Of course our order being *per incuriam* I feel myself free to come to the conclusion for the reasons already given that this action is not maintainable and the respondent is estopped. He should pursue his remedy on the judgment otherwise there would be no end to litigation. I would therefore uphold the appeal.

Appeal dismissed.

INTRA BANK SOCIETE ANONYME *v.* ROYAL EXCHANGE ASSURANCE COMPANY

COURT OF APPEAL (Sir Samuel Bankole Jones, P., Dove-Edwin and Marcus-Jones, JJ. A.): January 29th, 1970
(Civil App. No. 9/69)

[1] **Insurance—property insurance—bankers' and brokers' policies—"due and proper precaution for safety of money in transit"—requires not merely reasonably safe security system but continuous supervision by insured:** A provision in a policy of insurance that the "insured shall take all due and proper precaution for the safety of the money in transit" means not merely that the insured should provide a reasonably safe system of security but that there should be continuous supervision of that system by the insured on a minute-to-minute basis (page 25, line 21—page 26, line 13).

[2] **Insurance — property insurance — bankers' and brokers' policies — meaning of "in transit"—goods cease to be in transit if before delivery person delivering them deviates to undertake unconnected transaction:** When goods are being taken from one place to another they cease to be in transit for the purpose of transit insurance if, having taken the goods to their proper destination but before delivering them, the person taking them deviates to transact some other business wholly unconnected with the delivery (page 24, line 41—page 25, line 14).

The appellants brought an action against the respondents in the Supreme Court to recover insurance monies payable under a policy between them, and damages for breach of the contract of insurance.

The appellant bank was insured with the respondent company against loss of money in transit by the fraud or dishonesty of its employees if accompanied by the simultaneous flight of the thief with the money in his possession. The policy also stated that it was a condition precedent to the liability of the respondents that all due and proper precautions should be taken for the safety of the money in transit.

The management of the appellant bank authorised a bank official to take money and deposit it at the Bank of Sierra Leone and instructed another employee to drive him there. Before leaving the driver placed the box containing the money in the boot of the car, which he then locked. When they arrived at the Bank of Sierra Leone a representative of another bank was transacting business there and in order to save time the appellants' official told the driver to take him to another building, where he left the driver and the car. After about 10 minutes he returned to the car and found the driver gone; he came back, however, almost immediately and they proceeded to the Bank of Sierra Leone. On arrival the driver unlocked the boot but the box containing the money was gone. The driver was later charged with and convicted of its theft.

The appellants brought an action in the Supreme Court to recover compensation under the insurance policy, and damages for breach of contract. The court (Tejan, Ag. J.) held that the money was in transit at the time of the theft but that since the theft was not accompanied by the simultaneous flight of the thief the loss did not fall within the scope of the policy, and he dismissed the action. The proceedings in the Supreme Court are reported in 1968–69 ALR S.L. 202.

The appellants appealed to the Court of Appeal where they again maintained that the theft was covered by the policy of insurance. They further maintained that a reasonable system had been devised to ensure maximum security of the money whilst in transit, and therefore there was no negligence on their part.

Cases referred to:

(1) *Crows Transp. Ltd.* v. *Phoenix Assur. Co. Ltd.*, [1965] 1 W.L.R. 383; [1965] 1 All E.R. 596, distinguished.

(2) *Hepburn* v. *A. Tomlinson (Hauliers) Ltd.*, [1966] A.C. 451; [1966] 1 All E.R. 418, distinguished.

(3) *Pearson* v. *Commercial Union Assur. Co.* (1876), 1 App. Cas. 498; 35 L.T. 445.

Marcus-Jones for the appellants;
S.H. Harding for the respondents.

SIR SAMUEL BANKOLE JONES, P., delivering the judgment of the court:

This is an appeal from a judgment of the Supreme Court (Tejan, Ag.J.) in which the plaintiff/appellant's claim for the sum of Le28,500

and damages for breach of contract against the defendant/respondent was dismissed.

The facts briefly are as follows. On or about May 28th, 1963 the appellant, a banking company carrying on business in Sierra Leone, entered into a contract with the respondent, an insurance company also carrying on business in Sierra Leone. As a result of this, a policy of insurance was issued by the respondent by virtue of which the respondent undertook and contracted with the appellant to insure the appellant against loss of money, cheques or stamps. The operative part of the policy of insurance contained the following provision:

"Now this Policy witnesseth that subject to the terms exceptions and conditions contained herein or endorsed hereon the Corporation will make good to the Insured:—loss of money cheques or stamps as described in the Schedule in this policy (hereinafter referred to as 'money') by

(1) any cause whatsoever in the circumstances or situation described in the said Schedule;

(2) fraud or dishonesty of employees—

(a) during transit as described in the said Schedule if accompanied by simultaneous flight of the thief while having such money in his or her possession or

(b) while on the insured's premises for the payment of wages salaries or other earnings.

Exceptions

Any consequences of—

(a) war invasion act of foreign enemy hostilities (whether war be declared or not) civil war rebellion revolution insurrection or military or usurped power;

(b) riot or civil commotion loss or pillage in connection therewith."

On January 7th, 1966 the foreign exchange manager, an employee of the appellant named Fattallah was given, according to him, "specific instruction" by the appellant's manager to take the sum of Le28,500 and deposit it at the Bank of Sierra Leone, situated at Westmoreland Street. The money had been placed for security reasons in a box which was locked with a key and placed in the boot of the car. The key to the box was kept by Fattallah and the key to the boot by the driver of the car. The manager of the appellant, after instructing Fattallah to go to the Bank of Sierra Leone, instructed the driver, after the money had been put in the boot of the car and locked, to drive Fattallah to the Bank of Sierra Leone at Westmoreland Street. These

instructions were carried out to the letter. However, when they got to the Bank of Sierra Leone, Fattallah discovered that Barclays Bank was transacting some business there. The security guard on duty told him to wait and take his turn after Barclays Bank. Nevertheless, according to Fattallah himself, in order to save time, he decided to go to the old building of the Bank of Sierra Leone, Leone Building, where old currencies were being changed to new ones. He had a sum of Le592.00 in old currency then with him and he asked the driver to drive him to Leone Building, also in Westmoreland Street, a short distance away. When he got there, he left the driver in charge of the car and was away for 10 minutes transacting the business of changing old notes to new ones. On his return to the street, he saw the car near the building but unattended for fully one minute and the driver was nowhere to be seen. After that lapse of time, he saw the driver emerging from the entrance of the building. He boarded the car and was driven to the Bank of Sierra Leone a second time. On opening the boot of the car, it was discovered that the box containing the Le28,500 was gone. At a later date the driver was charged with the larceny of this sum. He was convicted and sentenced to imprisonment. On the evidence before him, the learned judge found on the balance of probabilities that the driver was the thief.

Throughout the conduct of this case, both in the court below and in this court, it was conceded that the appellant founded his claim under provision 2 (a) of the policy, *supra*, namely that the loss was due to the fraud or dishonesty of the appellant's employee, the driver.

The policy is a "cash in transit" policy of insurance. In the Supreme Court, Tejan, Ag. J. found that the money was "in transit" when it was stolen. This was what he said (1968–69 ALR S.L. at 206):

> "The fact that Fattallah went to Leone Building where he stayed for 10 minutes, in my view, does not terminate transit. I hold from the evidence that the money was in transit up to the time when the car arrived at the Bank of Sierra Leone on the second occasion."

Mr. Hudson Harding, in spite of the fact that judgment went in his favour in the court below, filed a notice in this court intimating that he would contend that the learned judge was wrong in law in finding that the money was in transit when it was discovered to be lost. The first question therefore for this court's determination is whether or not the money was in transit when its loss was discovered.

Reference to the evidence, I think, may help in arriving at an answer. These are a few extracts from Fattallah's evidence:

1. "On January 7th, 1966 I was given specific instructions to go to the Bank of Sierra Leone.
2. The manager told me to take the money to the Bank of Sierra Leone. The manager told the driver to take me to the Bank of Sierra Leone after the money had been put in the boot.
3. Because I wanted to save time I drove with the amount of Le28,500 from the Bank of Sierra Leone to Leone Building."

The question which now arises is, had Fattallah any right for the reason he gave, after arriving at his destination to drive out again with the money, to transact business which was not even collateral or incidental to the business of depositing such a large sum at the Bank of Sierra Leone? It was argued that in the circumstances, he exercised a discretion as to whether he should wait and take his turn at the Bank of Sierra Leone or, to save time, hurry out to transact another of his company's business. I do not, speaking for myself, think that such a decision on his part can be described as an exercise of discretion. In my view he was flagrantly disobeying his manager's expressed instruction. How did he know that when he returned there would not be other customers waiting to transact their own business and that he would therefore have to stand further down the queue to await his turn? What would he have done then: Gone out again to transact some other business?

Several cases were cited in an attempt to assist the court as to the meaning of the expression "in transit", but I am afraid none of them was very helpful. There were, for example, *Crows Transp. Ltd.* v. *Phoenix Assur. Co. Ltd.* (1) and *Hepburn* v. *A. Tomlinson (Hauliers) Ltd.* (2). In the former case, part of goods delivered for transportation were stolen. It was found that the plaintiff had taken all reasonable steps to safeguard these goods. He had temporarily housed them before transporting them and Lord Denning expressed the view, which was approved by the other judges of the appeal court, that such temporary housing, whether on or off the vehicles, constituted the goods being in the course of transit. In the latter case, goods had reached their destination and it was held by the House of Lords that the goods were still on risk under the policy when they were stolen, as the period of transit was defined to include unloading and this did not come to an end until the goods were unloaded. The theft took place before the goods were unloaded.

I am afraid that the instant case, as far as my researches go,

stands alone and solitary on its own platform, without companionship of any kind. Fattallah had come to the journey's end and he ought to have waited to complete the transaction at hand. If for the reason he gave, he thought it wise to take the money out again in the car, I think from that moment it cannot be said in fact and in law that the money was in transit when it was found missing on his second visit to the Bank of Sierra Leone. To construe the policy as permitting the appellant, having reached the destination where the money should be deposited, not to so deposit it when the Bank was open and holding itself ready and willing to transact business with its customers, and then to drive out with the money in the car in order to transact some other business wholly unconnected with such a deposit, would be to add a new condition to the policy which could not be done. See *Pearson* v. *Commercial Union Assur. Co.* (3).

It is, therefore, not without some feelings of sympathy for the appellant, that I have come to the conclusion that the money was not in transit at the moment it was discovered missing when the boot of the car was opened after the car's second excursion to the Bank of Sierra Leone. It naturally follows from this that the appeal cannot succeed.

But even if the learned judge was right in his finding that the money was in transit, this court would have to be satisfied that its loss was not due to the negligence of the appellant and that the theft was accompanied by simultaneous flight of the thief while having such money in his possession. The learned judge found against the appellant on these two issues and I think he was right. Condition (1) of the policy reads: "The insured shall take all due and proper precaution for the safety of the money in transit." Quite a lot of argument was adduced as to whether or not the appellant had devised a reasonable system to ensure maximum security of the money whilst in transit. I think that on the balance of probabilities the system was reasonably safe. It had proved sufficiently safe and reliable on past occasions when Fattallah and this same driver had transported huge sums of money from the appellant's bank to the Bank of Sierra Leone. However, I consider that condition (1) ought to be construed as meaning that, even allowing for the existence of a reasonably safe system, the person in charge of the money (Fattallah) ought to keep a vigilant eye on the minute-to-minute operation of the system. In other words there was a continuous duty cast upon him, metaphorically speaking, to keep the money in his sight from one moment to the next until its final deposit at the Bank of Sierra Leone. He did not do so. He

took his eye off the money when he left the car with the money in it in the custody of the driver for 10 minutes in order to transact a business which had nothing to do with the deposit of the money. The driver, after all, was a lowly employee of the appellant against whom the latter must guard itself against fraud or dishonesty. It so turned out that this employee became the thief. He was not found in charge of the car at least for a whole minute when Fattallah came out to carry out the now belated specific instruction of his manager. Had he diligently carried out the specific instruction of the appellant, as indeed he had done no doubt with diligence on previous occasions, this case may never have come to our courts. I therefore find that Fattallah was negligent in his duty and contravened condition (1) of the policy and such negligence must be imputed to the appellant. But it was urged by Mr. Hudson Harding in reply to the submission of Dr. Marcus-Jones that even if the driver was one of the two authorised employees of the appellant entrusted with control and custody of the money in the boot (Fattallah being the other), the driver's action in leaving the car unattended spells negligence on his part and consequently on the part of the appellant. Even though I may be disposed to favour such an argument, yet I find that Fattallah was the person entrusted with the safe custody of the money, not Fattallah and the driver jointly or jointly and severally.

Dr. Marcus-Jones submitted that there was proof on the part of the appellant that there was simultaneous flight of the thief while having the money in his possession. On the totality of the evidence however, I find that there was no proof of the flight of the thief while having the money in his possession. I agree with the learned judge that the words "simultaneous flight" ought to be construed in their ordinary and popular meaning, and so construed the learned judge found that the theft was not accompanied by simultaneous flight of the thief while having the money in his possession.

The conclusion I have therefore come to is that the appellant's claim does not fall within the terms of the policy and the appeal is accordingly dismissed with costs.

Appeal dismissed.

LAHM *v.* LAHM

SUPREME COURT (Browne-Marke, J.): February 19th, 1970
(Civil Case No. 355/68)

[1] **Family Law—property—matrimonial home—substantial financial contribution to purchase price by party to customary marriage creates joint tenancy:** Where the parties to a customary marriage buy a house in Freetown in their joint names intending it to be a continuing provision for their joint lives, and each makes a substantial financial contribution to the purchase price and they run the household by their joint efforts, the property belongs to them jointly and each will be entitled to a share of the proceeds of its sale (page 30, lines 27–29; page 31, lines 25–33).

[2] **Land Law—joint tenancy—matrimonial home—substantial financial contribution by party to customary marriage creates joint tenancy:** See [1] above.

The plaintiff sought a declaration that certain property belonged to him in fee simple absolute in possession, and the defendant counterclaimed that she was the lawful owner of half of the property.

The parties were married according to native law and custom and lived together for 14 years. During this time the plaintiff bought a house with the help of a loan from the defendant's father. According to the plaintiff he paid the balance himself, and later repaid the loan, but the defendant claimed that she contributed a substantial amount to the purchase price. The conveyance was executed in their joint names, but the plaintiff claimed that this was only because he was pleased with his wife for bearing him five children, and he further claimed that since buying the house he had spent money from his personal savings on improving it.

The marriage finally broke up and the defendant left the matrimonial home with the children and started a business of her own. The plaintiff did not pay any maintenance for the children, and she assumed the entire responsibility for supporting them. When she finally took out a summons against him for maintenance the plaintiff commenced the present action in the Supreme Court seeking a declaration that the matrimonial home belonged to him in fee simple absolute, and asking for the defendant's name to be deleted from the conveyance.

The defendant counterclaimed that she was entitled to half the property since it was bought and owned jointly by the plaintiff and herself. She maintained that she had made a substantial contribution