A

RAJ KUMARI

v.

Q.B.E. INSURANCE CO. LTD.

B

[SUPREME COURT, 1977 (Stuart J.), 17th October]

Civil Jurisdiction

C ***Insurance—motor vehicle—indemnity—insurers denying liability because driver in breach of policy conditions—whether policy covers driver driving whilst disqualified—whether policy covers driver driving under the influence of alcohol—whether driver entitled to be indemnified by insurers—Motor Vehicles (Third Party Insurance) Ordinance (Cap. 153) ss.4(1), 6, 9, 10, 11—Road Traffic Act 1930 (20 & 21 Geo. 5, c.43) (Imp.) s 36(1), 38—Road Traffic Act 1934.***

D **The plaintiff the widow of a motorist who was killed as a result of a collision with the insured, sued the insurance company under provisions of the Motor Vehicles (Third Party Insurance) Ordinance. The company denied liability on the grounds that the insured at the time of the accident was disqualified from driving and also under the influence of alcohol.**

E *Held:* 1. The effect of the Motor Vehicles (Third Party Insurance) Ordinance s.9 was to prevent an insurance company inserting conditions in the policy exempting itself from certain liabilities to a third party even if broken by the insured. However, such conditions were limited to cases of some specified things being done or omitted to be done after the happening of any event giving rise to a claim under policy. *(Gray v. Blackmore* and *Croxford v. Universal Insurance Co.* followed and approved: *New Great Insurance Co. of India v. Cross* disapproved).

F **2. As the policy was quite specific that the insured was only entitled to drive provided he held a licence and was not disqualified from driving, the insured was in breach of the terms of the policy and, therefore, the insurer was entitled to refuse indemnity to a third party.**

3. The fact that the insured was driving under the influence of alcohol did not entitle the insurer to escape liability as the case came within s.10*(a)* of the Ordinance (ante), and there was no specific mention in the policy of such an G **exclusion.**

Cases referred to:

Edwards v. Griffiths [1953] 2 All E.R. 874; 117 J.P. 514.
Gray v. Blackmore [1934] 1 K.B. 95; [1933] All E.R. Rep. 520.
Croxford v. Universal Insurance Co. [1936] 1 All E.R. 151; 52 T.L.R. 311.
Hardy v. Motor Insurers' Bureau [1964] 2 All E.R. 742; [1964] 2 Q.B. 745.
H *General Accident Assurance Corp. v. Shuttleworth* (1938) 60 Ll.L. Rep. 301.
Spraggon v. Dominion Insurance Co. (1940) 67 Ll.L. Rep. 532.
Muskham Finance Co. v. Howard [1963] 1 Q.B. 904; [1963] 1 All E.R. 81.

Zurich Insurance Co. v. Morrison [1942] 1 All E.R. 529; 58 T.L.R. 217.
New Great Insurance Co. of India v. Cross [1966] E.A.L.R. 90.
Ajwang v. British India General Insurance Co. (unreported).
Heydon's case [1564] 3 Co. Rep. 70; 76 E.R. 637.

Action in the Supreme Court for damages for negligent driving of a motor vehicle.

G. P. Shankar for the plaintiff.
P. I. Knight for the defendant company.

STUART J.: [17th October] —

In this action Rajkumari the daughter of Ramkissun sues QBE Insurance Limited claiming payment from the defendant of the sum of $10,000 together with interest calculated from 17 October 1975. The plaintiff is the widow of a man called Ramautar son of Satta who was killed on 22 October 1974 when the motor vehicle which he was driving collided with a vehicle driven by a man named Santok Singh f/n Sarwan Singh, who was at the time insured under a third party policy with the defendant insurance company. The plaintiff duly took action against Santok Singh and by consent judgment was entered in her favour against Santok Singh on 5 October 1976 for $10,000. That judgment was not satisfied and the plaintiff now sues the insurance company and says that the insurance company is bound to pay under the provisions of the Motor Vehicles Insurance Act Cap. 153. The defendant admits the policy but resists payment on two grounds. First it says that on the date when the accident occurred Santok Singh was disqualified from driving a motor vehicle and secondly it says that he was under the influence of liquor, and that because of those two matters the policy did not cover him at all. The plaintiff concedes that Santok Singh was disqualified from driving at the time this accident occurred, and she also concedes that at the time of the accident he was driving while under the influence of liquor. The action really depends upon the construction of the insurance policy which is said to have covered Santok Singh the driver of the vehicle which caused the death of the plaintiff's husband and it is necessary first to look at that policy. It is headed 'third party policy' and refers in its heading to the Fiji Motor Vehicles (Third Party Insurance) Ordinance and the Motor Vehicles (Third Party Insurance) Regulations. After setting out its number and date the policy starts off with six numbered paragraphs headed respectively

(1) 'description of motor vehicle',
(2) 'name and address of owner',
(3) 'period of insurance',
(4) 'persons or classes of persons entitled to drive and insured under this policy',
(5) 'limitations as to use', and
(6) 'amount of premium paid for issue of policy'.

I do not think that anything turns upon the fact that the policy is in the name of Santokh Singh f/n Sarwan Singh and the judgment against Santokh Singh f/n Sarwan Singh, for I understand that they are agreed to be one and the same person. The only one of those paragraphs which is relevant to this inquiry is the fourth paragraph headed 'Persons or classes of persons entitled to drive and insured under this policy'.

The remainder of that paragraph reads:

A "*(a)* The owner and
(b) Any person who is driving on the owner's order or with his permission:

"Provided that the person driving holds a licence permitting him to drive a motor vehicle for every purpose for which the use of the above motor vehicle is limited under paragraph 5 below or at any time within the period of thirty days immediately prior to the time of driving has held such a licence
B and is not disqualified for holding or obtaining such a licence."

Those numbered terms are followed by a recital

'Whereas the owner named herein has made a proposal and paid a premium to the above name*(d)* Insurer for the issue of a Third Party policy to comply with the Motor Vehicles (Third Party Insurance) Ordinance in
C relation to the motor vehicle described herein the insurer agrees subject to the terms, limitations, exclusions and conditions contained herein or endorsed hereon and to the provisions of the said Ordinance to insure the persons or classes of persons insured under this policy as described under paragraph 4 above against all liability incurred by such persons or classes of persons in respect of the death of or bodily injury to any person caused by or
D arising out of the use (of) such motor vehicle on a road in Fiji during the period aforesaid or during any period for which the insurer may renew this insurance.'

Then follow certain exclusions which are not relevant to this action, the signature of the insurer that is to say the representative of the insurance company, and a note
E referring to notice of death or injury, and change of possession and a notice that no expiry notice will be issued in respect of the policy. On the reverse side of the policy are two conditions, only one of which is relevant to this action. It reads 'The person insured shall not use the motor vehicle nor shall the owner permit or suffer any person to use such motor vehicle

(a), (b) and *(c)* are not relevant
F *(d)* while any such person as aforesaid

(i) is under the influence of intoxicating liquor.
(ii) is not relevant.

Then there is a schedule classifying vehicles, which need not be set out.

Since the policy purports to have been issued under Motor Vehicles (Third
G Party Insurance) Ordinance which is now properly referred to as an Act, and since the plaintiff relies upon that Act in this action, it now becomes necessary to consider the terms of that statute. It was passed by the Legislative Council of Fiji while Fiji was yet a British Colony, in 1954, and was obviously based upon the British legislation designed to make provision for compulsory insurance against third party risks arising out of the use of motor vehicles. The scheme of the act was
H that it became a criminal offence for any person to use or cause or permit to be used a motor vehicle unless there was in force in relation to the use of that motor vehicle such a policy of insurance in respect of third party risks as complied with the statute. I think that the first point to be noted is that what was required was a policy

of insurance which complied with statute. The punishment for contravention of this requirement was a fine or imprisonment or both, and what was more important, and a far more serious penalty to a user of a motor vehicle, he was to be disqualified from driving for at least twelve months unless a court for special reasons thought fit to order otherwise. Then the statute proceeded to deal with the policies of insurance. Section 6(1) provided that the policy was to be issued by an approved insurance company—that is one approved by the Minister for the purposes of the statute—and subsection *(b)* of section 6(1) provides that the policy is to insure

> "such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle".

Then there is a proviso which excepts four matters which are not required to be covered namely first, liability arising under the Workmen's Compensation Act, secondly liability in respect of death or injury to casual passengers not carried for hire or in pursuance of a contract of employment, thirdly liability to a relative or member of the user's family, and fourthly any contractual liablility. Then there is a proviso about limitation of amount which is not material to this case. Subsection (2) of section 6 deals with payment for hospital treatment and is also not material. Subsection (3) is as follows:

> "An approved insurance company issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons."

So that the policy is required to cover only the persons or classes of persons specified in the policy and only in respect of the liability which the policy purports to cover in the case of those particular persons or classes of persons. The policy as I have said, provides that the person or classes of persons entitled to drive and insured under the policy are the owner and any person driving on the owner's order or with his permission: provided that the person driving holds a licence permitting him to drive a motor vehicle and is not disqualified from holding or obtaining such a licence. That proviso really constitutes an exception, and if need be would have to be construed most strongly against the insurance company. Mr Shankar for the plaintiff argued that the exception applied only to the second class of person covered, namely a person who is driving on the owner's order or with his permission. He said that was the ordinary grammatical construction of the clause. This can only be so however, if the meaning of the words in the proviso "the person driving" is confined to the second class of persons entitled to drive namely "persons who are driving on the owner's order or with his permission." But I do not think that is the true contruction. I think that the person who is to hold a licence includes both the owner and the person driving with his permission. That at least was the construction put upon a similar clause in a similar certificate by Goddard LCJ in *Edwards v Griffiths* [1953] 2 All E.R. 1874, although the construction of that limitation was not the point in issue in that case. I think that the purpose of the clause must be to enable the insurance company to be released from liability in the event of a driver being disqualified, be he owner or person driving with the owner's permission. So that I hold that the persons or classes of persons entitled to drive

and insured under the policy are the owner and any person driving on the owner's order or with his permission so long as they are, neither of them, disqualified from holding a licence. Subsection (4) of section 6 is as follows:

> "(4) A policy shall be of no effect for the purposes of this Ordinance unless and until there is delivered by the approved insurance company to the person by whom the policy is effected a certificate, in this Ordinance 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 any other matters as may be prescribed."

A certificate was issued by the defendant insurance company in pursuance of the policy as provided by that subsection and that certificate contains upon its face precisely the same words as I have already set out as being contained in clause 4 of the policy itself, although the effect of it is somewhat marred by a garbled piece of typing which leads the casual reader to believe that "Transport Co. Box 243 Lautoka" in some way comes into the picture. A closer reading shows, however, that that particular typescript is part of the address of the insured Santokh Singh f/n Sarwan Singh c/- Tara Singh Transport Company, Box 234, Lautoka. The recital clause beginning 'Whereas' which I have set out above, and the exclusions and conditions to which I have already referred form no part of the certificate, but on the back of the certificate is a schedule of classification of vehicles in similar terms to the classification in the policy.

I think that sections 7 and 8 of the statute are irrelevant to the present inquiry, as they deal with payments for emergency treatment. But sections 9, 10 and 11 are relevant, and I set out the terms of those sections.

"9. Any condition in a policy issued for the purposes of this Ordinance, 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 be of no effect in connexion with such liabilities as are required to be covered under this Ordinance:

Provided that nothing in this section shall be so construed as to render any provision in a policy requiring the person insured to repay to the insurance company any sums which the insurance company may have become liable to pay under the policy and which have been applied to the satisfaction of the claims of the third parties.

10. Where a certificate of insurance has been delivered under the provisions of subsection (4) of section 6 of this Ordinance to the person by whom a policy has been effected so much of the policy as Purports to restrict the insurance of the person insured thereby 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 characteristics of the goods that the motor vehicle carried; or
(e) the times at which or the areas within which the motor vehicle is used; or

(f) the horse power 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 Traffic Ordinance,

shall, in respect of such liabilities as are required to be covered under this Ordinance, be of no effect:

Provided that nothing in this section shall require an approved insurance company to pay sum in respect of the liability of any person otherwise than in or towards the discharge of that liability and any sum paid by an approved insurance company in or towards the discharge of the liability of any person which is covered by the policy by virtue only of this section shall be recoverable by the approved insurance company from that person.

11. (1) If after a certificate of insurance has been delivered under the provisions of subsection (4) of section 6 of this Ordinance to the person by whom a policy has been effected judgment in respect of any such liability as is required to be covered by a policy under the provisions of paragraph *(b)* of subsection (1) of section 6 of this Ordinance, being a liability covered by the terms of the policy, is obtained against any person insured by the policy then notwithstanding that the insurance company may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurance company, 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 amount payable in respect of costs and sum payable by virtue of any written law in respect of interest on that sum.

(2) No sum shall be payable by an approved insurance company under the provisions of the last preceding subsection:

(a) in respect of any judgment unless before or within seven days after the commencement of the proceedings in which the judgment was given the insurance company has 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 connexion 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 was cancelled by mutual consent or by virtue of any provisions contained therein and either:

(i) before the happening of such event the certificate of insurance was surrendered to the insurance company or the person to whom the certificate of insurance was delivered made a statutory declaration stating that the certificate of insurance 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 the certificate of insurance was surrendered to the insurance company or the person to whom the certificate of insurance was delivered made a statutory declaration that the

certificate of insurance 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 the insurance company had commenced proceedings under this Ordinance in respect of the failure to surrender the certificate of insurance.

(3) No sum shall be payable by an approved insurance company under the provisions of this section if in an action commenced before or within three months after the commencement of the proceedings in which the judgment was given the insurance company has obtained a declaration that apart form any provision contained in the policy, the insurance company is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in a material particular or if the company has avoided the policy on the ground that it was entitled to do so apart from any provision contained in it:

Provided that an insurance company which has obtained such a declaration in an action shall not thereby be entitled to the benefit of the provisions of this subsection in respect of any judgment obtained in any proceedings commenced before the commencement of that action unless before or within seven days after the commencement of that action it has given notice thereof to the person who is plaintiff in the action under the policy specifying the non-disclosure or false representation on which it proposes to rely and that it intends to seek a declaration and any person to whom notice of such action is given may, if he desires, be made a party thereto.

(4) If the amount which an approved insurance company under the provisions of this section becomes liable to pay in respect of the liability of a person insured by a policy exceeds the amount for which it would, apart from the provisions of this section, be liable to pay under the policy in respect of that liability it shall be entitled to recover the excess from that person.

(5) In this section:

"liability covered by the terms of the policy" means a liability which is covered by the policy or which would be so covered were it not that the insurance company is entitled to avoid or cancel or has avoided or cancelled the policy; and

"material" means of such a nature as to influence the judgment of a prudent insurer in determining whether he will accept the risk and if so at what premium and on what conditions.

Something more must now be said about these sections. Section 9 reproduces in effect s. 38 of the English Road Traffic Act 1930 save that the last words of the English section after the word "connexion" were originally "with such claims as are mentioned in para. *(b)* of subsection 1 of section 36." I do not think the differences is material to this case. Sections 10 and 11 above reproduce sections 12 and 10 of the Road Traffic Act 1934 and became later part of the Road Traffic Act 1960. Section 38 was considered in the Commercial Court by Branson J. in *Gray v. Blackmore* [1934] 1 K.B. 95 and that learned judge rejected the argument that the

section was to be read as 'any condition that no liability shall arise under the policy . . . shall be of no effect' on the ground that was obviously a provision which the statute never meant to enact. He said at p. 107: A

> "I see nothing in the statue which prevents an underwriter and an assured from agreeing to a policy with any conditions that they choose; but if the assured takes the car upon the road in breach of those conditions he cannot thereby throw a greater obligation upon the underwriter. All that happens is that he is on the road without a policy which is covering him under the Road Traffic Act, and he is liable under s. 35 as though he had never taken out a policy at all." B

That was a case where the insurance policy prohibited the use of the vehicle for other than private purposes and at the time of the accident it was being used by the insured in towing another vehicle for the purposes of his business. It was held that the insurance company was not at risk. Similarly in *Croxford v. Universal Insurance* C *Co.* [1936] 1 All E.R. 151: Slesser L. J. after reading s. 38 went on to point out at page 157 that s.36(1)*(b)* dealt with a policy of insurance which "insures such person as may be specified in the policy in respect of any liability which may be incurred by him in respect of the death of or bodily injury to any person caused by or arising out of the use of a vehicle on a road"—which corresponds, for the purposes of this action with the Fiji section 6(1)*(b)* of the Motor Vehicles (Third Party Insurance) D Act cap. 153., and the learned lord justice then proceeded:

> "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 sect. 38 are limited to cases of some specified thing being done or omitted to be done after the happening of any 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 sect. 38 is limited to cases of things done or omitted to be done after the happening of an event giving rise to a claim. In other words, if the contract were, to take the case which it is said has arisen here, to have been voidable by the insurance company *ab initio* for non-disclosure of a material fact, that circumstance would not in itself bring the case within sect. 38 of the Act of 1930, and the insurance company could still be heard to say, as against the third party: "This policy of the assured on which it is sought now to make me liable does not apply because there has been a non-disclosure of a material fact." E F G

Then at p. 159 the learned Lord Justice begins to discuss the effect of s. 10(1) of the English Road Traffic Act 1934 which is in terms similar to s. 11(1) which I have set out above. He first explains the effect of s. 10(1) as follows:

> "Now the effect of the subsection standing alone is this: that after the passing of sect. 10 a further possible immunity of the insurance company is taken away. They are no longer, if the policy be one covering the liability to the third party, able to take the point as against that third party that the H

A insurer may be entitled to avoid or cancel the policy. They have already, as I have said, been prevented from taking that position in regard to matters which had been done or omitted to be done after the happening of the event giving rise to a claim by the Road Traffic Act, 1930, s. 38, but now they are prevented from taking the point that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy."

B Later at p. 160 he compares the effect of s. 38 of the 1930 Act and s. 10(1) of the 1934 Act in these words:

"Now, there is this great distinction to be drawn between sect. 38 of the Act of 1930 and sect. 10 of the Act of 1934, that sect. 38 of the Act of 1930, apart from one special proviso, does not qualify the liability of the insurance company. The language is expressed with regard to the liabilities ceasing in the event of some specified thing being done, or omitted to be done, after C "the happening of an event. But in the case of sect. 10, which is a very serious extension of the liability of the insurance company—indeed, one might also say, a remarkable extension—making them liable to a third party on a policy which ex hypothesi either does not exist or which they have a right to avoid, it is carefully qualified to give them protection. It is not every judgment which comes under sect. 10(1) which makes the insurance D company liable to a third party."

The whole matter is probably well summed up in the words of Goddard L.J. (as he then was) in the opening words of his judgment in *Zurich Insurance Company v. Morrison* [1942] 1 All E.R. 529, 540.

"The Road Traffic Act 1934 Part II was passed to remedy a state of E affairs that became apparent soon after the principle of compulsory insurance against third party risks had been established by the Road Traffic Act 1930. That Act and the Third Parties (Rights against Insurers) Act, passed in the same year, would naturally have lead the public, at least those who were neither lawyers nor connected with the business of insurance to believe that, if they were through no fault of their own, injured or killed by a motor car their dependents would be certain of recovering damages, even F though the wrongdoer was an inpecunious person. How wrong they were quickly appeared. Insurance was left in the hands of the companies and underwriters who could impose what terms and conditions they chose."

In an attempt to get over this frustration of legislative intention the Motor Insurers' Bureau was formed in Britain in 1946, and that body may be said, speaking generally, to have undertaken to satisfy judgments obtained by third parties against G any person responsible for the use of a motor vehicle which a policy of insurance purports to cover if that person fails to satisfy the judgment himself. There is however no Motor Insurers' Bureau in Fiji.

But Mr Shankar referred me to an East African case from Uganda, *Ajwang v. British India General Insurance Company*, which while not very helpful in itself H depends upon a case in the East African Court of Appeal, *New Great Insurance Company of India v. Cross* [1966] E.A.L.R. 90. That case was very similar to the present case in that the accident was caused by the negligence of a disqualified driver and the insurance policy was restricted to licensed drivers. There the court

was considering the Kenya legislation which is very similar to that in Fiji. It contains sections which correspond to sections 9, 10 and 11 of Cap. 153 which I have set out. But there is one major difference. The Kenya section which corresponds to our section 9 starts off.

> "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 etc."

It will be seen that in the Kenya legislation there is a comma at "policy" and none at "cease" where in the Fiji section the comma occurs at 'cease'. A majority of the East African Court of Appeal were therefore able to construe the Kenya section in the sense which Branson J. and the English Court of Appeal had rejected in *Gray v. Blackmore* [1934] 1 K.B. 95 and *Croxford v. Universal Insurance Co.* [1936] 1 All E.R. 151. The majority were the President Sir Charles Newbold and Crabbe J. A. while Sir Clement de Lestang J. A. delivered a dissenting judgment. It is necessary to look a little more closely at these judgments because Sir Charles Newbold adopted a construction of the section independent of the difference in the section itself from English and indeed, Fiji legislation. He says at p. 97, "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." For myself I find great difficulty with respect in accepting the proposition which Sir Charles Newbold found acceptable, for it seems to me that such a policy would be likely to defeat the whole purpose of the legislation and could not possibly be one issued for the purposes of The Motor Vehicles (Third Party Insurance) Act Cap. 153. On the contrary I find it quite possible to accept that a policy providing that no liability was to arise in the event of some specified thing done or omitted would be within the legislation, and as indicated both in *Gray v. Blackmore* and *Croxford v. Universal Insurance (cit supra)* under the section the thing done or omitted must arise after the happening of the event giving rise to a claim, viz. in this case the accident.

The supporting judgment of Crabbe J. A. was based upon the learned judge's construction of the Kenya section which corresponds with section 4(1) of the Fiji statute which is as follows:

He found that all that was necessary to enable the injured persons to recover was to shew:

(1) that the injury had been caused by the use of the insured's car
(2) that they had obtained judgment in respect of that injury and
(3) that there was in force at the material time a valid policy of insurance in compliance with the statute.

He held that the restrictions which the insurers purpoted to put on the class of persons who should drive the car could not exclude the injured persons' independent rights to recover under the statute, in that the restriction was a personal liability of the insured which could debar him from recovering but not the third parties. He sought to apply *Hardy v. Motor Insurers' Bureau* [1964] 2 All E.R. 742, and further relied upon the well-known passage in *Heydon's* case (1564) 3 Co. Rep. 70: 76 E.R. 637, 638.

A "For the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered: first, what was the common law before the making of the Act. Second, what was the mischief and defect for which the common law did not provide. Third, what remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth. And fourth, the true reason of the remedy; and then the office of all the judges is B always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the act, *pro bono publico.*"

I pause here to observe that while I accept the rule in *Heydon's* case to be a C statement of law binding upon me the current of judicial authority in the construction of statutes based upon the English third party insurance legislation has in my view run too strongly to enable this court to embark now upon a construction of such a statute unhampered by earlier authority. To do so would appear to go far beyond the interpretative powers of the Court and reach into the area of legislation.

D Sir Clement de Lestang J. A. who dissented from the majority judgment found the sections 9, 10 and 11 which I have set forth above to make sense when read separately but to be repugnant when read together—he treats the Kenya section corresponding to s. 9 with the differences in punctuation which I have already remarked—and he resolved the inconsistency by regarding s. 10 as being of particular application and throwing light upon the meaning of s. 9 which he regards E as of general application and he further suggests that because s. 10 prohibits certain clauses in a policy as therein set out, restrictions on the scope of insurance other than those specified are permissible.

Sir Clement then proceeds to argue that since the legislation was accepted into Kenya from Britain without change, it should be accepted subject the construction placed upon it by British courts, and this is a proposition, which with respect, I F accept.

I return to *Hardy v. Motor Insurers' Bureau* [1964] 2 All E.R. 742, which was discussed by Crabbe J.A. in the East African Court of Appeal and was relied upon by Mr Shankar in this court. I think it should be said that in that case the English Court of Appeal were dealing with a case in which there was no policy at all. The action arose from the theft of a motor vehicle and negligent driving of the vehicle G by the thief causing injury to third parties. Because the Motor Insurers' Bureau's agreement with the British Transport Department provided for satisfaction of a judgment obtained by a third party the court treated the matter as if there were a policy in existence, but unfettered in any way by restrictions. In the present case there is a policy in existence but restricted, as I shall hope to show, in a manner permitted by the statute. All the judges in *Hardy's* case place some reliance upon s. 207 of the Road Traffic Act 1960 which has its counterpart in Fiji s. 11 of Cap. 153. H However, before the insurance company can be held liable, the judgment must have been given not merely in respect of a liability covered by the legislation, but one covered also by the terms of the policy. In the present case, far from being

covered by the terms of the policy the liability was excluded because the driver of the vehicle was unlicensed. I accept the phrase "liability covered by the terms of the policy" to mean, as suggested by the learned author of *Shawcross on the Law of Motor Insurance* 2nd Ed. (1949) at p. 283 to be liability which comes within or arises out of a risk apparently insured by the express terms of the policy whether or not it is a liability in respect of which the insurers are entitled to refuse an indemnity on the ground that the insured has committed some breach of the terms of the policy. Shawcross then proceeds at pp. 283 to 287 to give examples of cases illustrating what has and what has not been held to be covered by the terms of the policy. There are three types of cases:

(a) liability with regard to the vehicle insured,
(b) liability with regard to the driver insured, and
(c) liability in relation to the case of the insured vehicle.

The second category is relevant here and there mention is made of *General Accident Assurance Corporation v. Shuttleworth* (1938) 60 L1. L.R. 301 and *Spraggon v. Dominion Insurance Co.* (1940) 67 L1. L.R. 532. In the former case Shuttleworth held an insurance policy granted by the plaintiff containing a limitation that the Insurance company was not to be liable while any motor vehicle covered by the policy was being driven by the policy holder if he were disqualified from holding a licence. Shuttleworth was disqualified, but went on driving and had an accident. Dealing with the limitation in that case, Humphreys J. said at p. 305 (column 1) of the report, "That seems to me to go to the root of the whole matter and to be a declaration which is perfectly legal and is not affected by any of the Road Traffic Acts: that the company is not insuring such a person at all by this policy". In *Spraggon's* case a third party who had suffered injury sued the insurance company. He had recovered judgment against Tomrley who had hired a car and was driving it when he knocked down Spraggon. The insurance company had issued a policy to the owner of the car which Tomrley had hired, but placed certain limitations upon the persons who could become hirers, and who also had to have certain types of licence. Tomrley was not one of the persons who could be entitled to the benefit of insurance from this company and he signed an untrue declaration that he was. It was held that he was not insured, and that the insurance company was not at risk and that Spraggon could not recover. It will be noted that both these cases arose subsequently to the appearance in the English legislation of the section which is the counterpart of section 10 of the Fiji Act.

It is section 10 which is relevant to the defendant insurance company's defence that Santok Singh's drunken driving entitles it to escape liability under the policy. I think that Mr Knight rightly placed little confidence in this defence for two reasons. First this case seems to come clearly within s. 10*(a)* of the Act in that it is the physical condition of the person insured which is relevant. But the second reason is that the certificate issued to the policy holder makes no mention of this exclusion, which does not therefore even purport to discharge the insurance company from liability.

So far I have said nothing about the provisos to section 9 and 10. The proviso to section 9 does not, as it appears to me, preserve the effect as against the insured of the conditions which the section has stated to be of no effect but merely allows an insurance company to insert a clause in the policy entitling them to recover from

the insured sums paid by them under the policy and applied in satisfaction of the
A claims of third parties. But there is nothing there which entitles the insurance company to refuse to pay any sum under a policy in respect of third party liability otherwise than on discharge of such liability.

The proviso to section 10 would appear to mean that the clauses of a policy restricted by the section and thereby rendered of no effect as regards a third party, shall nevertheless be effective in so far as the insured is concerned, and would
B enable an insurance company to recover from an insured where it had to pay a third party on a policy the breach of which would otherwise have enabled it to resist action by the insured.

Finally, I think that I should mention one observation made by Mr Shankar on behalf of the plaintiff to the effect that in the action which the plaintiff took against the defendant and recovered $10,000, the insurance company had intervened in
C such a way that they should not be allowed to defend the present action. The first thing that I say about that submission is that it really amounts to an estoppel and it should have been pleaded. See Rules of Supreme Court Order 18/8/3, and *Muskham Finance Company v. Howard* [1963] 1 Q.B. 904, 910 per Donovan and Pearson L. J. in the course of the argument, and per Donovan L. J. delivering the judgment of the Court of Appeal at p.913. The second thing is that if Mr Shankar wants to rely upon
D something of that kind, it is not sufficient for it to be put forward by way of an interlocutory affidavit though the pleadings in that action are to be regarded as evidence in this. The third thing is that the affidavit to which Mr Shankar referred was sworn by a person who stated that the insurance company instructed him to defend the action on behalf of the defendant. He was seeking to have a judgment entered by default set aside. He filed a defence but shortly there-after a new firm of
E solicitors appeared on the scene, stating they had been appointed to act for the defendant in place of the former solicitors. I am not prepared to give effect to Mr Shankar's submission.

In the result then the plaintiff's action fails upon the ground that the insurance company was not at risk by reason of the fact that the policy did not extend to cover an owner or a driver who was disqualified from holding a driving licence at the time
F when the liability arose. There will be no order as to costs.

Action dismissed.