INTRUSCO CORPORATION, by and thru its Manager, and INSURANCE COMPANY OF AFRICA, by and thru its Vice President, GIZAW MERRIAM, Informants/Movants, *v.* **FREDERICK K. TULAY**, Resident Judge, Civil Law Court, Montserrado County, and EDITH DENNIS, by and thru her husband, WILMOT DENNIS, Respondents.

INFORMATION PROCEEDINGS FROM THE CIRCUIT COURT FOR SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY, AND PETITION FOR REARGUMENT

Heard: March 19 & 20, 1984. Decided: May 10, 1984.

1. Upon the filing of a motion for re-argument, the case is re-docketed and further enforcement of the judgment is stayed. A motion for re-argument merely suspends the original judgment; it neither vacates nor annuls the judgment.

2. In order for information to be granted, it must be shown that the respondents have disobeyed or obstructed the enforcement of the Supreme Court's mandate.

3. Any claim or defense which a party relies upon to substantiate his cause of action or his defense in bar to the plaintiff's cause of action is material and should be specifically pleaded so as to give the opposing party notice of what the adversary intends to prove.

4. The pleading of certain provisions of an exhibit does not constitute pleading every other provision of said exhibit. He must plead all of the provisions relied upon in order to give due and timely notice to the other party

5. When a party pleads a condition precedent as a defense, the party must specifically allege in the pleading the condition precedent which the opposing party has failed to perform.

6. A petition for re-argument is not intended to challenge the opinion and judgment of the Supreme Court on points of law and facts raised and decided by the Court, simply because the petitioner is of the opinion that the Court is wrong in its conclusion on the law and facts. Re-argument is intended to call the Court's attention to the points of law and fact previously raised in the argument which the Court inadvertently overlooked to pass upon.

7. A party asking for a rehearing will not be permitted to establish a new ground for argument different from the one raised in the original hearing.

8. On a motion for re-argument the Supreme Court is required to consider only such points of law raised during the original argument and overlooked by the Court.

9. Only the averments denied in the responsive pleading require production of evidence to prove or disprove them. Hence, where the facts are admitted, the production of evidence, oral or written, is absolutely and legally unnecessary.

10. Averments in a pleading to which a responsive pleading is required are admitted when not denied in said pleading.

11. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim or counterclaim, shall be asserted in the responsive pleading thereto if one is required.

12. A policy or contract of insurance is to be construed liberally in favor of the insured and strictly against the insurer.

13. Statements in a collateral document do not become a part of the contract of insurance unless they are so referred to therein as clearly to indicate that the parties intended to make them a part of such contract.

14. Where an appellate court has once obtained jurisdiction of a cause, it has obtained it for all purposes and may give judgment upon all points properly presented for decision.

On February 10, 1984, the Supreme Court rendered judgment in an action of damages for violation of an insurance contract, reversing the judgment of the lower court finding the informants not liable. In reversing the lower court's judgment, the Supreme Court awarded damages in the amount of $210,000.00 to Edith Dennis, co-respondent in these proceedings.

The mandate having been sent down to the lower court, an assignment was issued and served on the parties on the 13th day of February 1984 for the reading of the mandate on the February 15, 1984. On February 15, 1984, the informants/movant in these proceedings, filed with the clerk of the Supreme Court a motion for re-argument. At the call of the case for the reading of the mandate, the informants informed the trial judge that they had filed a motion for re-argument, and requested a stay of the reading of the mandate. When the trial judge refused to stay execution of the mandate, informants filed a bill of information before the full bench alleging, among other things, that the Clerk of the Supreme Court should not have sent the mandate to the lower court since the motion for re-argument was timely filed and that as the motion for reargument had effectively nullified the judgment, the trial judge could not proceed with the reading of the mandate.

The Supreme Court granted the information, noting that while the filing of the motion for re-argument did not render the previous judgment null and void, it did serve as a stay to the enforcement until the motion for re-argument had been determined. The Court, after an examination of the motion for re-argument and a consideration of the arguments, denied the motion, holding that the grounds stated therein embodied issues which had already been determined by the Court in its previous judgment and matters not raised in and decided by the trial court. The Court accordingly ordered the enforcement of the judgment handed down previously.

John A. Dennis for plaintiff/appellant. *B. Mulbah Togbah* and *Henry Reed Cooper* for defendants/appellees.

MR. JUSTICE MORRIS delivered the opinion of the Court

This Court decided an action of damages for violation of an insurance contract concluded between Edith Dennis and Intrusco Corporation on February 10, 1984, by which final judgment Edith Dennis was to receive $210,000.00 as damages for the accident involving her insured pickup which claimed the lives of 19 persons as per record. It is not clear from the record as to when the mandate was sent down to the lower court. However, an assignment was issued and served on the parties on the 13th day of February, 1984 citing them to the reading of the mandate on the 15th day of February, 1984, at the hour of 2:00 o'clock p.m. Also, on the 15th of February, 1984, Intrusco Corporation filed a motion for re-argument with the clerk of this court at 8:30 a.m. Then at the call of the case by the lower court to read the mandate, counsel for co-informant Intrusco Corporation, informed the court that informants had filed a motion for re-argument and therefore the execution of the mandate should be stayed pending the disposition of the motion for re-argument in the Supreme Court. The judge on the other hand maintained that he had only one mandate before him and he had no authority to suspend the execution of the mandate. He therefore proceeded with the execution of the mandate. The informants then filed a bill of information before the full Bench; hence, this information and motion for re-argument. Respondents, in their resistance to the information and the motion for re-argument prayed for the consolidation of the information and motion for re-argument, to which informants raised no objection.

The informants have filed a nine-count bill of information and the respondents a thirteen-count Returns. Count one of the information relates to the date when the opinion was delivered and count two refers to the Rule of Court allowing three days within which a party may petition the Court for re-argument. Informants cited section 1.7 of the Civil Procedure Law in count three with respect to the computation of any period of time provided or

allowed by statute or Rule of Court to perform an act when the number of days is less than ten days by excluding intermediate Sundays and holidays. They maintained that February 11 was a national holiday and that the 12th was a Sunday. They expressed their surprise at the way the mandate was allegedly unprecedentedly and hurriedly sent down on the first legal day, February 13, 1984, and assignment issued and served on them for the reading of said mandate on February 15, 1984. They averred in count four the fact that the filing of the motion for re-argument was one within the time allowed by the rules of court after having been approved by Mr. Justice E. S. Koroma, one of the concurring Justices.

In count five, the informants contended that when the co-respondent judge called for the reading of the mandate at 2:00 o'clock p.m., he was duly informed about the existence of a motion for re-argument, but the co-respondent judge disobeyed this valued information and ordered the mandate read, and thereafter proceeded to enforce the judgment. The informants argued in count six that unless the court below is stopped, they would be compelled to satisfy a judgment, the effective date of which had not come or expired when the petition for re-argument was filed, and which has rendered the judgment inoperative until the petition for re-argument is heard. The informants also argued in count 7 that the sending of the mandate prior to the expiration of the 3 days allowed a party to file a motion for re-argument was a flagrant violation of the law of this country and the denial of a basic right of the informants. They further intimated that unless a stay order was granted to stay the enforcement of the judgment, the informants would suffer great injustice. Informants contended in count eight that once a petition for re-argument has been approved by a concurrent Justice and filed with the Clerk of the Court, the case is automatically re-docketed and therefore the judgment from the previous hearing becomes unenforceable and void. The above constitutes the grounds for the information.

While we are in agreement with the informants that upon the filing of a motion for rehearing the case is re-docketed and further enforcement of the judgment from the previous hearing is stayed, we do not agree that the previous judgment is void, as the petition for rehearing merely suspends and does not vacate or annul the original judgment.

The acts of the lower court complained of are the issuing of an assignment on the 13th of February,1984 for the reading of the mandate on the 15th of February, 1984, and the reading and ordering of the enforcement of the judgment by the judge on February 15, 1984 after having been informed that a motion for re-argument existed. The clerk is charged with sending the mandate prior to the expiration of the three days allowed for the filing of a motion for re-argument. To grant information, it must be shown that the respondents have disobeyed, or obstructed the enforcement of this Court's mandate or order. We also observe that the clerk sent the mandate down immediately after the Court had adjourned.

The Rules of the Supreme Court the respective parties relied upon provide as follows:

"Rule 9, Parts One and Two.

Permission for - For good cause shown to the Court by petition, a re-argument of a cause may be allowed when some palpable mistake is made by inadvertently overlooking some fact, or point of law.

Time of - A petition for re-hearing shall be presented within three days after the filing of the opinion, unless in cases of special leave granted by the Court."

Rule 11, Part One.

Entry of - The Justices shall sign all judgments and the clerk shall file the same and remit a copy under seal to the court below with a mandate requiring immediate and strict compliance therewith."

Rule 12, Part One.

Filing returns to mandates - Mandates to the courts below commanding the execution of judgments shall be trans-mitted immediately upon the adjournment of the term of court..."

We cannot hold the Clerk or the co-respondent judge in contempt as prayed for under the circumstances since both acted in accordance with the above provisions of the Rules of Court. The bill of information was filed on February 18, 1984. We strongly feel that after the informants were served with notice of assignment on February 13, 1984, they should have promptly filed this information instead of waiting until the 18th of February, 1984. The respondents in their returns contend that there is no basis for the bill of information, as the ultimate function of information is to compel a judge to strictly comply with the mandate of the People's Supreme Court and, further, that both the clerk and judge acted within the provisions of the Rules of the Supreme Court of Liberia. They raised other pertinent issues which we have carefully read and conceded to. However, since the informants filed their application for re-argument within the time prescribed by the Rules of Court, that is, within three days as provided by Rule 9, Part 2, we, as a Court of last resort, will not permit the rights of the party to suffer. Hence, we shall consider the motion for re-argument as filed by the informants.

Since we are passing on a motion for re-argument and therefore limited to only issues raised

in the pleading and argued before this Court which were inadvertently overlooked, we shall quote co-informant Intrusco Corporation's amended answer to ascertain whether these issues were raised in the pleading:

"INTERVENOR'S AMENDED ANSWER

Intrusco Company of Africa located at the corner of Broad and Gurley Streets, Monrovia, Liberia, most respectfully requests this Honourable Court for leave to intervene in the above cause of action, and showeth for reasons the following, to wit:

1. Because intervenor is the principal re-insurer of co-defendant Intrusco, as a result of which Intrusco's policies are sold on intervenor's forms as, will more fully appear from the policy proferted with plaintiff's complaint and defendant Intrusco's answer. Your intervenor requests the court to take judicial notice of the policy proferted as exhibits 'A' and 'B' respectively by defendant Intrusco and plaintiff Edith Dennis. Intervenor submits that any judgment arising from this case against defendant Intrusco will adversely effect your intervenor in that intervenor will ultimately be responsible for the satisfaction of said judgment in keeping with the insurance policy. Defendant gives notice that it will give evidence to prove its relation with Intrusco at the trial.

2. And also because intervenor says that even if the plaintiff were entitled to recovery for any death as a result of the accident, she could receive no more than $20,000,00 as the policy clearly states that the limits of liability for death in one accident is $20,000.00. Therefore, plaintiff is not entitled to the $210,000.00 she is claiming in one accident contrary to the terms and conditions of the policy. Further to that, plaintiff having received full settlement and executed a release thereby discharging defendant of further claim which, of course, was in keeping with the contract term, she cannot repudiate her own act and accord.

3. And also because your intervenor admits that plaintiff and intervenor's insured executed a policy of insurance for the vehicle referred to in the complaint, but maintains that the terms and conditions of said policy excluded passengers.

4. Defendant denies and strongly maintains that plaintiff has no cause of action against defendant for the death or loss of the lives of the 19 persons who were passengers in the insured vehicle of the plaintiff for reasons that ENDORSEMENT No 1 attached to the policy proferted reads as follows:

'In consideration of premium charged, it is understood and agreed that the vehicle insured under this policy will be used as public transport. It is also agreed that coverage A-Bodily Injury liability excludes passengers.'

Plaintiff having been a party to the contract on which she relies to sue and which contract expressly says that passengers are excluded under Coverage A-Bodily Injury liability of said contract, cannot repudiate the contract nor benefit therefrom under these circumstances. Defendant requests the court to take judicial notice of plaintiff's exhibit 'B' attached to her complaint and referred to in counts 3 and 4 thereof, and for emphasis proferts a copy of said contract marked exhibit 'D-1' to form part of this motion. Because of this provision of the contract, the defendant says that it is not liable to the plaintiff.

5. And also because intervenor says that plaintiff Edith Dennis is forever barred and *estopped* from bringing this action because on the 26th of January 1980, the said Mrs. Edith Dennis unconditionally discharged and released Intrusco Corporation from any and all claims, demand or obligation under policy number 201CA, 12580, in consideration of the amount of $8,896.00, as a result of which the said Mrs. Edith Dennis issued a final release. A copy of said release is hereto annexed as exhibit D-1. Therefore, intervenor/ defendant prays this Honorable Court to dismiss the complaint with cost against the plaintiff. Intervenor contends that plaintiff cannot be allowed to repudiate her own act.

6. And also because intervenor/defendant says that as to count four of the insurance policy which the plaintiff referred to as a binding contract, intervenor holds that said contract in plain words excludes passengers, as evident in the endorsement on which is an integral part of the policy and which was accepted by plaintiff in keeping with paragraph (b) of the general exclusion provision of the policy. A copy of the endorsement is attached as our Exhibit 'A'. Intervenor submits and seriously contends that plaintiff, having freely entered into this contract, bound by its terms and conditions, should not be permitted to take due advantage of her own act and accord.

7. And also because intervenor says that its defense by Intrusco is inadequate.

8. Intervenor denies all and singular the allegations of law and facts as are pleaded in the complaint and not made a subject of a special traverse.

WHEREFORE, and in view of the foregoing law and facts, defendant moves this

Honourable Court to grant intervenor leave to intervene so as to protect its rights and interest in this matter.

Respectfully submitted:
Insurance Company of Africa,
by and thru its Vice President,
Gizaw H. Merriam, intervenor/
defendant, by and thru its counsel:
Cooper & Togbah Law Office,
3 Buchanan Street, Monrovia, Liberia"

In count one of the motion for re-argument appellees argue that clause 8 of the insurance contract provides that no action shall lie against the company until, as a condition precedent thereto, the amount of insured's obligation to pay shall have been finally determined either by judgment against the insured after the actual trial or by written agreement of the insured, the claim-ant and the company. They maintain that the insured has entered no agreement with the company and there is no judgment which has been obtained against the insured by the families of the nine-teen persons alleged to have been killed in the accident. During the arguments on the motion, we asked counsel for informants/ movants whether he raised this important defense in the pleading. He maintained that once he pleaded the contract by proferting and attaching copy of the policy to the amended answer, the court should have taken the entire provisions into consideration because the whole contract was thereby pleaded. Respondents, in resisting count one of the motions maintained that the issue of condition precedent raised by the movants in their motion for re-argument had no legal basis, in that it was not raised in the amended answer. The counsel argued that all defenses and/or demurrers on which a party relies must be specifically pleaded, and that a failure to do so constitutes a waiver. Besides, she argues that this is not the function of a motion for re-argument. We disagree with counsel for the informants/movants and hold that any defense a party may rely upon to substantiate his cause of action or his defense in bar of the plaintiffs cause of action is material and should be specifically alleged in the pleading so as to give the opposite party notice of what his adversary intends to prove against him. In the instant case, both parties had specifically pleaded certain provisions of the contract to buttress their contentions respectively. The authorities on the issue hold that:

"Defendant must aver definitely and specifically what conditions precedent plaintiff has not complied with and which are made the subject of contest." 49 C.J., *Failure to Comply with Condition Precedent.* § 221 (b).

Thus the statement of defense should be sufficient in substance and should be set forth by

positive averments in such a way as to be fully understood by the opposite party and by the court, so certain and specific that if admitted, the court could give judgment upon it. It should contain a succinct statement of the facts relied on in bar, not leaving them to be deduced by argument and inference" *Ibid.*, § 221 (b).

Exhibits attached to pleadings do not obviate necessity of making proper allegations, of which exhibits may be evidence in whole or part; exhibit alone held insufficient to state cause of action in tax suit, without essential allegation in petition." 71 C. J. S., at 793, note 54.

“Matters of substance must be alleged in direct terms, and not by way of recital or reference, much less by exhibits merely attached to the pleading. Whatever is an essential element to a cause of action must be presented by a distinct averment, and cannot be left to an inference to be drawn from the construction of a document attached to the complaint." *Ibid.*

In some jurisdictions, a defendant must specifically plead all affirmative defenses. For example, if an insurer desires to take advantage of provisions in a policy limiting liability in the event of the existence of certain conditions, it is incumbent upon it to plead such conditions by way of affirmative defenses." 19 COUCH ON INSURANCE 2d *Waiver of Defenses*, § 76.86."

Our statute provides under condition precedent that:

"In pleading the performance or occurrence of conditions precedent it is sufficient to aver generally that all conditions precedent have been duly performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity." Civil Procedure Law, Rev. Code I: 9.5 (3).

In the case *Bailey* v. *Sancea,* 22 LLR 59, 62 (1973), this Court decided the following:

"Furthermore, one of the fundamental rules of pleadings requires that the facts on which the plaintiff predicates his cause of action, and the defendant his grounds of defense, shall be alleged and these are to be so stated as fairly to appraise the court and the adverse party of the cause of action or the nature and scope of defense...." *See* also *Clarke* v. *Barbour*, 2 LLR 15 (1909).”

Counsel for informants/movants also strongly argued before us that the opinion states that an insurance policy should be construed from the four corners. Therefore, he said, the court should have considered and construed the whole policy in such manner. This assertion made in the opinion refers to deciding issues that are raised by the parties in their pleadings,

because courts are not party litigants and cannot *sua sponte* raise issues and at the same time pass upon them.

It is our considered opinion, and we so hold, that the filing of an exhibit by a party who has specifically pleaded certain provisions thereof does not operate as a pleading of all the remaining provisions of said exhibit. Therefore when a party relies on conditions precedent in defense as a bar to plaintiff's claim, he must specifically allege in the pleading the conditions precedent which plaintiff has failed to perform as to give the plaintiff that due and timely notice of what the defendant is relying upon in bar of his claim. The failure of defendant to specifically raise this affirmative defense in its amended answer must be considered a waiver. Count three of the returns is sustained as against count one of the motion, and count one of the motion is therefore overruled.

The movants averred in count two of their motion that the court made a mistake in its interpretation of the conditions and provisions of the policy as well as the facts submitted in the pleadings. This Court has held that:

"A petition for re-argument is not intended to challenge the opinion and judgment of the Supreme Court on points of law and facts raised and already decided by the Court simply because the petitioner is of the opinion that the Court is wrong in its conclusion on the law and facts. Re-argument is intended to call the Court's attention to the points of law and fact previously raised in the argument and which the Court inadvertently overlooked to pass upon" *American Under-writers, Inc.* v. *Fares Import-Export*, 30 LLR ____(1982).

The Court having passed on the issue raised in count two of the motion, re-argument cannot be considered simply because the Court did not decide or interpret the conditions of the policy according to the desire or will of the movants. Count two is therefore not sustained.

The informants/movants made the following contention in count three:

"3. That movants raised and argued the point that the insurance policy is a contract which provides that the company shall indemnify the insured against liability imposed upon him by law for bodily injury, etc., caused by accident and arising out of the ownership, maintenance and use of the vehicle up to the amount of $10,000 for each person injured and up to the total amount of $20,000 in respect of any one accident, all involving third parties. Your movants contend that Your Honours did inadvertently omit to pass on this point when it awarded $10,000 for each person involved in the accident..."

Nowhere in the amended answer filed in the lower court, nor in the brief filed before us, did

the appellees ever raised such contention. The only reference made in the amended answer to the $20,000.00 and the $210,000.00 respectively, is in count two which we again recite hereunder for emphasis:

"2. And also because intervenor says that even if the plaintiff were entitled to recovery for any death as a result of the accident, she could receive no more than $20,000 as the policy clearly states that the limits of liability for death in any one accident is $20,000.00. Therefore plaintiff is not entitled to the $210,000.00 she is claiming in one accident contrary to the terms and conditions of the policy. Moreover, plaintiff having received full settlement and executed a release, thereby discharging defendant of further claim in keeping with the contract term, cannot repudiate her own act and accord."

The only issues raised and argued by appellees were that (1) the 19 persons as passengers were excluded under endorsement No. 1; (2) if appellant was to receive any money for the death of the 19 persons it would not exceed $20,000.00; (3) appellant had already received compensation for the accident and issued a release discharging the appellees from all claims and liabilities. Hence, the appellant could not repudiate her own act.

"A party asking for a rehearing will not be permitted to set up a new ground different from the one raised in the original hearing." *West African Trading Corporation* v. *Alrine (Liberia) Ltd.* 25 LLR 3, 10 (1976).

"On a motion for re-argument the Supreme Court is required to consider only such points of law as were raised in the original argument and overlooked by the court." *Hill* v. *Hill,* 13 LLR 393 (1959).

In count nine of appellees amended brief, they raised the contention that appellant did not produce evidence at the trial to prove the damages of $210,000.00, and this is what the Court said on page three of the opinion:

"Only the averments that are denied in the responsive pleading required production of evidence to prove or disprove them. Hence, where the facts are admitted, obviously the production of evidence, oral or written, is absolutely and legally unnecessary. *Watson* v. *OAC,* 13 LLR 94 (1957). The above enumerated averments in the complaint having been conceded expressly and tacitly in the answer and motion to intervene, they need no proof..."

Plaintiff/appellant in her complaint averred in count four that her insurance contract secured from the defendant provides $10,000.00 for each person for bodily injury, including death, and $20,000.00 for each accident. She alleged in count five of said complaint that

nineteen (19) persons died and three were seriously wounded as a result of the fatal accident involving her insured vehicle on the 26th day of January, 1980, and that she was to pay death compensation to the surviving families of the nineteen persons. She intimated in count six that she had appraised the defendants of the accident and the compensation therefor, orally and in writing, but the defendant has refused to cooperate claiming that it is not required to do so in keeping with the said policy. She also attached copy of said communication as exhibit "C", according to count six. These essential allegations were not traversed in the amended answer, except the reference made to the $20,000.00 as the limit in count two of the amended answer supra. Averments in a pleading, to which a responsive pleading is required, are admitted when not denied in the responsive pleading. Civil Procedure Law, Rev. Code 1:9.8 (3).

Informants/movants also quoted for the first time, clause 3, under "conditions" in their motion for re-argument as one of those issues which they claimed were inadvertently overlooked by the court in its opinion. Clause 3, under "conditions", states in substance that the limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of indemnity to be afforded by the company against all damages, including damages for care and loss of services arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by one person as the result of any one accident. In *King* v. *Cole,* 15 LLR 16 (1962), this Court held:

"A petition for re-argument is just another way of alleging inaccuracy by the Justice who prepared and delivered the opinion of the previous hearing. It is necessary, therefore, for the petitioner to state with certainty and clarity that particular issues raised in his pleadings in the court below, or in his brief before the Supreme Court, were overlooked. Re-arguments should not be encouraged for the mere purpose of rehearing issues already decided."

In the instant case, it is stated on the first page under "Coverages, bodily injury" and under "Limits of liability", $10,000.00 each person; then under $10,000.00 each person, it is also written: $20,000.00 each accident. If the informants/ movants intended to avail themselves of the provision of clause three under "conditions", other than the stipulation on page one, they should have so pleaded just as they have done now in their motion for re-argument in order to afford the court below the opportunity to pass upon same during the hearing. The Civil Procedure Law, Rev. Code 1: 9.8 (1) provides that: "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim or counterclaim, shall be asserted in the responsive pleading thereto if one is required, except that the defenses enumerated in 11.2 may at the option of the pleader be made by motion." Motion for re-argument shall only be granted when the issues of both law and fact in said motion were raised in the pleadings, or in the brief, and argued before the court during the hearing, but were inadvertently

overlooked in the decision. Assuming that clause 3 of the Conditions *supra* was pleaded, it unequivocally provides that the limit of such liability stated in the declarations as applicable to "each accident" is subject to the provision respecting each person above. It has been held in *Consolidated* v *Coal Co. . Peers*, 46 N. E. 1105 and 1108, that the words "subject to" are words of qualification and not words of contract. The phrase "subject to" has been variously held to mean dependent upon, inferior to, liable to be effected, limited by, subordinate to, affected by, subservient to and under the control, power, or dominion of. 60 C. J. S. § 8 (3), at 673. Since it is the $20,000.00 each accident provision that is subject to the $10,000.00 each person provision in the insurance policy, the Court rightly applied the rule governing the construction of insurance contract on page 6 of the opinion under attack which is also quoted hereunder:

"The rule that a policy or contract of insurance is to be construed liberally in favor of the insured and strictly against the insurer is based upon various reasons. The one most frequently advanced is that an insurance contract, like any written agreement, should, in case of doubt as to the meaning thereof, be interpreted against the party who has drawn it and is responsible for the language employed therein. Among other reasons mentioned are that a liberal construction in favor of the insured is most conducive to trade and business and, moreover, probably most consonant with the intention of the parties, and that in accord with the presumed intention of the parties, the construction should be such as not to defeat, without a plain necessity, the insured's claim to the indemnity which it was his object to secure and for which he paid a premium." 43 AM. JUR. 2d § 272, at 332.

The issue of the bodily injury liability provision under coverage "A" for $10,000.00 each person, and $20,000.00 each accident, as presented during the hearing, was lengthily passed upon in the opinion under review and therefore not a ground for rehearing. Counts three and six of the motion are not sustained.

The informants/movants contend in count four that once the trial court had admitted endorsement No. 1 into evidence, this Court should not have passed upon it otherwise. Endorsement No. 1 was sharply attacked by appellant as not being part of the insurance contract. Informants/movants maintained, in count six of their amended answer, that Endorsement No. 1, which excludes passengers, is an integral part of the insurance policy for which appellant has contracted. Therefore, they said, she cannot now be permitted to take advantage of her own act. Co-respondent Dennis, on the hand, argued that the policy contained exclusions, that Endorsement No.1 is not among the exclusions, and that informants/movants had just brought in Endorsement No.1 for the purpose of depriving the co-respondent of her just claim and to defeat the ends of justice. Co-respondent Dennis further contended that she did not sign Endorsement No.1 and therefore, it cannot operate

against her. Once this Court of last resort acquires jurisdiction, it has the right and the legal duty to pass upon all pertinent issues raised and argued before it as are contained in the transcribed record, especially so where the two parties are contending for and against the legality of a document. The arguments for and against Endorsement No.1 as part of the insurance contract led this Court to pass upon the probative value of this instrument, and settle the issue of when may a document or statement in a collateral document, or instrument, become a part of an insurance policy. Hence, this quotation on page seven of the opinion:

"A contract of insurance may, and often does, consist of a policy and other instruments incorporated therein by reference. Provisions on the back of a policy may be made a part of the contract by reference thereto on the face thereof.

"An insurance contract may thus consist of several separate documents. But statements in a collateral document do not become a part of the contract of insurance unless they are so referred to therein as clearly to indicate that the parties intended to make them a part of such contract. In the absence of such clear reference, the rights and liabilities of the parties to a contract of insurance are to be determined by the terms of the policy itself, to the exclusion of other papers not made a part thereof." COUCH ON INSURANCE 2d, § 3.23, at 147-148.

Relative to our authority to pass upon Endorsement No. 1 we quote the following authority:

"While, save where expressly conferred, it has no original jurisdiction, and in the exercise of its appellate jurisdiction is limited to a review of the actual proceedings of the lower court and can consider no original matter not connected with those proceedings and acted upon below, where an appellate court has once obtained jurisdiction of a cause, it obtains it for all purposes and may give judgment upon all points properly presented for decision...." 5 C. J. S., *Appeal and Error,* § 1453, at 25.

Appellees also aver in count six of the amended answer that appellant accepted Endorsement No. 1 as an integral part of the policy in keeping with paragraph (b) of the general exclusion provision which states that this policy does not apply: "under any of the coverage, while the automobile is used as a public or livery conveyance, unless such use is specifically declared and described in this policy and premium charged therefor."

Recourse to item 5 under use, it is stated in the policy that "the purpose for which the automobile is to be used is commercial (Taxi)". This is fully expatiated upon in the opinion on page 5.

The Court also quoted clause 24 which stipulates:

"By acceptance of this policy the named insured agrees that the statements in the declarations are his agreements and representations that this policy is issued in reliance upon the truth of such representations, and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance."

It then concluded on page eight of the opinion thus:

"It is, therefore, our opinion, that it was the intention of the parties that the policy contains the only terms and conditions that were agreed upon since, indeed, there is no reference whatsoever to another document as an integral part of the contract." Count four of the motion is overruled.

Count five of the motion cannot be conceded and it is therefore overruled.

The movants also filed a nine-count answering affidavit, but did not argue it, which is tantamount to a waiver. We therefore did not belabor ourselves to pass upon it.

In view of the facts stated and the laws cited, it is the opinion of this Court that the motion for re-argument should be, and the same is hereby denied. And it is so ordered.
Motion denied.