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.

[COURT **OF** APPEAL]

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

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 Viet. c. 38) ss. 6, *7, 53-Leases Act, 1849 (12 & 13 Viet. 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

April 25, 1957, and the plaintiff respondents, who had been the remaindermen then came into their estate, namely, an estate in fee simple as tenants in common.

The plaintiffs' claim in the court below was as follows:

> " The plaintiffs' claim is for a declaration that the lease dated 12th December, 1951, and supplemental lease thereto dated the 6th December, 1956, purporting to be made between Letitia Caroline John (now deceased) of the One Part, and the defendant Namie Kalil of the Other Part, in respect of premises at Little East Street, is invalid as against the plaintiffs because it was not granted in the bona fide exercise of the leasing powers of the tenant for life, having regard to the interests of all parties entitled under the settlement created by the will of James Thompson John (deceased), within the meaning of section 53 of the Settled Land Act, 1882."

The learned judge's reason for holding it to be invalid and of no effect was something which was not before him, namely, that the will had been witnessed by Letitia Caroline John, who as tenant for life was a beneficiary under it. This did not arise out of the pleadings and arose when the learned judge was considering his decision and had the original documents before him, the will and the lease, and came to the conclusion that the signature of Letitia Caroline John on each was that of the same person.

The learned judge did not then and there decide against the lease. **He** called for further argument as to the legal position arising out of this discovery. Mr. Macaulay agrees that the learned judge misdirected himself in deciding the issue on something which did not arise. He submits, however, that the learned judge's decision was right in the circumstances, although given for the wrong reason, because the lease infringed the provision of the Settled Land Act, 1882, in that the period for re-entry on non-payment of rent was 60 days ; whereas by the Act it should be only 30 days ; and also because it contained a covenant for renewal for 10 years at the end of the 91 years' term, which, he submits, offends also against the provision of the Act that a term cannot exceed 99 years and also because the 10 years was an estate which could not take effect within twelve months of the grant as required by the Act.

It should be said at the outset that it is admitted by Mr. Macaulay that the lease reserved the " best rent " and that there was no question of bad faith on the part of the lessee, the defendant appellant. He relies entirely on the infringements of the Act of 1882. He cited a number of cases in which leases by tenants for life were held to be bad, and I have examined most of them to see what the infringement was and why the bad leases were not held to be good contracts for leases in equity under the provisions of the Leases Act of 1849 (12 & 13 Viet. *c.* 26) which is in force in this country. This Act is "an Act for granting relief against defects in leases made under the powers of leasing in certain cases," which is its long title, and that and its long preamble make its purpose abundantly clear. Its purpose was to avoid the evils which arise when tenants for life and others having powers to grant leases " through mistake or inadvertence on their part," grant leases which deviate from their powers, with the result that when the successors or remaindermen come into possession of their estates they are able to treat the lease as invalid. It enacts (inter alia) that any lease, which by reason of the non-observance or omission of some condition or restriction or by reason of any other deviation from the

terms of such power, •• is invalid " against the person entitled after the determination of the interest of the lessor-then if the lease was made bona fide and the lessee has entered into possession thereunder, the lease shall be considered in equity as a contract for a lease to the same effect but subject to any variation necessary **to** make it comply with the lessor's powers of leasing.

In the case before us, it is agreed that as no powers were given by the will, the lessor's powers were those of a tenant for life under the Act of 1882. I will now turn to a consideration of the cases cited by Mr. Macaulay.

First of all there is *Sutherland* v. *Sutherland* [1893] 3 Ch. 169. In this case, the lease was held not to have been granted in the bona fide exercise of a tenant for life's leasing powers, having regard to the interest of all the parties and also that the best rent had not been reserved. The Act of 1849 was considered but it was held that there had been no mistake or inadvertence and furthermore that the lease could not be regarded as a contract for a lease because it would then have been a lease on terms which were substantially different.

Another case was *In re Handman and Wilcox's Contract* [1902] 1 Ch. 599. A tenant for life had granted a lease and thereafter became bankrupt. His trustee sold the lease. While the matter was still in the stage of a contract, requisitions on title made by the purchaser indicated that the lease had not been made for the best rent. This case was a summons under the Vendor and Purchaser Act of 1874 to seek a direction from the court as to whether or not in these circumstances the purchaser should be compelled to complete the purchase. It was held that he should not be compelled to complete a purchase which might thereafter be questioned by the remaindermen (there was **also a** question of notice which is not relevant to this appeal).

Another case was *Pumford* v. *W. Butler* & *Co. Ltd.* [1914) 2 Ch. 353. This was a lease of licensed premises by a tenant for life at a rent of £150. The Licensing Act, 1904, allowed tenants of licensed premises to deduct from their rent certain statutory charges imposed thereon " notwithstanding any agreement to the contrary." The lessees nevertheless covenanted to pay the rent without deduction of these charges and did so pay it. After the death of the tenant for life, the remaindermen took action and the lease was held to be bad because the £150 rent was not in the circumstances the true best rent-because the covenant to pay these charges was an invalid promise, and could not be enforced.

Another case was *In re Cornwallis West* (1919) 88 L.J.K.B. 1237. What happened in this case was really an arrangement to defeat creditors by a lease of the property by a tenant for life to his son-in-law at a rent, which was not the best rent, and not in the bona fide exercise of his powers. The son-in-law never went into possession of the property but sublet to the tenant for life at a peppercorn rent. The tenant for life went bankrupt and his trustee in bankruptcy had the lease set aside.

In all of these four cases the best rent was not reserved and in some of them there was also lack of bona fl.des. A lease which does not reserve the " best rent " could not possibly act as a contract for a lease. A lease with too long a term could be treated as a contract for the term minus the excess length, and other infringements can be amended and the lease read as a contract. But where the " best rent " is not reserved, how can the lease be possibly read as a contract, because what is the " best rent " is a matter 9f negotiation and there is no statutory formula for arriving at a figure. It is also impossible

where there is lack of bona fl.des. I have already said that in the case before us it is agreed that the " best rent " was reserved, and there was no lack of bona fl.des.

Another case cited by Mr. Macaulay was *Boyce* v. *Edbrooke* [1903) 1 Ch. 843. There a tenant for life leased premises to himself and two others with the usual covenants. The covenants were so worded as to make them joint covenants of all and so no action could have been brought upon the lease " at any rate during the tenant for life's life "-a party cannot be both plaintiff and defendant. This lease was held to be "absolutely bad."

Another case was *In re Farnell's Settled Estates* (1886) 33 Ch. 599. This was a petition under the Settled Estates Act, 1877, asking the court to sanction a sub-lease of settled land, which was really desired to be for a term longer than the head lease and it was sought to get round the difficulty by having a sub-lease for the period of the head lease with a covenant for an extension of the term by a further sub-lease after renewal of the head lease. The court held that this covenant could not be included because the extension of the term would not be a lease taking effect in possession within twelve months of the grant. The court therefore approved of a sub-lease for the term of the head lease less one day. I would point out that the extension of the term was to have been on exactly the same terms and conditions and to have been granted as of course, and had it not been granted, the lessee could have sued for specific performance. I mention this, because, in the case before us, we also have a covenant for renewal.

Another case was *Davies* v. *Davies* (1888) 38 Ch.D. 499. This was also a case under the Act of 1877. It turned on the proper construction of the covenant to repair, which was "at all times during the said term, keep the said premises in good and substantial repair and the same in good and substantial repair deliver up to the lessor at the expiration or sooner determination of the said term, fair wear and tear and damage by tempest excepted." This was held to be "obnoxious to the statute" and therefore the lease was bad because a tenant for life is liable for permissive waste.

Another case was *Kisch* v. *Hawes Bros. Ltd.* [1935) 1 Ch. 102. This was a case under the Law of Property Act, 1925, of England; this Act repealed in England the Act of 1849, but re-enacted it. In this case, a lease had been granted which was to take effect more than twelve months ahead and so infringed the statute. Section 152 of the Act of 1925, which re-enacted the Act of 1849, was considered but it was not held that the lease could be a contract in equity, apparently upon a question of onus of proof. There was no evidence that, apart from the lease not taking effect within twelve months, it was otherwise within the statutory powers by having reserved the "best rent," and so the defendants (in that case) could not take advantage of the Act.

In *Davies* v. *Hall* [1954) 2 All E.R. 330, which Mr. Macaulay also cited, the plaintiff sought to argue that the best rent had not been reserved, but failed because in that case the onus was on him, and no evidence had been tendered concerning it.

There are two further cases which should be mentioned, and which were cited by Miss Wright. One was *Gas Light & Coke Co.* v. *Towse* (1887) 35 Ch.D. 519. This was a case under a private Act of Parliament, not under the Settled Land Act, but it is pertinent, I think, because under the private Act trustees were able to grant building leases in possession for a term not **exceed**ing 75 years at the best yearly rent. The land was leased to a Gas Company

for 30 years for them to build on at rent which was the " best rent " at that time. There was a covenant for renewal for another 30 years at the like rent, if the lessees previously gave notice of their desire. Notice was given-a renewal was refused. The statutory successors to the Gas Company sued the trustees and their cestuis que trust claiming specific performance of the contract. The covenant was held not to be ultra vires but to be unenforceable on the ground that what had been the best rent 30 years before had ceased to be the best rent. It was also held that the Act of 1849 could not apply because there had been no mistake or inadvertance. As I have said, the Act of 1849 cannot be of avail where the best rent has not been reserved.

The other case to which I shall refer is *Pawson* & *Ors.* v. *Revell* [1958] 2 Q.B. 360. This was a lease made by the mortgagor informally in circumstances which Jenkins L.J. described as "a hole and comer arrangement." The arrangement for the lease did not contain a condition for re-entry in the event of the rent not being paid. In the case before us there is a condition but the statutory period has been exceeded. In *Pawson's* case Jenkins **L.J.** said-(at p. 239):

> " ... There is no doubt that section 152 contemplates the variation of the provisions of a lease where that is necessary in order to bring it within the terms of the section, and it appears to me that a provision such as this condition of re-entry is exactly the sort of provision, the inclusion of which, when necessary in order to validate the lease, was contemplated by section 152. . . . "

How do all these cases indicate what effect the statutory provisions have or should have on this case before us?

It is clear from the last ca,se that the 60 days' period of re-entry which made the lease bad under the Act of 1882 should be altered to 30 days so as to make it a contract for a lease within the Act if the mistake was due to inadvertance. The evidence shows that a Mrs. Bull, one of the remaindermen, and the defendant met at a solicitor's office where the terms were agreed to. A draft of the agreement was made by the solicitor then and there and sent to the solicitor whom the defendant had engaged to watch his interest. (This draft is one of the documentary exhibits in the case.) Each party having the services of a solicitor there ought not to have been an infringement of the terms of the Act. There is no question of mala fides, consequently the infringement was due, presumably, to inadvertence. Also what about the convenant to renew? I would point out that the convenant is not one which would take effect automatically if desired by the lessee because it is not a convenant to continue the same terms for a further 10 years ; it is a covenant to continue the lease at the "best rent." What the best rent will be at the end of the present 91 years' term, no one knows-it will be a matter of negotiation. In my view, this covenant is pleasing to the eye rather than real in law because it could not be enforced by an order for specific performance owing to the question of the " best rent."

There are, however, two further facts which are, to my mind, decisive in favour of the appellant. First of all this lease was a building lease. The tenant convenanted to build on the property and did build on it spending about £8,000." No wonder the plaintiffs/respondents want to get the lease cancelled and set aside by hook or by crook.

The other fact is that they have accepted rent from the appellant. We have before us a receipt by Mrs. Bull on behalf of herself and the other remainder. men. The receipt is somewhat naively headed "without prejudice," but it is in evidence. To my mind these facts make this case very different from those cited.

The second clause of the enactment of the Act of 1849 which I have already referred to ended up with the following proviso :

> " Provided always that no lessee under any such invalid lease as aforesaid, his heirs, executors, administrators, or assigns, shall be entitled by virtue of any such equitable contract as aforesaid to obtain any variation of such lease, where the persons who would have been bound by such contract are willing to confirm such lease without variation."

Then there follows :

> "3. And be it enacted that the acceptance of rent under any such invalid lease as aforesaid shall as against the person so accepting the same be deemed a confirmation of such lease."

I think that, in these circumstances, this lease should be confirmed, subject to the following variation, namely, that the period for re-entry on non-payment of rent should be reduced to 30 days and the covenant for renewal should be deleted.

For these reasons, I would allow the appeal, and set aside the judgment in the court below and order the variation of the lease accordingly.

[COURT OF **APPEAL]**

HAJAH FATMATIA KATAH . *Appellant*

v.

IBRAHIM MOMORDU ALLIE (ADMINISTRATOR OF THE ESTATE OF ALHAJI ANTUMANI ALLIE, DECD.) . *Respondent*

[Civil Appeal 8/61]

Real property-Testator bequeathed property to wife for life, remainder to minor son-Official Administrator of Estates conveyed property to wife in fee simple relying on "Deed of Family Arrangement "-Whether sufficient evidence that "Deed of Family Arrangement" approved by court.

Testator bequeathed property at No. 2 Kissy Road to wife for life, remainder to minor son-Purchase price not fully paid at time of testator's death-Unpaid purchase price charge on property unless contrary intention in will-Whether there was contrary intention-Whether proper for Official Administrator to convey property to wife if she pays unpaid purchase price-Real Estate Charges Acts, 1854-1877 (Locke-Kings Acts).

Momordu Allie (the testator) died testate on January 22, 1948. By his will, he bequeathed certain properties to his wife, Rajah Fatmatta Allie, for life, with remainder to his son, Alhaji Antumani Allie. The executors appointed in the will having renounced probate, the Official Administrator of Estates, Ahmed Alhadi, was appointed administrator of testator's estate. In July 1948, the Official Administrator conveyed all the properties *to* Hajah Fatmatta Allie (the