some misrepresentation or concealment on the part of the assured."

It is also stated in McGILLIVRAY ON INSURANCE LAW 5th Ed. Vol. 2 Para. 2065 at p. 1001 that

> "Motor-vehicle policies frequently contain clauses restricting the liability of the insurers in various ways e.g. the indemnity afforded may be limited by reference to the driver of the vehicle or to the purposes for which it is used. After some conflict of judicial opinion it has now become clear that such a policy complies with the Act pro tanto; that is to say, that provided that the liability insured against is that specified by the Act, the vehicle may lawfully be used within the limits laid down by the policy, although an offence will be committed by anyone who uses it, or causes or permits it to be used, outside those limits."

That was the construction given to section 10 of the 1934 Act before 1946. It is also the construction given by the Ghana Courts to the equivalent section of their Act (See ADJOA POKUA v. THE STATE INSURANCE CORPORATION (Supra). I think that that is the proper construction and the construction which, in my opinion, we should give to Section 11 of our Act.

The Road Traffic Acts of 1930 and 1934 introduced revolutionary changes in British Law to the extent that they inter alia made provision for compulsory insurance of motor vehicles, gave the injured third party a direct cause of action against the insurer in certain circumstances and imposed restrictions on the conditions an insurer may insert in a policy of Insurance. But the changes were not as revolutionary as some people had imagined. The changes did not solve the problem of the

driver who, from one cause or another, was not insured at all or was not covered by a policy in force in respect of the vehicle he was driving. In this connection the words of Goddard J. (as he then was) in JONES v WELSH INSURANCE CORPORATION LTD. (1937) 4 All E.R. 149 are appropriate. He said at pages 152 - 153:-

> "The result is that the action fails, and must be dismissed, though I come to this conclusion with as much regret as a judge may properly feel when he gives effect to what he decides are the legal rights of the parties. For this adds another to the growing list of cases which show that, in spite of the statutory provisions for compulsory insurance, persons injured by motor cars through no fault of their own may be left with no prospect of obtaining compensation, a position to which the late Swift J. not long since called attention in vigorous and pointed language. The public believe, and with reason, that the Road Traffic Acts insure that, if they have the misfortune to be killed or injured by a driver's negligence, there will at least be compensation for themselves or their dependants, knowing nothing of the pitfalls which still abound in policies, in spite of Sec. 12 of the Act of 1934. No one can fairly expect insurers to pay on a risk additional to that for which they have received a premium . . . . . .
> . . . . . .
> No legislation can guard against the criminal who wilfully drives an uninsured car, but it is just as well that it should be realised that, though there may be a policy in force, and an unauthorised person is driving the car which causes injury, there is no certainty that liability will attach to the insurers."

It was to solve that problem that an Agreement was entered into between the British Minister of Transport and the Motor Insurers' Bureau on 17th June 1946. The object of that Agreement was to secure compensation to third party victims of road accidents in cases where, notwithstanding the provisions of the Road Traffic Acts relating to compulsory insurance, the victim was deprived of compensation by the absence of insurance, or of effective

insurance.

Clause 1 of the said Agreement provides as follows:-

> "1. If judgment in respect of any liability which is required to be covered by a policy of insurance or a security (hereinafter called "a contract of insurance") under Part II of the Road Traffic Act, 1930 is obtained against any person or persons in any court in Great Britain whether or not such person or persons be in fact covered by a contract of insurance or if judgment in respect of any liability which is not so required to be covered by reason only of the provisions of subsection 4 of section 35 of the said Act is in fact covered by a contract of insurance and any such judgment is not satisfied in full within seven days from the date upon which the person or persons in whose favour the judgment was given then the Motor Insurer Bureau will . . . . . .
> . . . . . .
> pay or satisfy or cause to be paid or satisfied to or to the satisfaction of the person or persons in whose favour the judgment was given any sum payable or remaining payable thereunder in respect of the aforesaid liability including taxed costs (or such proportion thereof as is attributable to the aforesaid liability) whatever may be the cause of the failure of the judgment debtor to satisfy the judgment."

I need hardly say that, being an agreement, the Motor Insurers Bureau Agreement did not, and indeed could not, in any way amend the provisions of the Road Traffic Acts 1930 and 1934. The provisions of those Acts remained in fact. Those provisions were replaced by Part VI of the Road Traffic Act, 1960 which has recently been replaced by Part VI of the Road Traffic Act, 1972, but no material change in this branch of the law was effected by either of the Acts just referred to.

It is evident from the provisions of the said Agreement, that it is not necessary now in Britain, for a third party victim of road accident, to claim the judgment debt recovered by him, from the Insurer of the vehicle involved in the accident. He may claim directly from the

Motor Insurers Bureau. If the English Law Reports are sufficient evidence to go by, the result is that since 1946 very few, if any, claims based on Section 10 of the 1934 Act (or section 207 of the Road Traffic Act, 1960 which replaced it) have come before the English Courts. This fact, I think, emphasises the importance and relevance of pre-1946 cases like HERBERT v. RAILWAY PASSENGERS CO. (Supra).

A comparison of Section 10 of the 1934 Act (our Section 11) and the said Agreement would reveal that whilst under the Section it is essential for the third party claimant to prove that the liability in respect of which the claim is made is a liability covered by the terms of the policy, the Agreement stipulates no such requirement. So under the said Agreement the third party claimant may succeed in a claim against the Motor Insurers Bureau irrespective of the terms of the policy and even if there is no policy in force. In my opinion therefore, decisions based on claims under the said Agreement are of little relevance or assistance to us in construing our Section 11. Mr. Smythe relied on one such case i.e. the HURDY v. MOTOR INSURERS BUREAU (1946) 2 All E.R. 742, which was a decision of the English Court of Appeal. That case was based on a claim against the Motor Insurers Bureau under the said Agreement. There was no Insurance Company involved, and there was no Insurance Policy to be construed. Suffice it to say that the construction of Section 207 of the Road Traffic Act, 1960 (the equivalent of section 10 of the 1934 Act) was not necessary for the Court's decision and the Court certainly did not decide that the terms of the policy must be disregarded.

in claims based on Section 207 of the Road Traffic Act, 1960. In my opinion therefore that decision is of little relevance or assistance to the solution of the problem with which this Court is faced.

Mr. Smythe submitted before us that the appellants did not prove at the trial that Sahr Kissi Kondowa was not a "driver" within the meaning of the definition clause in the Schedule. That may be so. But it was alleged in the Defence that he was an "unlicensed driver" and that the liability which arose was not covered by the terms of the policy. Mr. Smythe himself conceded at the trial that Sahr Kissi Kondowa was an "unlicensed driver." That term was taken by the Trial Judge to mean that he had never had a licence and that as such he was not a driver within the definition. The Court of Appeal also accepted that Sahr Kissi Kondowa was not a driver within the definition. That was the whole basis on which the case proceeded at the trial and before the Court of Appeal. Indeed far from saying that it was not proved that Sahr Kissi Kondowa was not a "driver" within the definition, Mr. Smythe submitted before the trial Judge and before the Court of Appeal that the word "knowingly" should be implied in the proviso to the definition clause. It would, in my opinion, be without justification and contrary to precedent for this Court to depart from the basis on which the case proceeded in the High Court and the Court of Appeal. In the circumstances I think that it is too late to raise the point, even assuming it has any merit.

Mr. Smythe submitted before us that the word "knowingly" should be implied in the proviso to the definition clause. He made the same submission before

the trial Judge and the Court of Appeal, but neither Court considered it. I do not think that a convincing case has been made for implying the word in this case and the submission accordingly fails.

It has been said that people are entitled to feel assured, as they walk along the streets or make any other lawful use of the highway, that the legislature has protected them against the hazards of motor accidents. That may be desirable and progressive policy, but in my opinion, it is certainly not the policy of the Road Traffic Act (Cap. 133). As Judges, we should always bear in mind, that however much we may sympathize with a certain policy, we are not entitled or justified to strain the words of a statute so as to accord with that policy. Our function is to interprete the law as we find it. To do otherwise, would be usurping the function of the Legislature. As I said earlier in this judgment, our Act has given some protection to third party victims of road accidents. That protection may not accord with what we consider desirable in the public interest. But it is not for us to decide whether what we consider desirable is politic. In the final analysis it is for Parliament and/or the Government, in their wisdom, to decide whether to adopt that policy and how to put it into effect. They may decide to make some arrangement with the local Insurance Companies or with the National Insurance Company, similar to the Agreement between the British Minister of Transport and the Motor Insurers Bureau, or they may decide to amend the Road Traffic Act (Cap. 133) to provide in unmistakable terms that a third party victim of road accident shall be entitled to recover in any event.

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irrespective of the terms of the Policy or of the non-existence of a Policy. They may find some other solution. When such a policy is adopted and made law in whatever form, then it will be our duty as Judges to interpret and apply the law as we find it then. But until then third party victims of road accidents must be content with the rights and benefits given to them by the Road Traffic Act (Cap. 133) and by the other laws of the land.

For these reasons, I would allow the appeal.

.....

E. Livesey Luke - Justice of the Supreme Court.

agree (Sgd) S.C.W. Betts - Justice of the Supreme Court

agree (Sgd) S. J. Forster - " " "

agree (Sgd) N.S. Brassington - " " "