of so many copies with intention to disperse them. Nevertheless, in our opinion, it is quite clear that when this one copy was sold the respondent had started to put his intention into effect and was in fact and in law attempting to disperse them.

For these reasons, in our opinion, the learned magistrate should have called upon the respondent for a defence to a charge of attempting to disperse the newspapers; and we order that the case be sent back for him to do so.

Freetown
April 14,
1961

Ames P.
Marke and
Bankole Jones
JJ.

[COURT OF APPEAL]

SULAIMAN SESAY . . . . . *Respondent*

v.

WHITE CROSS INSURANCE CO. LTD. AND BAFFI MINERAL MINING COMPANY LTD. . . . . *Appellants*

[S.L. - G.A. 2/61]

Insurance—Whether insurance company liable to pay person obtaining judgment against insured—Motor Vehicles (Third Party Insurance) Ordinance (Cap. 133, Laws of Sierra Leone, 1960), ss. 7, 11—Whether defendant company's liability to plaintiff was one which was required to be covered by insurance policy.

Respondent was injured in an automobile accident while a passenger in a motor car belonging to the Baffi Co., of which he was "managing director." He sued the company for negligence and obtained judgment against it for £2,645 12s. 6d. and costs. The Baffi Co. had insured the car with the appellants, who had undertaken the Baffi Co.'s defence. Subsequently, respondent brought an action against appellants under the provisions of section 11 (1) of the Motor Vehicles (Third Party Insurance) Ordinance. This action was successful, and respondent obtained judgment for the £2,645 12s. 6d. (less 10 per cent) and costs. Appellants appealed on the grounds (1) that the trial judge erred in deciding that respondent was not at the material time in the employment of the Baffii Co. and (2) that the judge erred in interpreting section 11 of the Motor Vehicles (Third Party Insurance) Ordinance and finding that said section gave respondent the right to proceed directly against appellants for satisfaction of the judgment obtained against the Baffi Co.

Section 11 (1) of the Motor Vehicles (Third Party Insurance) Ordinance provides:

> "If after a certificate of insurance has been issued in favour of 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 . . . issued for the purposes 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 insurer . . . may be entitled to avoid or cancel . . . the policy . . . the insurer . . . shall . . . pay to the persons entitled to the benefit of such judgment any sum payable thereunder in respect of the liability . . . including costs and any . . . interest."

The proviso to section 7 states:

> "Provided that such policy shall not be required to cover—
>
> "(*a*) liability in respect of the death . . . of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person . . .

" (*b*) save in the case of a passenger vehicle . . . liability in respect of the . . . bodily injury to a person being carried in . . . a motor vehicle. . . ."

Held, allowing the appeal, that, since Baffi Co.'s liability to respondent was not one which was required to be covered by the policy respondent could not proceed against appellants under section 11 (1) of the Ordinance.

The court (Ames P.) also said, obiter, that respondent was not in the employment of the Baffi Co.

Cases referred to: *Burton* v. *Road Transport and General Insurance Co.* (1939) 63 Ll.L.R. 253; *Lee* v. *Lee's Air Farming Ltd.* [1961] A.C. 12.

Arthur E. Dobbs for the appellants.

Cyrus Rogers-Wright for the respondent.

AMES P. The plaintiff-respondent in this appeal was injured in a motoring accident, while a passenger in a motor car of the Baffi Mineral Mining Co. Ltd., of which company he was at the time styled " managing director." He sued the company for damages for negligence and obtained judgment against them for £2,645 12s. 6d. and costs, which were taxed at £96 7s. 3d. The Baffi Co. (as I will call them) had insured the car with the appellants and they had undertaken the Baffi's Co.'s defence. The insurance policy included, of course, third party liability.

The respondent afterwards took action against the appellants, under the provisions of section 11 (1) of the Motor Vehicles (Third Party Insurance) Ordinance, 1949 (which I shall refer to as the Ordinance). The respondent's action was successful and he got judgment for the £2,645 12s. 6d. less 10 per cent. and for the £96 7s. 3d. and for his taxed costs. The 10 per cent. reduction was because the policy required the Baffi Co. to bear the first £25 or 10 per cent. (whichever was greater) of all claims.

Against the judgment the appellants brought this appeal and the respondents have made a cross-appeal against the 10 per cent. reduction. This latter point can be dealt with at once. Mr. Dobbs, for the appellants, agreed that the matter of the 10 per cent. is one between the appellants and the Baffi Co. and that if the appellants fail in their appeal the respondent should succeed in his cross-appeal. I agree with Mr. Dobbs.

Before coming to the main part of the appeal there is one matter that should be disposed of. Mr. Rogers-Wright for the respondent submitted that because the appellants undertook the defence of the Baffi Co. in the respondent's suit against that company, and were unsuccessful, they were estopped from denying liability under the policy. There are decided cases which show that an insurer can be so estopped but that he is not necessarily so estopped. I do not think it necessary to consider these decisions and how the principle affects the appellants, because in my opinion the point is not before this court. In my opinion it should have been pleaded in the court below. It was not, and so was not an issue there. It was mentioned first in the address of counsel for the respondent. The learned judge mentioned it in his judgment but made no decision about it. There is no ground of appeal in the cross-appeal concerning it or complaining that the learned judge erred in omitting to decide it.

I will now turn back to the main part of the appeal. The grounds of appeal are:

" (1) That the learned trial judge erred in deciding that the respondent

was not at the material time in the employment of the second defendant, the Baffi Mineral Mining Company Limited.

"(2) That the learned trial judge erred in interpreting section 11 of the Motor Vehicles (Third Party Insurance) Ordinance of 1949 and finding that the said section gave the respondent the right to proceed directly against the appellant for satisfaction of a judgment obtained against the second defendant."

Section 11 (1) of the Ordinance, omitting words which are not material to this appeal, is as follows:

> "11 (1) If after a certificate of insurance has been issued in favour of a person by whom a policy has been effected . . . judgment in respect of any such liability as is required to be covered by a policy . . . issued for the purposes 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 insurer . . . may be entitled to avoid or cancel or may have avoided or cancelled the policy . . . as the case may be, the insurer . . . 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 costs and any . . . interest. . . ."

The learned judge said that the important words of the section were: "In respect of any such liability as is required to be covered by a policy . . . issued for the purposes of this Ordinance." But, with respect to him, he did not go far enough. In my opinion the important words are those set out together with those which follow immediately thereafter, namely: "Being a liability covered by the terms of the policy."

These two sets of words are relevant to the second ground of appeal. The respondent could proceed, as he did, directly against the appellants if he could show that the judgment which he had recovered against the Baffi Co. was in respect of a third party liability required to be covered by the Ordinance and also actually covered by the terms of the policy.

Section 7 (1) (*b*) of the Ordinance sets out the liabilities required to be covered. It includes ". . . bodily injury to any person caused by or arising out of the use of a motor vehicle covered by the policy." This is a liability which is covered by the terms of the policy. There are however two provisos setting out two liabilities which are not required by the Ordinance to be covered. They are provisos (*a*) and (*b*). I will refer to (*b*) later on. Proviso (*a*) is as follows:

> "Provided that such policy shall not be required to cover—
>
> "(*a*) Liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment."

The policy contains a corresponding exception. Its item (*a*) of paragraph 1 of section 11 excepts liability for injury to any person which "arises out of and in the course of the employment of such person by the insured." (The item continues with another exception which has an exception within it, but it refers to a person being a member of the insured's "household" and an incorporated company cannot, in my opinion, have a "household," so that exception does not concern this appeal.)

The respondent had to prove that he was not in the employment of the Baffi Co., or if he was, then that the injury did not arise out of and in the course of such employment. The learned judge found that he was not in their employment, and this finding is the subject-matter of the first ground of appeal.

Now the learned judge looked for contractual employment. He said:

> "From the evidence in this case there is nothing from which I can deduce a contractual relationship of employment between the plaintiff and the company."

In doing so, I think he was wrong. "Employment" in this connection has a wider meaning. In *Burton* v. *Road Transport Insurance Co.* (1939) 63 Ll.L.R. 253, which was about a policy which covered anyone in the employ of the insured and driving the car on his authority, Branson J. said:

> "It was argued that employment in the policy can only mean employment under a contract of service. It is plain enough that the word employment in its ordinary meaning in English may mean employment under a contract of service and employment in a dozen other ways. I can find nothing in this contract which makes it right or proper to restrict the word employment to a meaning which if that policy had got to express it properly could only be expressed by writing into the policy after the word employment, the words 'under contract of service.' It is not necessary to imply those words nor is it necessary in order to give a business effect to this document, to restrict the meaning of the word 'employment' to employment under a contract of service."

The evidence must be examined to see if there was evidence of any sort of employment.

The respondent was (and may still be) a shareholder of the Baffi Co. and a director and a managing director (so styled). It is settled law that a director, as such, cannot be in the employment of his company. But he may be employed in another capacity. In *Lee v. Lee's Air Farming Ltd.* [1961] A.C. 12, which the learned judge referred to in his judgment, Lee was the principal shareholder and "governing director," and made a contract on behalf of the company to employ himself as principal pilot of the company. He met with an accident and the New Zealand court held that he was a worker within the meaning of the New Zealand Workmen's Compensation Act.

Whether or not a managing director is in the employment of the company depends on the circumstances and not on his being styled managing director. He must be a manager in addition to being a director.

What are the circumstances here? The respondent's evidence was:

> "I was a part time unpaid managing director. There were three other directors. . . . The reason why the company has not paid me is because the company is young and not financially strong. The initial expenses of the company are heavy. . . . I was appointed managing director by the company. I reside in Freetown and if any advice is required by the company I proceed to the Protectorate. When matters are referred to me I take a decision. . . . The headquarters of the company are at Sefadu in Kono District. . . . I was the only managing director of the company at that time. . . ."

Another director gave evidence. He said:

> ". . . I am also a director. . . . (Respondent) is the managing director of the company. The directors are not paid salary. (Respondent) does not receive salary. The Board of Directors did not vote a salary for the plaintiff."

The appellants called a witness, their local manager, who said: "As far as I know Mr. Sesay was a servant of the company."

That was all the evidence on the point; and with all respect to counsel, it was a very meagre quantity on which to expect the judge to make such an important finding of fact. There is certainly no evidence of contractual employment, as the learned judge said. I cannot see any evidence of any kind of employment. The company's business of mining is done at Sefadu. The respondent lives in Freetown and is a trader. How can he be a manager of the company when he only goes to Sefadu when sent for? Who sends for him? We do not know. Presumably the person who is the manager.

The plain fact is, as it seems to me, that the plaintiff is not a manager, but merely a director who has the additional unpaid function of going to Sefadu when his advice is called for, and I agree with the learned judge that he was not in the employment of the company.

Mr. Dobbs argued that even if the respondent was not in the Baffi Company's employment, he cannot succeed because he comes within proviso (*b*) of section 7 (1) of the Ordinance. The material words of this proviso are:

> "Provided that such policy shall not be required to cover: (B) Save in the case of a passenger vehicle . . . liability in respect of . . . bodily injury to a person being carried in . . . a motor vehicle at the time of the occurrence of the event."

The car was not a passenger vehicle within the meaning of the Ordinance, and was insured as a private motor car. So liability for injury to passengers was not a liability required by the Ordinance to be covered and so, as Mr. Dobbs argued, the respondent could not take advantage of section 11. Is this correct?

The policy itself does not exclude this liability. It includes it and covers the Baffi Company's third party liability to passengers in the car unless they happen to be in their employment and the injury arises out of and in the course thereof.

Mr. Rogers-Wright in opposing the argument relied on section 7 (2) of the Ordinance, which reads:

> "(2) Notwithstanding anything in any law contained a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of person specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of person."

This, he says, extends the scope of section 11, and enables a person to take advantage of it, if the liability is in fact covered by the policy. But section 11 has two conditions before it operates. The liability must be (1) one required by the Ordinance to be covered by the policy and also (2) actually covered by the policy. Neither can avail without the other. Both must be fulfilled.

Section 7 (2) does not seem to me to confer any benefit on third parties, so as to bring within section 11 any third party, who is not within it apart from

section 7 (2). "The persons or classes of person" there mentioned must be the same as "such person or classes of person" mentioned in section 7 (1), and they are the person or persons insured by the policy. They are not third parties to whom the person or persons insured have become liable.

In my opinion therefore, the respondent does not come within the provisions of section 11 and so is not able to maintain this suit. I would therefore allow this appeal and dismiss the cross-appeal and set aside the order of the court below including the order for costs and order judgment to be entered for the appellant/defendants. I would allow the appellants their costs, both here and in the court below.

Freetown
April 14, 1961
Ames P.
Benka-Coker C.J.
Marke J.

[COURT OF APPEAL]

NAMIE KALIL . . . . . *Appellant*

v.

SAMUEL JOHN AND OTHERS . . . . . *Respondents*

[Civ. App. 20/60]

Real property—Lease by tenant for life—Whether lease by tenant for life invalid as against remaindermen—Settled Land Act, 1882 (45 & 46 Vict. c. 38) ss. 6, 7, 53—Leases Act, 1849 (12 & 13 Vict. c. 26)—Law of Property Act, 1925 (15 Geo. 5, c. 20) s. 152.

Letitia John was tenant for life of property on Little East Street, Freetown, under a settlement created by the will of her husband who pre-deceased her. She leased the property to Kalil. After her death, the remaindermen obtained a declaration by the Supreme Court that the lease was invalid. From this decision Kalil appealed.

Held, allowing the appeal, that the lease should be confirmed with certain variations to make it conform with the provisions of the Settled Land Act, 1882.

Cases referred to: *Sutherland* v. *Sutherland* [1893] 3 Ch. 169; *In re Handman and Wilcox's Contract* [1902] 1 Ch. 599; *Pumford* v. *W. Butler & Co. Ltd.* [1914] 2 Ch. 353; *In re Cornwallis West* (1919) 88 L.J.K.B. 1237; *Boyce* v. *Edbrooke* [1903] 1 Ch. 836; *In re Farnell's Settled Estates* (1886) 33 Ch.D. 599; *Davies* v. *Davies* (1888) 38 Ch.D. 499; *Kisch* v. *Hawes Bros. Ltd.* [1935] 1 Ch. 102; *Davies* v. *Hall* [1954] 2 All E.R. 330; *Gas Light & Coke Co.* v. *Towse* (1887) 35 Ch.D. 519; *Pawson and Others* v. *Revell* [1958] 2 Q.B. 360.

Miss Frances Wright (*Arthur Dobbs* with her) for the appellant.
Berthan Macaulay (*Alfred Barlatt* with him) for the respondents.

AMES P. This appeal is against a decision of the Supreme Court declaring a lease of property in Freetown by Letitia Caroline John to the defendant to be invalid and of no effect, and also giving consequential relief and an order for costs.

Letitia Caroline John was a tenant for life of the property under the settlement created by the will of her husband who pre-deceased her. She died on