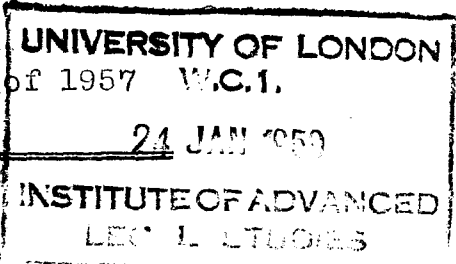


20,1958

IN THE PRIVY COUNCIL

No. 6 of 1957 W.C.1.



O N A P P E A L

FROM THE COURT OF APPEAL FOR EASTERN AFRICA  
AT NAIROBI

52067

B E T W E E N

MOHAMEDALI JAFFER KARACHIWALLA  
... (First Defendant) Appellant

— and —

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1. NOORALLY RATTANSHI RAJAN  
NANJI ... (Plaintiff)
2. ISMAILIA CORPORATION LIMITED  
... (Second Defendant)
3. KARMALI KHIMJI PRADHAN  
... (Third Defendant) Respondents

C A S E FOR THE RESPONDENTS

Record

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1. This is an Appeal from a Judgment and Order of the Court of Appeal for Eastern Africa at Mombasa (Worley P. and Briggs and Bacon JJ.A.) dated the 27th March 1956 affirming a Judgment dated the 11th November 1954 and three Orders dated respectively the 15th November 1954 and the 21st January and 20th May 1955 of the Supreme Court of Kenya at Mombasa (Mayers J.) in an Action in which the First Respondent was Plaintiff and the Appellant and the Second and Third Respondents were Defendants.

pp. 33-91  
pp. 42-51  
p. 51, 52  
p. 54  
p. 58

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2. The primary issue in this Appeal is whether on the 8th August 1953 (when the proceedings were started) the First Respondent as Mortgagee was entitled to enforce the security created by a Third Mortgage executed by the Appellant on the 29th October 1951 (subject to the First and Second Mortgages of the Second and Third Respondents respectively) and affecting three parcels of land on the Island of Mombasa of which the Appellant is the Lessee. There is a further issue whether (if the First Respondent was so entitled) his claim to

Record

enforce the said security was settled by agreement in the month of September 1953 after these proceedings had been started.

- p.2(12)  
-p.3(10)
3. The Appellant is the Lessee of three pieces or parcels of land situate on the Island of Mombasa in the District of Mombasa known as Subdivisions Numbers 259, 260 and 261 of Section Number XVIII (hereinafter referred to as No.259, No.260 and No.261 respectively) all of which pieces or parcels of land were delineated on Deed Plans attached to a certain Indenture dated the 18th July 1944. The Appellant holds No.259 under an Indenture of Lease dated the 19th November 1951 for a term of 99 years from the 1st March 1946 at an annual rent of 2000/-; the Appellant holds No.260 under an Indenture of Lease dated the 1st March 1946 for a term of 99 years from the 1st March 1946 at an annual rent of 1500/- the benefit of which Indenture of Lease was assigned to the Appellant on the 1st April 1949; the Appellant holds No.261 under an Indenture of Lease dated the 1st March 1947 for a term of 99 years from the 1st March 1947 at an annual rent of 1800/- the benefit of which Indenture of Lease was assigned to the Appellant on the 1st April 1949. 10
- pp.94-100
4. By an Indenture of Mortgage (hereinafter called "the First Mortgage") dated the 23rd October 1951 the Appellant mortgaged Nos.259, 260 and 261 in favour of the Second Respondent to secure repayment of 84,000/- and interest thereon. By an Indenture of Mortgage (hereinafter called "the Second Mortgage") dated the 29th October 1951 the Appellant mortgaged Nos. 259, 260 and 261 in favour of one Mahomed Dhanji subject to the First Mortgage to secure repayment of 21,623/- and interest thereon. On the 20th November 1951 the Second Mortgage was assigned to the Third Respondent. 20
- p.3(11.19)  
pp.129-138
5. On the 29th October 1951 the Appellant executed an Indenture of Mortgage (hereinafter called "the Third Mortgage") expressed to be made between the Appellant of the one part and the First Respondent of the other part whereby it was witnessed that for the consideration therein mentioned the Appellant 30
- p.3(20-30)
- p.3(30-33)
- pp.104-111

- covenanted to pay to the First Respondent 150,000/- on the 30th June 1968 with interest thereon at 4% per annum on the first 100,000/- at 9% per annum on the subsequent 25,000/- and at 12% per annum on the last 25,000/- such interest to be paid at the end of every month as it should accrue due and the Appellant assigned to the First Respondent Nos.259, 260 and 261 with all improvements then being thereon and all buildings then in course of erection and to be erected thereon subject to the First Mortgage and the Second Mortgage for all the residue of the said respective terms of years therein mentioned except in each case the last two days of such respective terms.
- 10
6. The material covenants on the part of the Appellant in the Third Mortgage may be summarised as follows:-
- pp.106-109
- (b) To pay principal and interest and other moneys secured by the First Mortgage and the Second Mortgage, to observe the terms and conditions on the part of the Lessee under the said Indentures of Leases and to pay ground rent Municipal rates and taxes and outgoings.
- 20
- (d) To insure with the Jubilee Insurance Company Limited all improvements and buildings on the mortgaged premises and to pay all the premiums necessary for that purpose.
- p.106(30-31)
- (e) That if the Appellant should default in payment of ground rents, Municipal rates and taxes or insurance premia or fail to pay interest regularly and punctually under the First and Second Mortgages or fail to pay regularly interest due under the Third Mortgage or to perform any of the covenants conditions and agreements therein contained the First Respondent should be at liberty to demand the repayment of principal and interest notwithstanding the time for repayment therein-before contained and to recover the same through a Court of Law with a proviso (so far as material) that the First Respondent should not enforce his right to claim and recover the whole principal sum until after five weeks' previous notice given to the Appellant demanding compliance of any such breach or default.
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- 40
- (f) That the Appellant would repay the said sum
- p.107(30)-  
p.108(12)
- p.108(13-43)

Record

of 150,000/- by 25 half yearly instalments of 5,000/-, 7 half yearly instalments of 3,000/- and a final instalment of 4,000/- thus paying off the whole amount by the 30th June 1968.

p.108(1-10)

7. By the Third Mortgage the First Respondent covenanted that if the Appellant should pay the total principal sum and interest by the 30th June 1968 the First Respondent would reassign and surrender the mortgaged premises to the Appellant or as he should direct.

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8. The facts set out in paragraphs 3, 4 and 5 hereof and the execution of the Third Mortgage containing the provisions summarised in paragraphs 6 and 7 hereof were admitted in the pleadings.

p.95(21-37)

9. The said Indenture of Lease of No.259 was executed on the 19th November 1951 in the following circumstances. On the 1st March 1946 one Saud Bin Ali as Trustee executed an Indenture of Lease granting to certain Tenants a lease of

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p.95(50)

No.259 for a term of 99 years from the 1st March 1946 and on the 1st April 1949 the survivors of the said Tenants assigned No.259 for the residue of the said term to the Appellant. In the year 1950 it was held by the Supreme Court of Kenya at Mombasa that the Trust whereunder the said

p.96(21)

Saud Bin Ali granted the said Lease was void and that No.259 became part of the estate of Saud Bin Ali (then deceased) and vested in one Said Bin Seif as his Administrator. Subsequently

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p.96(43)

the Appellant surrendered to the said Said Bin Seif the said Lease created by the said Indenture of Lease dated the 1st March 1946 and thereupon the said Said Bin Seif executed in favour of the Appellant the Indenture of Lease of No.259 mentioned in paragraph 3 hereof.

p.2(13)

- 3(10)

p.11

(5-27)

10. All the Leases Assignments and Mortgages aforesaid were duly registered in the Mombasa Registry and at the trial before Mayors J.

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p.43(47)

-44(7)

evidence was given by one de Souza the Clerk at the Registry of Titles and accepted by the Learned Judge that on the 28th November 1951 there were registered in the following order (1) the Surrender of the said Lease dated the 1st March 1946 of No.259 (2) the withdrawal of caveat (not here material) (3) the new Lease of No.259 dated the 19th November 1951 and (4) three mortgages of (inter alia) No.259 including the Third Mortgage and a sub-mortgage.

11. The statutory provisions relevant in this Appeal are Sections 57, 59 and 67 of the Indian Transfer of Property Act 1882 as applied to the Colony and Protectorate of Kenya.

Section 57 of the Act requires every document affecting any holding or any interest in any holding in respect of which a certificate of title has been issued under the Act to be registered under the Act. p.44(8-12)

10 Section 59 of the Act (so far as material) provides as follows:- p.44(14-25)

20 "No lien, charge or mortgage (other than such as may arise or be created in favour of the Crown or the Government under or by virtue of any Ordinance or other enactment) shall be created or effected so as to be of any legal validity upon or in respect of a holding or interest therein, unless the same be created or effected by a last will, of which probate is registered under this Ordinance, or by the order of a competent court or by a duly executed instrument, being duly registered under this Part..."

Section 67 of the Act (so far as material) provides as follows:-

30 "In the absence of a contract to the contrary, the mortgagee has at any time after the mortgage-money has become payable to him and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property be so sold." p.87(9-19)

40 12. Prior to the 2nd July 1953 the Appellant was in breach of the covenants on his part contained in the Third Mortgage in that he had failed to pay the principal moneys and interest secured by the First and Second Mortgages he had failed to pay ground rent or Municipal rates for the year 1953 in respect of No.259 No.260 and No.261 he had failed to pay insurance premiums for the year 1st July 1952 to 1st July 1953 and to renew the insurance policy for the year 1st July 1953 to 1st July 1954 as required by the Third Mortgage and he

Record

- pp.112,113 had failed to pay three instalments of 5,000/- each and interest from the 1st February 1952 to the 30th June 1953 under the provisions of the Third Mortgage. By a Notice dated the 2nd July 1953 served on the Appellant by the Advocates of the First Respondent the First Respondent required the Appellant to remedy the breaches of covenant aforesaid within five weeks from the date of receipt thereof but the Appellant failed to comply with the terms of the said notice. 10
- p.6 13. The matters set forth in paragraph 12 hereof were in the pleadings denied by the Appellant but were subsequently admitted by him in the course of the hearing before Mayers J.
- p.27(37)  
- 28(11)  
p.1 14. On the 8th August 1953 the First Respondent started the present proceedings against the Appellant in the Supreme Court of Kenya at Mombasa by Plaint claiming repayment of principal moneys and interest due under the Third Mortgage an Order for Sale of No.259 No.260 and No.261 and the buildings thereon and consequential relief. The Second and Third Respondents were joined as formal Defendants. 20
- p.8 15. At the start of the hearing of the Action before Mayers J. on the 29th July 1954 Counsel for the Appellant sought and was granted leave to amend his Defence by adding a new paragraph 12 in the following terms: 30
- p.10(1-10) "12. Without prejudice to the above Defence the Defendant submits that at some time in September 1953 a compromise was arrived at between the Plaintiff and himself adjusting this suit fully."
- p.33(12-14)  
p.35(31-35) 16. At the hearing of the Action the submissions on behalf of the Appellant (it being accepted that on the 2nd July 1953 the Appellant was in breach of the covenants on his part contained in the Third Mortgage and had failed to comply with an appropriate Notice served thereunder) were (1) that the parties had after Action brought fully adjusted the case and (2) that quoad No.259 when the Third Mortgage was executed the Appellant had no lease of the property. 40

17. The circumstances in which it was alleged that the suit had been fully adjusted between the parties and the evidence thereon may be summarised as follows:

10 In the month of September 1953 the Appellant and the First Respondent each initialled a document headed "Terms of Settlement between Plaintiff and Defendant No.1" which in the Action was and is hereinafter referred to as "Exhibit E". The said terms contemplated the continuance of the Third Mortgage with a variation in the rate of interest payable, the execution by the Appellant of a Fourth Mortgage which might be in favour of the First Respondent's wife, the collection of rents by the First Respondent, the addressing of letters to all tenants so that "if rent not paid within a certain time terms to be agreed as to what will happen in default" and other consequential provisions. p.127-128

20 The First Respondent's evidence in chief was that Exhibit E was initialled at the office of Mr. C.A.Patel (the First Respondent's Attorney) after discussions between the parties and that when Exhibit E was initialled he (the First Respondent) took it that the claim was settled. p.18(23-29)  
p.18(38)

30 In re-examination the First Respondent's evidence was that the Appellant had not carried out any term of settlement relating to the Mortgage in Exhibit E and the intention was that there was to be mutual settlement if a suitable settlement had gone through - "that was to be done after the Fourth Mortgage had been executed". p.24(5-11)

The Appellant's evidence was that upon Exhibit E being initialled the case was settled and the settlement was not conditional on the Fourth Mortgage being registered. p.25(11-17)

40 Mr. C.A. Patel gave evidence in rebuttal on behalf of the First Respondent that after Exhibit E was initialled there were several discussions at which both parties brought in new terms, that the Appellant wished the amount of the proposed Fourth Mortgage to be increased, that the amount gradually increased from 50,000/- to 67,000/- that the case was to be considered settled on the execution and registration of the Fourth Mortgage and that the Agreement broke down on the question of securing regular payment of rent for part of the mortgaged property known as "The Blue Room". In cross-examination Mr. Patel said

Record

p.31(40) that the purpose of initialling Exhibit E was to provide evidence of what the parties had decided at that time and that the question of rent of  
p.32(15) "The Blue Room" was to be decided later.

pp.114-119 It was not disputed that a draft of a Fourth Mortgage was prepared but not agreed and that the amount inserted in the draft was increased from 50,000/- to 68,000/- though the Appellant's evidence was that he had not agreed to the increase. 10

pp.122,123 On the 9th September 1953 the Appellant wrote letters to the Second and Third Respondents respectively asking for consent to his raising a Fourth Mortgage for 50,000/- or thereabouts and to the Registrar of the Supreme Court of Mombasa. By a letter dated 12th September 1953 the Second Respondent gave the consent so requested upon certain terms and conditions therein set forth.  
pp.126,127

pp.42-51 18. On the 11th November 1954 Mayers J. delivered a reserved judgment in favour of the First Respondent. On the 15th November 1954 the Learned Judge ordered accounts to be taken and the amounts due on the First Second and Third Mortgages to be certified and ordered, a sale of the mortgaged premises in default of payment by the Appellant of the amounts found due from him within three months after the delivery of the accounts in Court with a further order that a final decree would issue against the Appellant for the amount if any by which the sum realised upon a sale should fail to discharge the Appellant's liability to the First Respondent in full. 20 30

19. The grounds upon which the Learned Judge based his decision may be summarised as follows:

p.44(34-37) (1) That upon the true construction of Section 59 of the Indian Transfer of Property Act 1882 the Lease of No.259 dated the 19th November 1951 and the Third Mortgage took effect upon the day of their registration. 40

p.44(38-47) (2) That until the registration of the earlier Lease of No.259 dated the 1st March 1946 had been cancelled the Appellant was entitled to create a Mortgage upon No.259



Record

- (3) That when upon registration of the Lease dated the 19th November 1951 the Appellant acquired a perfect title to No.259 that perfect title fed the defective title created by him by the Third Mortgage; (Whitehorn Brothers v. Davison [1911] 1 K.B. 463; Butterworth v. Kingsway Motors Ltd. [1954] 2 All E.R. 894). p.44(48)-  
p.45(5)  
p.45(8)  
p.46(20)
- 10 (4) That Mr. Patel's evidence represented the real nature of Exhibit E and that upon the evidence Exhibit E was not intended by either party to be a concluded settlement of the action. p.47(52)  
-48(1)  
p.48(50-52)
- (5) That as a matter of construction Exhibit E could not be regarded as a concluded agreement because (in effect) some part of the subject matter of the agreement was left undetermined and that deficiency was not cured by the preparation of the draft Fourth Mortgage. p.49(1-4)  
p.50(42)  
-51(16)
- 20 20. On the 24th November 1954 Notice of Appeal to Her Majesty's Court of Appeal for Eastern Africa against the decision of Mayors J. was served on behalf of the Appellant. p.53
- 30 21. On the 21st January 1955 a Preliminary Decree was made for the sale of the Mortgaged Property if the Appellant should not pay into Court by the 15th March 1955 the amounts thereby certified to be due on the First Second and Third Mortgages with a Personal Decree against the Appellant for the amount (if any) by which the net proceeds of sale should be sufficient to discharge the said amounts together with subsequent interest and costs of the Respondents. On the 20th May 1955 a Final Decree for the sale of the Mortgaged Property was made. pp.54-58  
pp.58,59
22. The Appellant's appeal was heard before Worley P. and Briggs and Bacon JJ.A. on the 19th and 20th March 1956 when the submissions on behalf of the Appellant were:
- 40 (1) Submissions adumbrated in Ground 1 of the Appellant's original Memorandum of Appeal dated the 22nd January 1955 and Grounds 3 and 4 of his Notice of Additional Grounds of Appeal dated the 7th February 1955 that there was under the Third Mortgage no liability upon the Appellant to repay any of the principal moneys advanced until the 30th June 1968 and that accordingly no order for sale should p.60(27)  
-61(2)  
p.63(15-25)  
p.66(19)  
- 67(22)  
p.72(1-28)

Record

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|---|--|----|
| p.76(41) -<br>78(36)  | be made before that date.  |    |
| p.68(1-28)<br>p.73(15-31)<br>p.79(20)<br>- 80(16)<br>pp.83-89<br>p.90 | (2) That the First Respondent's Action had been settled in the month of September 1953.  |    |
| pp.90,91  | 23. On the 27th March 1956 the Learned President delivered a reserved judgment with which Briggs and Bacon JJ.A. concurred dismissing the Appeal with costs and an Order to that effect was made and issued on the 9th April 1956.   | 10 |
| p.87(9-19)  | 24. On the Appellant's first submission the Learned President after reciting Section 67 of the Indian Transfer of Property Act 1882 as applied to the Colony and Protectorate of Kenya posed the question as follows: "Had the mortgage money become payable at the date of the institution of the suit and if so is there anything to the contrary in the contract which disentitled the First Respondent from obtaining the order for sale?" He then expressed the opinion that having regard to Clause (e) of the Third Mortgage it was impossible to argue that the principal money and interest did not become payable by reason of the Appellant's default so that the statute (in the absence of a contrary provision) gave the First Respondent the right to an order for sale and that there was no contrary provision because there was no difficulty in reading together the first covenant to repay with clauses (e) (f) and (h) so as to give effect to the intention disclosed by the deed as a whole. | 20 |
| p.87(20-25)   |  |    |
| p.87(25-29)   |  |    |
| p.87(43-47)   |  |    |
| p.88(14-17)   |  | 30 |
| p.88(45-50)   | 25. On the appellant's second submission the Learned President after holding that in so far as the Learned Judge's conclusion was based on his estimate of the credibility of witnesses the Court would be slow to interfere with it and that nothing had been said on the Appeal which would warrant such interference further held that an examination of Exhibit E showed that it was not intended to be a concluded agreement on the ground that the question thereby left unsettled was "the real rock on which the negotiations foundered" and that the settlement of the suit was dependent on the parties executing the Fourth Mortgage which was never done.  | 40 |
| p.88(50)<br>-89(11)   |  |    |
| p.88(32-35)   |  |    |

26. On the 4th March 1957 the Court of Appeal for Eastern Africa made an Order granting the Appellant's application for final leave to appeal to Her Majesty in Council.

pp.92,93

27. The Respondents will respectfully submit that the First Respondent's right to enforce the security created by the Third Mortgage depends (having regard to the provisions of Section 67 of the Indian Transfer of Property Act) solely upon the construction of the Third Mortgage; that upon a sound construction of the Third Mortgage there is no inconsistency or repugnance between the initial covenant to repay the principal moneys thereby secured on the 30th June 1968 and (a) the subsequent provisions for the First Respondent to be at liberty to demand repayment of such principal moneys and interest upon the Appellant making any of the specified defaults and (b) the subsequent provision for repayment of the principal moneys by instalments and for redemption on repayment of principal and interest by the 30th June 1968. Upon the question of compromise the Respondents will respectfully submit that upon the evidence given at the trial and upon the true construction of Exhibit E and the draft Fourth Mortgage Exhibit E (whether regarded alone or in conjunction with the draft Fourth Mortgage) was not intended to be and was not a concluded or binding agreement. In so far as it may be open to the Appellant to rely on the argument presented at the trial of the Action (but not in the Court of Appeal) that the Third Mortgage was not effective to create any mortgage on No.259 the Respondents will respectfully submit that the argument is not well founded for the reasons given by the Learned Trial Judge.

p.87(9-19)

p.105(26-30)

p.107(30  
-108(12)  
p.108(13-43)  
p.109(1-10)

pp.127,128

pp.114-119

pp.104-111

p.44(25)  
-46(42)

28. The Respondents will further submit that the reasoning and conclusions of Mayers J. and of the Court of Appeal were correct.

29. The Respondents humbly submit that this Appeal ought to be dismissed and the Judgment and Order of the Court of Appeal of Eastern Africa affirmed for the following among other

R E A S O N S

1. BECAUSE the Third Mortgage took effect upon registration on the 20th November 1951 immediately after the Indenture of Lease of No.259 dated the

Record

- 19th November 1951 was registered and took effect.
2. BECAUSE on the 29th October 1951 when the Third Mortgage was executed the Appellant had a subsisting leasehold interest in No.259.
  3. BECAUSE if the Third Mortgage was at the date of its execution ineffective to create a valid Mortgage of No.259 the title of the First Respondent under the Third Mortgage in relation to No.259 was perfected upon the execution and registration of the Indenture of Lease of No.259 dated the 19th November 1951. 10
  4. BECAUSE the Third Mortgage created a valid mortgage of No.259 as well as of No.260 and No.261
  5. BECAUSE on the 2nd July 1953 the Appellant had failed to comply with the covenants and conditions to be observed by him pursuant to the Third Mortgage and mentioned in Clause (e) thereof and further failed so to comply within five weeks after the service upon him of a proper notice pursuant to the said Clause (e). 20
  6. BECAUSE before the 8th August 1953 the whole of the principal moneys and interest then unpaid by the Appellant under the Third Mortgage had become payable to the First Respondent.
  7. BECAUSE upon the said principal moneys and interest becoming so payable as aforesaid the First Respondent became entitled to an order that the property comprised in the Third Mortgage be sold. 30
  8. BECAUSE upon the true construction of the Third Mortgage there was not therein contained any "contract to the contrary" within the meaning of Section 67 of the Indian Transfer of Property Act 1882 as applied to the Colony and Protectorate of Kenya.
  9. BECAUSE the Appellant and the First Respondent never agreed to settle or compromise the First Respondent's claim to enforce the security created by the Third Mortgage. 40

10. BECAUSE Exhibit E (whether taken alone or in conjunction with the draft Fourth Mortgage) did not constitute a concluded or binding agreement for the settlement or compromise of the First Respondent's said claim.
11. BECAUSE the Judgments of the Supreme Court of Kenya at Mombasa and of the Court of Appeal of Eastern Africa and the Orders made by those Courts respectively were correct and ought to be affirmed.

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ARTHUR BAGNALL

No.6 of 1957

IN THE PRIVY COUNCIL

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O N      A P P E A L  
FROM THE COURT OF APPEAL FOR  
EASTERN AFRICA AT NAIROBI

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B E T W E E N  
MOHAMEDALI JAFFER KARACHIWALLA  
...                      ...                      Appellant  
— and —  
NOORALLY RATTANSHI RAJAN NANJI  
and OTHERS ...                      Respondents

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C A S E  
— for —  
THE RESPONDENTS

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WALTONS & CO.,  
101, Leadenhall Street,  
LONDON, E.C.3.