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Judgment
38, 1965

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

No.13 of 1964

ON APPEAL FROM THE COURT OF APPEAL
FOR EASTERN AFRICA AT NAIROBI

B E T W E E N :

NATIONAL AND GRINDLAYS BANK LIMITED
(2nd Defendant)

Appellant

- and -

KENTILES LIMITED (in liquidation) and
THE OFFICIAL RECEIVER (as Liquidator
thereof) (Plaintiffs)

Respondents

RECORD OF PROCEEDINGS

SANDERSON LEE MORGAN PRICE & CO.,
77, Bishopsgate,
London, E.C.2.
Solicitors for the Appellant.

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
- 9 FEB 1966
25 RUSSSELL SQUARE
LONDON, W.C.1.

80977

ON APPEAL FROM THE COURT OF APPEAL
FOR EASTERN AFRICA AT NAIROBIB E T W E E N :NATIONAL AND GRINDLAYS BANK LIMITED
(2nd Defendant)Appellant

- and -

KENTILES LIMITED (in liquidation) and
THE OFFICIAL RECEIVER (as Liquidator
thereof) (Plaintiffs)RespondentsRECORD OF PROCEEDINGSINDEX OF REFERENCE

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	(v) Letter Deputy Official Receiver to National Bank of India Limited	28th October 1957	282

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2	<p>Agreed bundle of Correspondence :-</p> <p>(i) Letter Akbarali G. Nanji, Tajdeen G. Nanji and S.L.Freeberne to Official Receiver</p> <p>(ii) Letter Akbarali G. Nanji, Tajdeen G. Nanji and S.L.Freeberne to the Receiver Manager Kentiles Limited</p> <p>(iii) Letter Hamilton Harrison & Mathews to Shapley Barret Allin & Co.</p> <p>(iv) Letter Hamilton Harrison & Mathews to The Secretary, The Land Control Board</p> <p>(v) Letter Commissioner of Lands to Hamilton Harrison & Mathews</p> <p>(vi) Letter Commissioner of Lands to Shapley Barret Ennion & Marsh</p> <p>(vii) Letter Official Receiver and Liquidator to Robson Harris & Co.</p> <p>(viii) Letter Shapley Barret Ennion & Marsh to (1) The Official Receiver and Liquidator, (2) Hamilton Harrison & Mathews and (3) Robson Harris & Co.</p>	<p>3rd September 1958</p> <p>23rd September 1958</p> <p>23rd June 1959</p> <p>3rd July 1959</p> <p>17th July 1959</p> <p>6th August 1959</p> <p>25th August 1959</p> <p>29th October 1959</p>	<p>286</p> <p>288</p> <p>290</p> <p>291</p> <p>293</p> <p>294</p> <p>295</p> <p>298</p>

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IN THE JUDICIAL COMMITTEE OF THE No.13 of 1964
PRIVY COUNCIL

ON APPEAL FROM THE COURT OF APPEAL
FOR EASTERN AFRICA AT NAIROBI

B E T W E E N :

NATIONAL AND GRINDLAYS BANK
LIMITED (2nd Defendant) Appellant

- and -

10 KENTILES LIMITED (in liquida-
 tion) and THE OFFICIAL
 RECEIVER (as Liquidator
 thereof) (Plaintiffs) Respondents

RECORD OF PROCEEDINGS

No.1

PLAINT DATED 7TH MAY 1958

IN HER MAJESTY'S SUPREME COURT OF KENYA AT
NAIROBI

CIVIL CASE NO. 658 OF 1958.

In the
Supreme Court
of Kenya at
Nairobi

No.1

20 KENTILES LIMITED (In Liquidation) and
 THE OFFICIAL RECEIVER as Liquidator
 thereof PLAINTIFF

Plaint -
7th May 1958

versus

HUBERT RICHARD BRICE FIRST DEFENDANT

and

NATIONAL OVERSEAS & GRINDLAYS
BANK LIMITED SECOND DEFENDANT

P L A I N T

1. The Plaintiff Company was incorporated

In the
Supreme Court
of Kenya at
Nairobi

No.1

Plaint -
7th May 1958
continued

under the Companies Ordinance Cap.288. On the 11th day of January 1957 this Honourable Court made an Order that the Plaintiff Company be wound up by the Court and the Official Receiver is the Liquidator thereof by virtue of Section 184 of the Companies Ordinance. The Plaintiff Company's address for service is c/o The Official Receiver, Central Government Building, Constitution Avenue, P.O. Box 30031, Nairobi.

2. The first Defendant is an Accountant carrying on business in partnership as such at the Mansion House, Nairobi, under the name or style of Brice & Gill. 10
3. The Second Defendant is a licensed Bank incorporated in the United Kingdom and whose principal place of business in the Colony of Kenya is in Government Road, Nairobi.
4. The Plaintiff Company is the owner of the freehold interest in a plot of land adjoining the Nairobi/Ruiru Road near Nairobi, containing 557 acres or thereabouts, known as Land Registration No.57 Kasarini, together with the brick and tile factory and other building erected thereon or on part thereof and the machinery and other fixed equipment thereto belonging and is the absolute owner of all moveable assets upon the said plot of land excepting only such moveable assets as were in the possession of the Plaintiff Company on the 22nd day of November 1956 and are now the subject of a charge in favour of the Second Defendant by virtue of a debenture dated the 1st day of October 1951 and the appointment of a Receiver on the 22nd day of November, 1956. 20 30
5. On or about the 22nd day of November 1956 the Defendants or their respective servants or agents wrongfully entered and assumed possession of the said land of the Plaintiff Company and since then have continued wrongfully to occupy the same and the factory and other buildings thereon and will so continue unless restrained from so doing by this Honourable Court. 40
6. The Plaintiff Company has suffered damage by reason of the said wrongful acts of the Defendants and in particular :

- a) by reason of the depreciation in the value of the buildings, machinery and other fixed assets on the said land wrongfully utilised by the Defendants;
- b) by reason of the Plaintiff Company being wrongfully deprived of possession of the said property and being consequentially prevented from operating the brick and tile manufacturing business and earning a profit in respect thereof.

In the
Supreme Court
of Kenya at
Nairobi

No.1

Plaint -
7th May 1958
continued

10

7. On the 29th day of April 1958 the Committee of Inspection appointed by this Honourable Court under the provisions of Section 196 of the Companies Ordinance duly gave sanction for the Official Receiver as Liquidator of the Plaintiff Company to bring this suit in the name and on behalf of the Plaintiff Company.
8. The said land being within the Colony of Kenya this Honourable Court has jurisdiction to hear and determine this Suit.
9. The Plaintiff is unable to give any estimate of the value of the subject matter of this suit.

20

WHEREFORE the Plaintiff prays for:-

(i) An injunction to restrain the Defendants, whether by themselves or by their servants or agents or otherwise, from entering on the said land and buildings known as Land Registration No.57 Kasarini.

30

(ii) A declaration as against the First and Second Defendants that the Plaintiff Company is the free and unincumbered owner of the freehold estate in the said land and buildings known as Land Registration No.57 Kasarini, together with all machinery and other fixed equipment belonging thereto and is the absolute owner of all moveable assets thereon excepting only such moveable assets as were in the possession of the Plaintiff Company on the

40

In the
Supreme Court
of Kenya at
Nairobi

No.1

Plaint -
7th May 1958
continued

22nd day of November 1956 and are now the subject of a charge in favour of the Second Defendant by virtue of the said debenture dated the 1st day of October 1951 and the appointment of a Receiver on the 22nd day of November, 1956.

- (iii) An order for delivery of possession of the said property more particularly described in the second paragraph of this Prayer. 10
- (iv) An account.
- (v) Mesne profits.
- (vi) Damages.
- (vii) Costs.
- (viii) Further or other relief.

DATED this 7th day of May, 1958.

KENTILES LIMITED in Liquidation by the Official Receiver and Liquidator. 20

R.H. MUNRO,
ACTING OFFICIAL RECEIVER
and Liquidator.

Filed by:

The Official Receiver,
Central Government Building,
Coronation Avenue,
P.O. Box 30031,
Nairobi.

on the day of May, 1958. 30

No.2
RE-AMENDED DEFENCE AND COUNTERCLAIM
DATED 18TH SEPTEMBER 1961.

In the
Supreme Court
of Kenya at
Nairobi

IN HER MAJESTY'S SUPREME COURT OF KENYA
AT NAIROBI
CIVIL SUIT NO. 658 OF 1958

No.2

Re-Amended
Defence and
Counterclaim
18th September
1961

KENTILES LIMITED (in liquidation) and
THE OFFICIAL RECEIVER as Liquidator
thereof PLAINTIFF

10

versus

HUBERT RICHARD BRICE FIRST DEFENDANT
and

NATIONAL OVERSEAS AND GRINDLAYS
BANK LIMITED (now known as NATIONAL
AND GRINDLAYS BANK LIMITED) SECOND DEFENDANT

20

AMENDED DEFENCE OF NATIONAL OVERSEAS AND
GRINDLAYS BANK LIMITED THE SECOND DEFENDANT
(now known as NATIONAL AND GRINDLAYS BANK) AND
COUNTERCLAIM (delivered pursuant to Order
dated the 5th day of March, 1959 and Order
dated the 18th day of September, 1961)

1. The Plaint herein is bad in law and dis-
closes no cause of action vested in or attach-
ing to either the Plaintiff Company or Official
Receiver as Liquidator of the Plaintiff Company
and this Defendant will contend that insofar as
this suit consists of claims or a claim against
it the same should be dismissed.

30

2. This Defendant its servants or agents did
not nor did any of them on or about the 22nd
day of November, 1956 or at any subsequent time
enter or assume possession of or occupy so much
of the land referred to in paragraph 4 of the
Plaint as consists of the lands now known as
L.R. 57/16 (hereinafter called "the excluded
lands") or any part thereof or the buildings

In the
Supreme Court
of Kenya at
Nairobi

No.2

Re-Amended
Defence and
Counterclaim
18th September
1961
continued

thereon as alleged in paragraph 5 of the Plaint or at all.

3. Save as to so much thereof as consists of the excluded lands this Defendant has entered upon the entire of the land referred to in paragraph 4 of the Plaint and is now in possession thereof.

3A. By the debenture mentioned in paragraph 4 of the Plaint it is provided that at any time after the principal moneys thereby secured should become payable this Defendant might appoint by writing a Receiver and Manager of the property thereby charged. The said principal moneys became payable to this Defendant on or about the 19th day of November 1956 whereupon this Defendant on or about the 20th day of November 1956 in exercise of the power in that behalf conferred upon it by the said debenture appointed the First Defendant to be a Receiver and Manager of the said property and entered upon and went into possession of the said property by such Receiver and Manager. 10 20

4. Without prejudice to paragraph 3 hereof and subject thereto this Defendant -

- (a) denies that (save as to so much thereof as consists of the excluded lands) the plaintiff Company is the owner of the freehold interest in the land referred to in paragraph 4 of the Plaint or of any portion thereof or of any buildings thereon as alleged in the said paragraph or at all; 30
- (b) is a stranger to so much of paragraph 4 of the Plaint as alleges that the Plaintiff Company is now the owner of that portion of the land therein referred to which consists of the excluded lands;
- (c) admits that on or about the ~~22nd~~ 20th day of November 1956 the Defendants entered and assumed possession of the land referred to in paragraph 5 of the Plaint (save so much thereof as consists of the excluded lands) and that since then 40

they have and each of them has continued to occupy the same and the buildings thereon but denies that the said acts of entering, assuming possession of and occupying the said land and buildings were or that any of them was wrongful as alleged in the said paragraph or at all;

In the
Supreme Court
of Kenya at
Nairobi

No.2

Re-Amended
Defence and
Counterclaim
18th September
1961
continued

10 (d) denies that it has committed any wrongful act as alleged in paragraph 6 of the Plaint or at all and contends further and in the alternative that if it has committed any wrongful act as so alleged (which is denied) the Plaintiff Company has not suffered the damage referred to in the said paragraph or any damage by reason of any such wrongful act of this Defendant as alleged in the said paragraph
20 or at all.

5. The Plaintiffs are not nor is either of them entitled to any relief against this Defendant either as claimed in the Prayer to the Plaint or at all.

COUNTERCLAIM

30 6. The Defendant refers to and repeats the contents of paragraph 3A. hereof. By the debenture referred to therein the Plaintiff Company covenanted with this Defendant to deposit from time to time with this Defendant the title deeds of any immovable property which might thereafter be acquired by the Plaintiff Company all such deposits to be by way of equitable mortgage as collateral security for the repayment of the principal moneys and interest by the said debenture secured. The Plaintiff Company on or about the 19th day of December 1951 caused to be delivered to this Defendant
40 the title deeds of the lands referred to in paragraph 3 of this Defence, which deeds are still held by this Defendant, but the Plaintiffs have refused to implement the said delivery by the execution of an appropriate memorandum of deposit by way of equitable mortgage to enable this Defendant to complete and give

In the
Supreme Court
of Kenya at
Nairobi

No.2

Re-Amended
Defence and
Counterclaim
18th September
1961

Inued

effect to the said delivery as a deposit of the said title deeds by way of equitable mortgage as collateral security for the repayment of the principal moneys and interest secured by the said debenture. In the premises the Plaintiff Company acting by the said Liquidator is bound to complete and execute and when completed and executed to deliver to this defendant an appropriate memorandum of deposit of the said title deeds by way of equitable mortgage of the said lands in favour of this Defendant.

10

7. By an Indenture of Mortgage made the first day of November, 1951 (registered in the Crown Lands Registry at Nairobi on the 19th November, 1951, Volume N.6 Folio 276/29 and registered in the Registry of Companies at Nairobi on the 5th February 1952) the Plaintiff Company conveyed unto this Defendant in fee simple by way of mortgage the lands referred to in paragraph 3 hereof and known as L.R. 57.

20

8. By an indenture of conveyance made the 1st day of November 1951, (Registered in the Crown Lands Registry at Nairobi subsequently to the registration of the mortgage referred to in paragraph 7 hereof) this Defendant as mortgagee conveyed unto one Michael Notkin in fee simple the lands known as L.R. 57/16 being that portion of lands of L.R. 57 referred to in paragraph 2 hereof as "the excluded lands".

~~WHEREUPON this Defendant prays that as against it the said suit be dismissed with costs.~~

30

WHEREUPON this Defendant claims:

1. An order that the Plaintiff's suit be dismissed with costs.

1A. A declaration that by virtue of the indenture of mortgage referred to in paragraph 7 above, this Defendant is the legal mortgagee of the lands referred to in paragraph 3 hereof and known as L.R.57 (save and except so much thereof as is comprised in the plot known as L.R. 57/16 and referred to above as the excluded lands.)

40

2. A declaration that this Defendant is entitled to require the Plaintiffs or one of them to deliver to it duly executed an appropriate memorandum of deposit of title

deeds of the lands referred to in paragraph 3 hereof and known as L.R. No.57 (save and except so much thereof as is comprised in the plot known as L.R. 57/16) by way of equitable mortgage as collateral security for the repayment to this Defendant of the principal moneys and interest intended to be secured to it by the said debenture.

- 10 3. An order that the Liquidator of the Plaintiff Company be directed forthwith at his own expense or that of the said Company to complete and execute in favour of this Defendant and when so completed and executed to deliver to this Defendant an appropriate memorandum of deposit of the title deeds referred to in the next preceding sub-paragraph hereof by way of equitable mortgage as set out therein and to do all things necessary to enable the same to be duly registered against the title to the lands comprised in the said title deeds.
- 20 4. If necessary an order that an account be taken of the moneys now due by the Plaintiffs or either of them to this Defendant and secured or intended to be secured by the said debenture.
- 30 5. An order that this Defendant is entitled to its costs of and in connection with its Counterclaim when taxed the same to be paid by the Plaintiffs or one of them with its demand.
6. Further or other relief.

DATED this 4th day of June, 1958.

AMENDED this 16th day of March 1959.

AMENDED this 18th day of September, 1961.

(SD) W.L. HARRAGIN,
HAMILTON HARRISON & MATHEWS.
Advocates for the Second
Defendant.

40 Filed by
HAMILTON HARRISON & MATHEWS,
Advocates,
Stanvac House,
Queensway,
Nairobi.

In the
Supreme Court
of Kenya at
Nairobi

No.2

Re-Amended
Defence and
Counterclaim
18th September
1961
continued

In the
Supreme Court
of Kenya at
Nairobi

NO.3

REPLY AND DEFENCE TO COUNTERCLAIM OF
THE SECOND DEFENDANT DATED 24TH
AUGUST 1959.

No.3

COLONY AND PROTECTORATE OF KENYA

Reply and
Defence to
Counterclaim
of the
2nd Defendant
24th August
1959

IN HER MAJESTY'S SUPREME COURT OF KENYA AT

NAIROBI

CIVIL SUIT NO. 658 OF 1958

KENTILES LIMITED (In Liquidation) AND
THE OFFICIAL RECEIVER AS LIQUIDATOR
THEREOF ...

PLAINTIFF

10

versus

HUBERT RICHARD BRICE ...

FIRST DEFENDANT

and

NATIONAL OVERSEAS & GRINDLAYS BANK
LIMITED (now known as NATIONAL &
GRINDLAYS BANK LIMITED) ...

SECOND DEFENDANT

REPLY AND DEFENCE TO COUNTERCLAIM
OF THE SECOND DEFENDANT

1. The Plaintiffs admit paragraph 2 of the
Defence of the First Defendant and say that
immediately prior to the 22nd November 1956
the Plaintiff Company was in possession of
the said land (other than the excluded lands).

20

2. Save that the Second Defendant went into
possession of the said property by the First
Defendant the Plaintiffs do not admit any
allegation in paragraph 3A of the Defence and
deny that the Second Defendant was ever
entitled to any charge on the said land or to
appoint a Receiver or Manager thereof as
alleged or at all. If (which is not admitt-
ed) the Second Defendant is or was at any
material time the holder of any debenture or
other document which purported to create any
charge on the said land or to confer upon the
Second Defendant any power to appoint a
Receiver and Manager thereof the Plaintiff

30

says that the said land is land registered under the provisions of the Crown Lands Ordinance (Cap.155) and that no such debenture or other document was ever registered pursuant to the provisions of the said Ordinance. Further or alternatively no written consent of the Governor for the creation of any such charge was ever obtained by the Second Defendant pursuant to the provisions of Part viii of the said Crown Lands Ordinance nor was any consent in writing of the Land Control Board obtained by it pursuant to the provisions of section 7 of the Land Control Ordinance (Cap.150) and the Plaintiffs will contend that any such debenture or other document was and is thereby rendered void.

10

20

30

40

3. The Plaintiffs admit paragraph 4(b) of the said Defence.
4. As to paragraph 6 of the Counterclaim the Plaintiffs repeat paragraph 2 hereof and say that if (which is not admitted) the debenture referred to in the said paragraph contained any such covenant as is therein mentioned the said covenant is not therein fully or accurately set forth but provided in addition that the Plaintiff Company would when called upon execute a legal mortgage or charge in favour of the Second Defendant over its immovable property. In the premises the said covenant constituted an agreement for a mortgage and was and is void under the provisions of the Ordinances hereinbefore referred to.
5. Further or alternatively if (which is denied) the said covenant was valid and effective the same was fully complied with by the execution by the Plaintiff Company on the 1st November 1951 of an Indenture of Mortgage purporting to create a legal mortgage of the said land which said mortgage was and is void under the provisions of the said Ordinances.
6. In the further alternative the Second Defendant was at all material times a Company incorporated outside the Colony not being a

In the
Supreme Court
of Kenya at
Nairobi

No.3

Reply and
Defence to
Counterclaim
of the
2nd Defendant
24th August
1959
continued

In the
Supreme Court
of Kenya at
Nairobi

No.3

Reply and
Defence to
Counterclaim
of the
2nd Defendant
24th August
1959
continued

Company registered pursuant to the provisions of the Companies Ordinance (Cap.328) and the acquisition by it of any estate or interest in the said land was at all material times ultra vires by reason of the provisions of section 328 of the said Ordinance.

7. The Plaintiffs admit that the title deeds to the said land were delivered to the Second Defendant on or about the date mentioned in paragraph 6 of the Counterclaim and that the said deeds are still held by the Second Defendant but deny that the said delivery constituted or purported or was intended to constitute a deposit of the said deeds by way of equitable mortgage of the said land.

10

8. In the premises the Plaintiffs deny that they are or that either of them is bound to complete or execute or deliver to the Second Defendants any memorandum as alleged in paragraph 6 of the Counterclaim or at all.

20

9. Save as aforesaid and save in so far as the same consist of admissions the Plaintiffs join issue with the Second Defendants on their Defence and Counterclaim and say that the said Defendants are not entitled to the relief claimed or to any relief.

Dated this 24th day of August, 1959.

Filed by:
Byron Georgiadis,
Advocate.
Church House,
Government Road,
Nairobi.

BYRON GEORGIADIS
ADVOCATE FOR THE PLAINTIFFS

30

We agree to this Reply being
filed out of time.

Dated this 29th day of September
1959.

(SD) W.L. HARRAGIN
HAMILTON HARRISON & MATHEWS,
Advocates for the First & Second
Defendants.

40

No.4

REPLY OF SECOND DEFENDANT TO PLAINTIFF'S
DEFENCE TO COUNTERCLAIM DATED 31ST
OCTOBER 1960.

In the
Supreme Court
of Kenya at
Nairobi

No.4

IN HER MAJESTY'S SUPREME COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 658 OF 1958

KENTILES LIMITED (In Liquidation) and
THE OFFICIAL RECEIVER as Liquidator

PLAINTIFF

Reply of
2nd Defendant
to Plaintiff's
Defence to
Counterclaim
31st October
1960

10

versus

HUBERT RICHARD BRICE

FIRST DEFENDANT

and

NATIONAL AND GRINDLAYS BANK
LIMITED

SECOND DEFENDANT

REPLY OF SECOND DEFENDANT TO PLAINTIFF'S
DEFENCE TO COUNTERCLAIM.

FILED PURSUANT TO AN ORDER MADE ON THE 21ST DAY
OF OCTOBER, 1960.

20

1. This Defendant joins issue with the
Plaintiffs upon their Defence to Counterclaim
save and except for admissions.

30

2. In further answer to paragraphs 5 and 6 of
the said Defence to Counterclaim this Defendant
relies upon the provisions of the Banks' Title
to Land (Amendment of Laws) Ordinance, 1958,
and states that it is and was at all material
times one of the banks or bodies of persons
with whom title deeds may be deposited by way
of equitable mortgage or charge by reason of
paragraph (b) of sub-section (4) of section 7
of the Land Control Ordinance (cap. 150) and
that the said Counterclaim having been filed
on the said 17th day of March 1959 is not an
action suit or proceeding commenced before
the 13th day of May, 1958.

In the
Supreme Court
of Kenya at
Nairobi

No.4

Reply of
2nd Defendant
to Plaintiff's
Defence to
Counterclaim
31st October
1960
continued

3. In the alternative to paragraph 2 hereof and in further answer to paragraphs 5 and 6 of the said Defence to Counterclaim this Defendant refers to the pleadings herein and avers that the Debenture referred to therein was executed by the Plaintiff Company in favour of this Defendant in consideration of a loan by way of over-draft amounting to Shs. 1,800,000/- plus interest granted by this Defendant to the Plaintiff Company at the request of the latter for the purpose of enabling the latter to effect its purchase of the said lands which purchase was financed by means of the moneys so provided to the Plaintiff company by this Defendant. If the said Debenture is affected by any defect irregularity error or want of due legal form (which is denied) the Plaintiff company had or should be deemed to have had at all material times full and due notice and knowledge thereof but nevertheless failed to inform this Defendant thereof and waived its rights (if any) in regard to the same as a result of which the position of this Defendant has been materially worsened. For these reasons the Plaintiffs are estopped from relying upon any such defect irregularity error or want of due legal form and from seeking to challenge the validity of the said Debenture as in the said paragraphs 5 and 6 or at all.

10

20

Dated this 31st day of October, 1960.

(SD) N.V. PANCHOLI

30

for HAMILTON HARRISON & MATHEWS
Advocates for the Defendants

Filed by:

HAMILTON HARRISON & MATHEWS,
Advocates,
Stanvac House,
Queensway,
Nairobi.

Copy to be served upon

The Official Receiver,
NAIROBI.

40

No.5

REJOINDER OF SECOND DEFENDANT TO
PLAINTIFF'S REPLY DATED 31ST OCTOBER
1960.

In the
Supreme Court
of Kenya at
Nairobi

No.5

Rejoinder of
2nd Defendant
to Plaintiff's
Reply
31st October
1960

IN HER MAJESTY'S SUPREME COURT OF KENYA AT
NAIROBI

CIVIL CASE NO. 658 OF 1958

KENTILES LIMITED (In Liquidation) and
THE OFFICIAL RECEIVER as Liquidator PLAINTIFF

10

versus

HUBERT RICHARD BRICE FIRST DEFENDANT

and

NATIONAL AND GRINDLAYS BANK
LIMITED SECOND DEFENDANT

REJOINDER OF SECOND DEFENDANT TO
PLAINTIFF'S REPLY

FILED PURSUANT TO AN ORDER MADE ON THE 21ST
DAY OF OCTOBER, 1960.

20

1. This Defendant joins issue with the Plain-
tiffs upon their Reply save and except for
admissions.

30

2. In further answer to paragraphs 5 and 6 of
the said Reply this Defendant contends that
since this Defendant is (as the Plaintiffs
admit) in possession of the land referred to
therein and has in its Defence herein expressly
pleaded and relied upon such possession the
Plaintiffs are not entitled in their Reply to
seek to impugn and are estopped from seeking to
impugn the validity of the Indenture of Mortgage
dated 1st November 1951 or the validity of the
legal estate of this Defendant in the said land
in the manner in and to the extent to which they
have purported so to do in the said paragraphs
5 and 6 or at all.

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Rejoinder of
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to Plaintiff's
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3. In the alternative to paragraph 2 hereof and in further answer to paragraphs 5 and 6 of the said Reply this Defendant refers to the pleadings herein and avers that the said Mortgage was executed by the Plaintiff company in favour of this Defendant in consideration of a loan by way of overdraft amounting to Shs. 1,800,000/- plus interest granted by this Defendant to the Plaintiff Company at the request of the latter for the purpose of enabling the latter to effect its purchase of the said lands which purchase was financed by means of the moneys so provided to the Plaintiff company by this Defendant. If the said Mortgage is affected by any defect irregularity error or want of due legal form (which is denied) the Plaintiff company had or should be deemed to have had at all material times full and due notice and knowledge thereof but nevertheless failed to inform this Defendant thereof and waived its rights (if any) in regard to the same as a result of which the position of this Defendant has been materially worsened. For these reasons the Plaintiffs are estopped from relying upon any such defect irregularity error or want of due legal form and from seeking to challenge the validity of the said Mortgage as in the said paragraphs 5 and 6 or at all.

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Dated this 31st day of October, 1960.

30

(SD) N.V. PANCHOLI

for HAMILTON HARRISON & MATHEWS
Advocates for the Defendants.

Filed by:
HAMILTON HARRISON & MATHEWS,
Advocates,
Stanvac House,
Queensway,
Nairobi.

Copy to be served upon:
The Official Receiver,
NAIROBI.

40

No.6

NOTES OF THE HONOURABLE MR. JUSTICE MILES

IN HER MAJESTY'S SUPREME COURT OF KENYA AT

NAIROBI

CIVIL CASE NO. 658 of 1958

KENTILES LIMITED (In Liquidation) and
THE OFFICIAL RECEIVER as Liquidator
thereof ... PLAINTIFFS

versus

10 HUBERT RICHARD BRICE ... 1ST DEFENDANT
NATIONAL OVERSEAS & GRINDLAYS
BANK LIMITED ... 2ND DEFENDANT

18.9.61

B. O'Donovan Q.C.

Georgiadis for plaintiffs.

T.F. Donaldson Q.C.

Gerald Harris for defendants.

20 O'Donovan: Action in trespass arising out of
exercise by 2nd defendant of power in debenture.
L.R. 57 - Kasarini. May turn on question whether
debenture and other documents are admissible in evidence.
Agreed bundle to be put in subject to argument as to
admissibility.

Defendants have served notice to admit copies of originals filed.

30 Plaintiffs incorporated in Kenya on 18.9.51 - Capital £500,000 in £1 shares. Certificate under section 95(3) Companies Ordinance 27.9.51. September 1951 Company entered into negotiations with 2nd defendants, then National Bank of India, for a loan on security of £90,000. Directors Meeting on 26.9.51 - resolved that subject to certificate under section 95(3) offer of National

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Bank of India be accepted. Zukerman authorised to make originals. 1.10.51 second meeting of Directors. Debenture produced. Floating charge on all amounts. Indenture of Mortgage creating fixed charge as collateral security to debenture on land L.R. 57. "Legal mortgage". Secretary instructed to register debenture in Companies Register. That was done. Particulars filed on 4.10.51. Certificate under section 82(2) Companies Ordinance 4.10.51. Also resolved at meeting that equitable mortgage ranking as second charge be created in favour of East African Industries Ltd. 1.11.51 plaintiffs acquired land L.R. 57 Kasarini by conveyance. Contemporaneously it created a legal mortgage in favour of National Bank of India as collateral security. Registered in Crown Lands Registry. No consent obtained from Land Control Board under Land Control Ordinance nor consent of Governor under Crown Lands Ordinance. Particulars of mortgage registered in Registry of Companies on 5.2.52. Extension of time granted by this Court. Application under both Ordinances on same form for consent. Crown Lands Ordinance, section 88. Powers of Governor delegated to Commissioner of Lands Crown Sale Ordinance. Application of prescribed form submitted by Kaplan and Stratton. Never dealt with because secretary of Land Control Board advised consent of Land Control Board not necessary. I submit this wrong. 10

Application not pursued.

December 1951 - Title deeds of L.R. 57 delivered to second defendants who were on face of it owners of legal estate as mortgagees.

17th November 1956 - Meeting of Directors: legal advisers stated company insolvent. Resolved that petition be filed for winding-up.

19th November 1956 - Petition for winding-up presented. 40

20th November 1956 - 2nd defendants appointed 1st defendant receiver and manager under Debenture of 1.10.51.

14th December 1956 - Court appointed Official

Receiver provisional liquidator with limited powers, i.e. to take possession of reversion of property in hands of receiver.

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11th January 1957 - Winding-up order: Official Receiver to act as provisional liquidator.

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No further appointment by Court. Official Receiver now in fact and law liquidator, section 184(a)(d) Cap.288.

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October 1957 - Official Receiver wrote letter.

Exs.1 Agreed bundles of correspondence put in pro- and 2 visionally as Exhibits 1 and 2.

Ex. 3 Debenture put in as Exhibit 3 provisionally.

Ex. 4 Mortgage put in as Exhibit 4 provisionally.

Exhibit 1 - Letter 50: 28.10.57. Official Receiver took this action because 2nd defendant appeared to be about to sell assets for £120,000. Nothing would result for unsecured creditors if the securities were good.

20
Plaint filed 7th May 1958 shortly before Bank's Title to Land Amendment Ordinance 1958. Further delay in filing would prejudice unsecured creditors. L.R. 57 is in Highlands - affected by Part VIII of Crown Lands Ordinance section 88. National Bank of India has delivered documents to Registrar of Companies as a foreign company under Part 13 but not registered as company under Part 11.

Plaint paragraphs 4, 5 - Trespass alleged.

30
I do not propose to address evidence as to mesne profits. These include compensation for use and occupation and damage to premises. It includes net annual value of premises. We are agreed that if it is found plaintiffs are entitled to mesne profits an enquiry be ordered as to mesne profits. It will be argued that Official Receiver has acted unreasonably and deprived of mesne profits.

Donaldson: We only desired finding as to principle of assessing mesne profits.

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O'Donovan: Defence - original. Possession arrested and denial of our letter. Application to have Pleadings amended by pleading security. Not immediately filed. They took out summons asking for liberty to commence action against plaintiffs to enforce debenture by appointing receiver. Dismissed on 2.1.59 by MacDuff J. Defendants appealed. Judgment 1959 E.A. 681 National Bank of India v Official Receiver - 682.1 687. A is a decision as to what the effect of the proviso is. Further amendments applied for by defendants. Amended defence and counterclaim. Defence of 2nd defendant as amended. Paragraph 1 - not proposed to be taken as preliminary issue.

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Counterclaim - Extremely studied language.

Donaldson: I shall apply to amend counterclaim. As result of all complications one possibility that mortgage might be valid on counterclaim but invalid on claim.

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No objection by O'Donovan.

ORDER. Leave to amend as prayed.

Reply and defence to counterclaim.

Rejoinder filed - Estoppel.

Donaldson: I do not intend to rely on estoppel.

Patterson v Mohamedraja Versi, 23 E.A.C.A. 106. Paragraph 1 of Defence.

Donaldson: Restricted powers of provisional liquidator. Plaintiff does not disclose cause of action. Do two orders restrict power of liquidator or do they prevent him bring action?

30

O'Donovan: I suggest framing of issues be deferred until later, if necessary at all.

Plaint - Action for trespass. Correct method of putting in issue validity of defendant's security. Not expressly put in issue in plaintiff. Unnecessary to plead title of defendant in plaintiff simply to rebut it. Order VIII rule 14. Clear that defendants intend to justify by reliance on

security. Res judicata would apply if defences not taken when they might have been. In action against wrongdoer not necessary to allege more than prior right to possession. Unnecessary to plead derivation of title. Reliefs and statement at length of cause of action which is for recovery of land. Statement of machinery. Joinder of claims: Gledhill v Hunter, 14 Ch. D. 492, 500. In effect we sue for recovery of land. As machinery we ask for declaration etc. Legal consequences.

10

Plaintiff's case.

1. I submit Defendant Bank is a foreign un-registered company, not entitled to hold interest in land in Highlands. If no power to hold land no power to acquire land. Securities ultra vires qua debenture holder, mortgagee or equitable mortgagee.

20

Companies Ordinance Cap. 288, sec. 2: definition "Existing company". "Context otherwise requires" in Part XI. Section 304 (1)(b). Clearly requires more extensive meaning than in section 2. Defendants could have applied under Part XI for registration. Section 312 - Company would be entitled to certificate. Section 316 - section 312 - Registration. Section 313 - vesting of property. Contrast these provisions with Part XIII. Alternative procedure. Certain particulars only need be determined. Section 328 - Proviso. No definition in this Ordinance of "lands". Must mean any interest in land.

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Adjourned to 2.15 p.m.

2.15 p.m.

O'Donovan: "Acquire" means hold. Ordinance must refer to interests. Land as such cannot be held. Under Land Control Ordinance "Land" includes interest in land - section 2.

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"Right over or in respect of".

"Registered" in proviso to section 328 Cap. 288 - word means more than delivery of

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documents under section 327. Otherwise meaningless. Intention of Legislature clearer if history considered.

1943. No. 23 of 1944. Amending Ordinance. Section 88 of Crown Lands Ordinance enacted at same time Land Control Ordinance Cap. 150 enacted.

Proviso to section 328 added in 1945. Intended to complete system of control so far as companies concerned. Reason is that a foreign company does not have to deliver annual return to Registrar of Companies and any change in equity capital of foreign company would not be known to Government. If it were registered under Part XI provisions relating to annual returns would apply. Change in ownership of shares would be known to public. On registration constitution of shareholding known and Land Control Board would be in position to decide whether to give consent to acquisition of land by company. Object of proviso to prevent evasion of provisions of Part IX of Crown Lands Ordinance though foreign company, which is not required to disclose shareholding. 2nd Defendant company not having registered under Part XI can only hold land outside Highlands. This clearly invalidates legal mortgage. This assigns legal estate to bank.

Debenture - Question whether invalid and whether deposit of title deeds is "acquisition of land" is complicated. Legal mortgage also invalidated by section 7 of Land Control Ordinance and section 88 Crown Lands Ordinance. Section 7(1) (2) original; Amended Ordinance sec. 7(2) Amended Sec. 7(3)(b). Same exclusion in sec. 88(4). Does not help legal mortgage.

Sec.7(3)(b) in 1933. Amended by Ordinance 1933. Now section 7(4)(b). Section 7(3) now Section 7(4). Submit debenture is void so far as it concerns immoveables under section 7(1)(a) of Cap. 150 and 88(1) Cap. 155. I submit it is not receivable in evidence. Section 1127 Crown Lands Ordinance. Only registered in companies Register. Crown Lands Registrar could not have registered it even if asked.

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Clause 1 and 2 - Clause 1 "purely" creates a charge. Clause 2 "created by this debenture": "a fixed charge". Purports by itself to create a fixed charge. Clauses 1 and 2 must be read together. Clause 2 qualifies clause 1. Does not mention what property is. Submit not merely a floating charge. Taking clause 1 in isolation - a floating charge at time of creation might not create charge over land. As soon as it becomes a fixed charge debenture creates a right title and interest in land and falls under section 127. Curious result under 1958 Ordinance. Draftman appears to have overlooked existence of floating charge.

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Clause 2 - Debenture where in isolation offends against both Ordinances. Clear that only form of mortgage permitted without consent is mortgage by deposit of title deeds.

20

Result: (a) - a legal mortgage not saved merely because accompanied by a deposit of deeds;

(b) - equitable mortgage not saved if unaccompanied by a deposit of deeds.

Charge created by debenture itself divorced from deposit of deeds is invalid. Section 7 (1)(a) and section 88(1) (a) it purports to create fixed charge. (b) it contains an agreement to do something the Ordinance has prohibited, i.e. to grant a legal mortgage. Section 7(3) Cap. 150; Section 88(3) Cap. 155. Under Cap. 155 document only invalid in so far as it creates a charge. Section 7(3) wider "void for all purposes". Does not invalidate debenture as a whole or provisions not relating to land. Consequence is that Bank not entitled to appoint receiver for this purpose.

30

Equitable Mortgage by deposit.

Section 7(4)(b) Cap. 150; 88(4)(b) Cap. 155 do authorise this. I submit counterclaim for execution of memorandum unenforceable. (1) because if debenture not receivable in evidence no other evidence of any contract to create an equitable mortgage. No proof.

40

(2) Title deeds were handed to Bank

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after execution of legal mortgage and must be held by Bank in pursuance of supposed legal estate under that document and not as equitable mortgagees. Deposit of deeds with intent to create equitable security by such deposit is missing. This is essential element.

(3) Relief sought in counterclaim affects suit filed by plaintiff who is entitled in these proceedings to protection by section 1 proviso in Amending Ordinance No. 36/58. Proviso does not mean that validity be expressly raised in proceedings.

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(4) Contract between parties in debenture required plaintiff to execute a legal mortgage which they have done and not to execute any further documents relating to an equitable mortgage. English, Kenya and Indian Law different. In Kenya an equitable mortgage can only be created by a deposit of title deeds. Cap. 152 Equitable Mortgage, section 2. Agreement to create legal mortgage does not here create equitable mortgage. Section 57 Indian Transfer of Property Act - since repealed. Section 59(3) Indian similar to our Cap. 152. In India nothing to prevent an equitable mortgage by deposit of deeds from being enforced although no memorandum of deposit. In Kenya if no registered memorandum any transaction caught by section 127 Crown Lands Ordinance. Proviso. No memorandum. Not registered so no evidence receivable of transaction, i.e. deposit of deeds. In India much discussion as to effect of documents which frequently accompany deposits. Indian decisions in construing debenture. I say debenture constitutes bargain between parties and in itself created the security, therefore compulsorily registrable under Cap.155. No parole evidence can be admitted either as to what bargain was. Section 129(c) Cap.155 as enacted. Amendment could not affect suit filed before 1.3.60. (Donaldson agrees). Section does not apply. No case of trustees. Section 129(e) does not apply as clause 2 purports to create in itself a charge over land.

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Sir Hari Sarkar Paul Keda v Nath Saha (1939) 2 All. E.R. 737: Editorial note p. 738: p.740 A - "bargain". Clear that Cl.2 is operative instrument, not merely evidential. In itself it

purports to create charge on land - "hereby charged". All terms set out in debenture. In India courts would conclude this was operative document not evidencing a completed transaction, therefore debenture dealing as it does with land, is not admissible because not registered. Irrelevant that it would be difficult to register. Defendants have to rely on debenture for their counterclaim. If inadmissible any other evidence inadmissible.

10 SARKAR on Evidence, 9th edition p.538.

Once parties set out contract in written document this can be produced.

Metha v Chan. MacPhee, (1916) 43 Indian Appeals, 122, 125. Without debenture counterclaim fails because contract to give equitable mortgage cannot be proved.

2. Crucial question is capacity in which Bank hold documents of title. Obvious from sequence of events that they held them in pursuance of rights of legal mortgagee. Could not have intended to create mortgage by deposit. As soon as legal mortgage created deposit would merge in higher security. They held legal estate therefore no equitable charge. Defendants' position delicately balanced between alternative dangers. They cannot allege documents deposited when intent to create security. If that alleged any evidence inadmissible as no registered memorandum. They have got to say there was a delivery of documents connected with a contract to give a security. They say not intended to operate as a deposit until a memorandum executed. Memorandum of deposit does not effect deposit, it records it. Deposit with intent to create security. If there has been such a deposit no registered memorandum, therefore not admissible.

20

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3. Counterclaim affects suit filed by plaintiff. May be said counterclaim is new suit. Submit section 3 of 1958 Ordinance does not help, nor section 4, Both deal with floating charges which later become fixed. Here it purports to be a fixed charge. Section 2 removes disability. Cannot be relied on as suit affected. Proviso gives plaintiff vested right which cannot be taken away by filing another suit. Might be

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different if different issues concerned in counterclaim. Claim by plaintiff for declaration. Right to equitable mortgage not raised in defence, only in counterclaim. Makes no difference. Might have been raised on issue as to whether plaintiff entitled to declaration. Section 6 Civil Procedure Ordinance, Explanation 4. Even assuming this new proceeding defendants cannot be better off by filing counterclaim than by filing new suit. Court would have had to stay new suit. Clause 2 of debenture shows what form parties intended contract to take. Unlike Paul's case no provision that memorandum will be prepared but a legal mortgage. Bank say if contract unenforceable we ask Court to make another enforceable contract. Parties here intended to create equitable mortgage. One month after debenture they agreed on legal mortgage.

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Adjourned to 19.9.61

B.R. Miles, J.

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O'Donovan: It has been agreed that statement of facts which I made be accepted. A second debenture has been created in favour of East African Marketing Co. Ltd. - floating debenture. Receiver appointed under this. Not registered against any land. No consent obtained.

Donaldson: I have no information to contradict this but I am not in a position to admit it.

O'Donovan: Charge in favour of East African Industries Ltd. vacated in 5.4.1952. A debenture created in June 1954 in favour of East African Marketing Co.Ltd.

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Donaldson: I accept this not registered and no consent obtained.

O'Donovan: I submit nothing turns on this.

Donaldson: Only question is whether open to plaintiffs having taken no proceedings to challenge debenture to claim that they are unencumbered freeholders and to claim possession.

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O'Donovan: 29.4.58. Committee of Inspection

sanctioned filing of this suit by Official Receiver. No consent of Governor or Land Control Board to any form of security in favour of defendant. Nothing registered in Crown Lands Registry other than mortgage.

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Ex.5 Photostat copy of Register of L.R. 57 put in by consent as Ex.5.

Ex.6 Photostat copy of Title Deeds put in by consent, Ex.6.

10 Ex.7 Copies of minutes of meetings of directors dated 26.9.51, 1.10.51, 17.11.56, put in by consent as Exhibit 7.

Ex.8 Extract from Bankruptcy and Winding-up Cause 50/1956 put in as Exhibit 8.

I submit Winding-up Order resulted in powers accruing to Official Receiver ex officio: Section 184(a) (d). Section 190(1) - Powers of liquidator, sub-section (a).

Ex.9 Letter 22.4.58 put in as Exhibit 9.

20 Close of Case for Plaintiff.

Donaldson: Connell J. judgment: p.2. Merits on one side.

Facts - 1. Reason why no consent to Mortgage was letter p.18, Exhibit 1; letter p.14. Obviously refers to section 7(3)(b) of Cap.150.

2. No one has ever before suggested that a debenture requires registration under Crown Lands Ordinance - section 127(2): Evidence. Section 126: Registration.

30 3. No one has ever suggested that section 328 Companies Ordinance has effect now suggested.

A. Preliminary point - Powers of Receiver. Company is wound up by Court. Provisional Liquidator is subject to directions of Court. I submit powers of Official Receiver expressly limited in this case to taking possession of receiver as per order of 14.12.56. This

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continued by Winding-up Order. Do not permit bringing this action. It assumes there is a reversion. Essence of this action is that there is nothing to revert. Section 183(2) Pelly Murphy J. acted under this. Section 184(a) Winding-up: (d). (a) (d) may be thought contradictory. You cannot say liquidator not appointed by court until there has been an application to appoint a liquidator. If refused Official Receiver becomes liquidator. That stage never reached. Official Receiver is, I submit, still the provisional liquidator under two previous orders and subject to previous restrictions. No one had thought of challenging rights of defendant. Not unreasonable that Edmonds J. should continue restriction. Section 190(3) a justification for Edmonds J. restricting powers. Even so if no power to Edmonds J. to make this restrictive order it was not appealed. Plaintiff cannot now say it was not in his power to make it. Plaintiffs can now ask Court for leave to bring another action. If a new action brought the Banks 1958 Ordinance would operate in my favour. There is substance in this objection. It is agreed that no leave of Court has been obtained for this action. Not open to Committee of Inspection to overrule a limitation imposed by Court. Even if liquidator has power, limited under section 193.

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B. Legal mortgage. Bank relies on protection of this. This registered under Companies and Crown Lands Ordinance. Attached as (1) ultra vires company under section 328 Companies Ordinance;

30

(2) no consents under Cap. 150 and 155.

(1) section 328, Cap. 288, Companies Act 1929.
Under both 4 clauses of company :-

1. Ordinary company incorporated under Part II. Kenyan by birth. Power as to land. Section 15(2). Same scheme in 1929 Act. Part I sections 1-33. Section 13 same as section 15 of Kenya but no reference to land. Section 14 Act 1929; land. Section 14 important. Mort-mains and Charitable Uses Act 1888. A foreign company does not have benefit of section 14. It needs a licence or other statutory assistance to hold land.

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Corporation of Canterbury v Wyburn, (1895) A.C. 89, p.94. Only applies to land in England.

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2. Companies incorporated under repealed laws. Kenya Part X section 302-3. 1929 Act Part 8 section 316-20.

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10 3. Other companies not formed under the Ordinance or Act. Kenya Part XI section 304-19, 1929 Act Part IX section 321-336. It is said that our Bank could register under this part. I agree. Section 306 - we are joint stock company. Section 312, 313. Foreign company is being naturalised. All property vested in new body. Section 316(3) - "formed". Not commercial formality to transform a bank into a Kenya company.

20 4. Foreign companies Kenya Part XIII, England Part XI section 343,345: foundations of Kenya section 328. Without Mortmain Act this statutory power not needed. Capacity of a judicial person is governed by law of incorporation. Not cut down in Kenya by Mortmain. Kenya draftsman did not appreciate this. Section 328 "incorporated".

30 (a) Power not needed in Kenya to hold land unless some law prohibiting it; (b) this can not refer to naturalised company under Part XI. Under section 312 it is to become a company incorporated under this Ordinance. Language inappropriate to Part XI. Section 328 - Proviso. "Unless" paid - this does not apply to us as not registered under Part XI. Section 316(3) - "as if it had been formed under Ordinance". Proviso must be dealing with a Part XIII not a Part XI company. Proviso does not cut down main body of section as you get power to hold lands on delivery of documents to registrar. Proviso operates up to registration. For lands other than Highlands you have power to hold lands as from delivery of deeds to Registrar. As regards
40 Highlands you have power when Registrar has effected registration. Short interval of time. Based on English Act. This intended to be an enabling not a restricting section. We have power to hold land anywhere in world by English law subject to local law taking

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power away. Proviso applies to companies who have delivered documents but not been registered.

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Donaldson: When a company has delivered particulars it is registered under this part. Impossible to say a company registered under Part XI is a company registered under the provisions of this Ordinance since section 328 and proviso are contained in Part XIII which only applied to companies incorporated outside Colony. Part XI company is not incorporated outside Colony. Ordinance 1958 was a panic measure before this case. It is otiose on my instruction. Right place to put in the enabling power would be in Part XIII or unless such company is registered in accordance with the provisions of Part XI. Section 312 and 313 turns company formed etc. into a company incorporated under this Ordinance. Scarcely likely that it was intended to exclude big banks from holding land. Impracticable for a foreign company of this character to accept consequences of Part XI. Could not accept vesting and incorporating provisions. Proviso cuts down enabling power. I can say I have power to hold land under English Companies Act. Proviso to an enabling section is no way to take away inherent rights. Different if there was a Mortmain Act here.

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Equitable interests. Said land in this Ordinance includes interest in land. Where legislature extends "land" beyond ordinary meaning it says so. I accept no definition of land in other Ordinance. Crown Lands and Land Control Ordinances both contain sections exempting equitable mortgage by deposit of title deeds in favour of National Bank of India. Cannot have been thought that these banks were registered under Part XI nor that they would be prepared to register under Part XI. If my friend is right astonishing position that legislature in 1943 was exempting equitable mortgages upon need for consent when for previous 10 years there had been a statutory provision preventing them holding any interest in land in Highlands. Does

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not make sense. The legislature having provided exemption in 1943 in two controlling Ordinances then imposed a total prohibition in 1945 in Companies Ordinance and repealed exemption when it amended Land Control Ordinance in 1949. "Acquire land" must mean acquire legal estate. Under an equitable mortgage you don't acquire land, only certain rights in respect of land.

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10 C. Legal Mortgages - Land Control and Crown Lands Ordinances.

1. Where you have a system of registration and rectifying register, the register is conclusive till rectified. This particularly so where Registrar has statutory duty to satisfy himself that Ordinance complied with before he registers.

20 Cap. 150 section 44. Section 148, Cap. 155 - rectification of register. No rectification here. Policy: if you have register a person having business in land ought to see what position is from register. Register valueless if liable to be left unrectified. Wrong for person to say register not correct in later litigation. Plaintiffs have not persisted in rectification.

2. I submit consent not necessary for legal mortgage.

30 (a) Section 7 and 88 restrict freedom of contract or to own land must be strictly construed. Control operates in 3 distinct ways:-
(1) Prohibition on disposal without consent by one individual to another. (2) Prohibiting without consent acquisition of land by an individual for himself or another individual or for a Part XIII company. (3) Prohibition on transfer of shares of a company within meaning of Companies Ordinance. My clients are not companies under Cap. 288.

40 Reason is that these Ordinances are necessarily concerned with racial holding of land in Highlands. Company has no i.e. control in case of company must operate at share holding level. Section necessary in case of foreign company because there companies maintain share registers

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abroad. Not competent to legislature to legislate as to what a foreigner shall not do outside Colony. I agree intention is that my clients could not acquire land but I submit by oversight what is prohibited is not acquisition of land by a Part XIII company but acquisition by an individual on behalf of a Part XIII company. Not function of court to remedy omissions in drafting. Section 7 in present form amended in Ordinance 38/49; "Person" ambiguous - could include companies. Prima facie it does under Interpretation Ordinance unless context otherwise requires. Word bears same meaning section. Where word elsewhere in section must mean an individual. Section 7(1)(a) "to any other person". If person there includes living person these words are otiose. You cannot sell land to yourself. No point in putting this in unless less embracing meaning than in Interpretation Ordinance. I say it means an individual. Section 7(1)(b) "or of any company". Why those words if person covers it? Why single out Part XI companies instead of Part XIII companies?

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7(1)(c); section 7(2) - I agree on my construction no need for section 7(4). This does not matter if this regarded as an oversight in drafting 7(1)(b). Should have read "no person or company registered under Companies Ordinance". Not possible if person means individual to construe 7(1)(b) as requiring my company to get consent. Other sections bear this out. Section 8(1) Land Control Ordinance. This makes sense on my construction. Section 8(1)(b)(1) - Limited grounds of refusal of consent. Board concerned with whether individual has sufficient land or shares etc. If person includes company astonishing gap. Although he returned whether company owned sufficient land there is no provision enabling Board to refuse consent on ground that shareholders of company owned sufficient land etc. Board would need that power in case of Kenya companies. In case of Part XIII company it cannot exercise control over shares. Section 88 Cap. 155 same pattern as Section 7 Cap. 150. Section 90 - "of a different race". Cannot include company. Section 91 does not refer to company - no provision on lines of section 99(2). Section 95

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40

"of a different race". Section 96 deals with security. My clients did not therefore need consent under these sections. Mortgage duly registered.

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10 D. Equitable mortgage. Under Kenya Law an equitable mortgage is unaffected by section 59 Transfer of Property Act. For whatever amount, subject to Cap. 155, can be created by delivery of title deeds with intent to create security on land. Authority for this in Cap. 152.

(a) Reference to Crown Lands Ordinance is not a reference to consent provisions but registration provisions.

(b) Intent as to create security not necessarily an equitable security.

2. Section 7 and 88 (1) have no application to deposit of title deeds to this Bank.

20 3. Section 127 Cap. 155 does not avoid mortgages but prevents evidence directed to proving the existence of a mortgage unless that mortgage has been created (not evidenced) by a written instrument. One exception, i.e. in case of mortgage by deposit rule, has no application if memorandum of mortgage in statutory form has been registered. This is in contrast to written instruments required by main body of rule. Memorandum is evidence written instruments have to be creative documents. Volume VI Subsidiary Legislation 2371. "No" such document executed by plaintiff, therefore not possible to register any mortgage. Therefore I cannot submit that my clients are at this moment equitable mortgagees as holding equitable mortgage.

30

40 I submit agreement exists under which plaintiffs agree to give an equitable mortgage. Under Kenya laws you impliedly agree (1) to deposit title deeds; (2) to execute a memorandum and perhaps to register if not open to mortgagee to register. Deeds have been deposited but I have no memorandum. I invite Court in equity jurisdiction to restrain plaintiffs from exercising rights which they only exercise by breach of contract until I have received

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memorandum and had an opportunity to register.

Hurst v Picture Theatres Ltd. (1915) 1 K.B. 1.
Cap. 152. Section 7(4) and 88 take me out of
necessity. Sec. 127(2) Cap. 155. Proviso.
Does not affect validity but proof. Deposit
mortgage. Disability only continues until
memorandum executed and registered. Court in
equitable jurisdiction should give relief: on
principle equity regards that as having been
done what ought to be done.

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Hurst v Picture Theatres Ltd; Wood v Leadbetter
is the key to this: p.7.

Frogley v Earl of Lovelace.

Adjourned to 20.9.61. B.R. Miles, J.

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20.9.61.

O'Donovan: Powers of Official Receiver. I seek
to adduce evidence as agreed fact of two meet-
ings of creditors and contributories on 15.5.57
when resolved no application be made to Court
to appoint liquidator in place of Official
Receiver. Report filed by Official Receiver on
12.4.58. 1st defendant attended creditors'
meeting.

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Donaldson: I have no objection subject to costs
should Court decide point against me on this
point.

Court: So be it.

Donaldson: I submit more than this is required.
If Court has specifically limited powers of
Official Receiver it requires further applica-
tion to Court to extend them. Liquidator may
be appointed on Winding-up order or at some
later stage.

30

O'Donovan reads Section 184(d) - "where" as
"when".

Equitable mortgage Bank entitled to counter-
claim for delivery of memorandum of deposit and
to claim by way of defence to have possession
stayed until.

Walsh v Lonsdale. MULLA 4th edition. 275, para. 28 - exactly position here. In Ariff's case defendant could not get specific performance because of Limitation. In India creation of mortgage depends on document. In Kenya it merely goes to evidence. Ariff v Tulanath, 58 Indian App. 91, 101 - "created".

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10 If I can have my memorandum I am claiming inconsistency with and not in violation of Crown Lands Ordinance. Only answer of plaintiffs is that defendants cannot give evidence of debenture. Sub. (1) section 328 Companies Ordinance "Acquisition" must be limited to legal estate. This construction inconsistent with exceptions in sections 7(4) and 88(4).

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20 2. Said I must rely on Banks Title to Land Ordinance. If I am right on my construction of section 328 I don't need to rely on that Ordinance. Title "and to remove doubt". Undoubted Amendment introduced in section 3, 4. Could have read "to remove doubts of Official Receiver". I do not rely on this for defence.

3. Said debenture avoided by sections 7 and 88. O'Donovan agreed it is good as far as chattels are concerned. Plaintiff must show particular sections in which this agreement is contained is itself avoided by sections 7 and 88.

30 I submit (1) exceptions in those sections which protect mortgage itself must protect any antecedent agreement to give such a mortgage. Otherwise result would be that oral agreement would be avoided if no consent, but if I spontaneously deposit deeds that is valid.

(2) Edwards v Denning held section 88 does not apply to agreements, only transactions. Sec. 7 on same footing.

40 (4) Said evidence cannot be given of agreement in debenture because of section 127 Cap. 155 I submit Edwards v Denning decides :- Section 127 does not prevent evidence given of agreement to effect specified transactions.

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2. submit I am not asking court to consider debenture as evidence of mortgage but only as agreement to give a mortgage.

3. So far as debenture may by other provisions effect a charge on the land - it is avoided by section 88, Cap.155, and that part of debenture which created charge being avoided remainder of debenture is within section 129(e).

1958 E.A. 628; 632 C; 635.1. I say debenture is only tendered as evidence of an agreement and not of any charge.

10

In P.C. 1960 3 W.L.R. 801, 1961 A.C. Distinction here is that charge is in issue in other issues. Section 127 can be applied in segments. Otherwise different results could be obtained by different suits being filed in which issues completely defined. I am protected by this decision as far as agreement for equitable mortgage. Debenture falls within section 129(e). Sir Hari Paul's case is one of series of cases in which issue in each case was whether the document was a memorandum of completed terms of transaction in which case it required registration, or whether it was a mere receipt for documents. None of cases concerned with an antecedent agreement to give a mortgage by deposit of deeds. In Paul's case there was an antecedent agreement. Case not concerned with registrability of that but of subsequent memorandum. 1909 2 All. E.R. 740 D. There was an agreement for mortgage drawn up on 24th July. When I get my memorandum I will have to register it. Agreement of 24th July corresponds to debenture. Debenture is not tendered as evidence of this charge. Also as President said I have not got Governor's consent and it is void.

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Clause 1. I concede for this point that this is a charge.

Clause 2. 1st sentence.

Clause 2 provides then for 2 collateral securities. It is an agreement - "whenever called on" etc. important. First part effects a charge. Agreement to give equitable mortgage in any event. Legal Mortgage to be given if

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required. It may be if you have first class security, if you have some security, you won't want to put him to expense of legal mortgage. In majority of cases you will want a legal mortgage and also protection while this is being prepared. You want protection if something goes wrong with legal mortgage, as happened here. Said there was merger on execution of legal mortgage. So far as deposit of title deeds goes that is wrong. Even with a legal mortgage we still want title deeds. So far as capacity in which Bank holds deed some truth in it. If you obtain an effective legal mortgage you have a higher security in which lower security merged or if lower security not yet given which impliedly removes need to give lower security. On no principle can delivery of a document which is a nullity have any effect on your obligation to perform original contract.

20 Facts - Proof of evidence of Mackie Robertson put Ex."A" in by consent as Exhibit "A". Letter p.11.

Ex."B" Proof of Mr. Brice put in by consent as Exhibit "B". These show voluntary handing over of possession to my client. Said my claim could be defeated by showing Kentiles never had any intention of depositing deeds to Bank by way of security which is what Cap. 152 requires. I submit that if deeds deposited as part of creating a legal mortgage I would be within words of Ordinance. I submit actual intention irrelevant if there is an agreement to deposit deeds by way of security; if title deeds are deposited the depositor will not be heard to say the deposit was otherwise than by way of security unless he gave notice to the depositee. Debenture provides that deposit is by way of security. Only merger if a higher security comes into existence and there has not.

Adjourned to 2.15 p.m.

40 2.15 p.m.

Court refers to HALSBURY pp. 642, 659, 2nd edition, also Bankruptcy and Winding-up Cause 50/56 and order of Court on 16.4.58.

Donaldson: At moment my point would appear to be

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bad but perhaps I may be permitted to resile
from this later if necessary.

Question of costs.

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Abdulla v Patel, (1960) E.A. 900.

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I submit neither Cap. 150 or 155 have
any application to future changes on unascertain-
ed land. No express exemption in Ordinance to
unascertained land. Common form of commercial
document. Land was acquired within 4 months
of execution of document. Arguable that in
fact charge did not attach until company became
insolvent. Section 7(8) - 4 months of date of
agreement. Life of debenture on that view is
4 months. That is why 1958 Ordinance says you
can have a floating charge. I do not rely on
Banks Ordinance which was unnecessary. Essence
of a floating charge is that it attaches as
happening of event after date of agreement.
Debenture would operate as fixed charge on any
land in possession of company as its date.
There was none. It became fixed charge when
immoveables acquired and when company became
insolvent qua moveables. Clause 2 - If you
own legal or equitable property it is a fixed
charge. If not it becomes "all other property
hereby charged" and is a floating security.

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Prayer for declaration. I submit not proved
that plaintiffs are free and unencumbered owners.
2nd debenture holder has appointed a receiver:
p.43. We are not told to give up possession
before April 1958. 2nd debenture holder
appointed receiver in December 1956. Plaintiffs
must prove they are free and unencumbered owners.
May be said (1) this declaration is inter parties
only, or (2) 2nd Debenture is bad for same
reasons as my debenture. As to (1) some force
in this but no court is prepared to make a
declaration which implies that some other person
has no right without hearing that person.
Possibility must be removed. As to (2) terms
not known. Known no consent given. May be
some argument may be adduced showing it to be
good. 2nd Debenture holders should have been
joined.

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Claim for possession. Plaintiff must succeed on

strength of own case. Danford v McAnalty 8 A.C. 456, 460 "From time out of mind". Even if I have no title I put plaintiff "at arm's length". Plaintiff must negative possibility of claim by 2nd Debenture holder. Must be done in proceedings to which they are party. 2nd Debenture holders would lose land. First mortgagee must hand over to second. 2nd Debenture holders would be plaintiffs. Plaintiffs here could only claim for damage to reversion. Who may sue in Trespass? HALSBURY 2nd edition, Volume 33, p.10. I concede immediate right to possession may sue.

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Mesne profits and damages. No claim for loss of market as O'Donovan concedes. Defence to action of trespass that he entered by leave and licence of plaintiff. HALSBURY p.18, Vol.33, para. 30. Here licence revoked. No defence to claim. After 28.4.58 we were trespassers subject to our defences. Not pleaded as defence to damages. Terminus a quo is reasonable time after letter 28.4.58. Evidence of Mackie-Robertson and Brice. Consent under misapprehension of legal position of debenture and mortgage.

Armstrong v Sheppard and Short Ltd., (1959) 2 Q.B. 384, 401. Terminus ad quem is issue of plaintiff. Trespass is continuing tort. Action can be brought every day. Damage limited to this period. HALSBURY Vol. 33, p.5 para 6 - different from negligence. Cause of action on one day.

Counter-claim. 1958 Banks Ordinance. Apart from memorandum my counterclaim is unnecessary unless I have to rely on Banks Ordinance. Counterclaim is separate proceeding. Order VIII rule 2, 12. 13.5.58. Counter-claim on 16.3.59.

Chappell v North (1891) 2 Q.B. 252, 255.

Said that these sections in 1958 affect counterclaim and that counterclaim affects his claim. Not what is intended by proviso to section 1. If claim abandoned, counterclaim could go on. It cannot affect my rights under counterclaim whether plaintiff goes on with claim. Might have been intended.

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(a) to make certain that anyone who had begun an action at that date to have costs taken away. Plaintiff sues on existing law, or

(b) Legislature may have intended to protect mortgagees who had actions going against mortgagees when Bill published. Must be many debentures in favour of these Banks. Should have been "nothing shall deprive a mortgagee of any right", etc. Proviso concerned with proceedings not substantive rights.

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1959 E.A. 685 H; 686 H. I accept there is a vested right. I accept rights of parties should be decided in these proceedings. I do not accept that an action is affected by this Ordinance as a result of a counterclaim which is affected. This Ordinance is unique. Vice-President thought in terms of res judicata. Estoppel only arises where issues are same. If wholesale charge in law for second action issues are not the same.

20

HAILSHAM Vol. 13 2nd edition, p.410 para 465, 466, 467. We have no opportunity in dealing on claim with matters of this Ordinance. I am free to rely on new law. Sole question is whether legislature has removed this right. I suggest not intended to protect rights of privileged class but only to safeguard them as to costs.

Legal mortgage. No other objection affected by this Ordinance.

Equitable mortgage. Banks Ordinance does not enter into unless cannot decide that section 328 prevents a bank acquiring a mortgage by deposit.

30

Debenture. Section 3(b) and 4(b) 1958 Ordinance can be prayed in aid. I submit these already outside Ordinance since 1943. Debentures never registered. Whole Colony not wrong for whole of time.

Adjourned to 21. 9.61.

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21. 9.61

Donaldson: I concede that if the legal mortgage is valid the equitable mortgage by deposit would merge in it. I rely on mortgage (legal) as defence. Not pleaded as defendant who pleads possession may raise any legal but not equitable mortgage.

10 Debenture. I argue that charge in Cap. 150 and 155 cannot include that species of charge which is confined by debenture.

20 2. You can sever parts which create charge from parts which entitle me to possession. i.e. Clause 7 and 8. 8(9) - "hereby charged". This a shorthand way of describing property of which he is to take possession. Does not matter that property not charged as parties intended it to be. Would not give me any more rights than if it said "the property owned by company or acquired thereafter". May be said that section 88 protected parting with possession of property. Only objection so far as person parting with possession is concerned nothing to prevent a person acquiring property. Plaintiff would be setting up own illegality to obtain possession. Para 8 Counterclaim - only pleaded to explain excluded lands. Does not affect my rights. Close of Case for defendants.

O'Donovan: 1. Preliminary point:-

30 (a) BUCKLEY on Companies 507, 13th edition. 1948 Act. Section 239 same as our section 184. Court has no power to appoint as provisional liquidator other than Official Receiver. Court cannot appoint liquidator until the 2 meetings held under section 184 (b). No order of court necessary unless some other than Official Receiver appointed. At stage of report provisional liquidator becomes liquidator.

40 (b) No power in Court to deprive liquidator of ex officio rights as provisional liquidator on winding-up. There is power under section 190(3) to conduct exercise. Interim Liquidator's powers may be restricted. Provisional

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liquidator's powers arise by operation of law.
Court cannot restrict those powers.

2. Section 328 - Proviso.

(a) Submitted that company registered means a
company registered under Part XIII

(b) Under Part XIII not company which is
registered but documents and particulars.

In Part XI procedure is for registration under
the Ordinance. This is in title to Part XI.
Section 304, 305 - "Registered" also in 306,
307, 312, 313, 314. Under Part XIII no
certificate by Registrar required. Enabling
provisions apply immediately documents and
particulars supplied. Little purpose in re-
stricting company for interval between presen-
tation and registration especially when no re-
striction in case of lands outside Highlands.
Said Proviso ought to be in Part XI. First
part may be put in to relieve doubts as to
application of Mortmains. Answer is in sec-
tion 316. This applies all provisions of
Ordinance including section 15 which gives
power to hold land. Proviso tacked on al-
though inartistic because enabling part appears
logically in Part XIII.

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(b) Said it may be ultra vires to hold land
but not an equitable interest. Absence of
definition of "land" to be deliberate.

Proviso may be regarded as part of system of
control in Cap. 150 and 155. Land in 7th
Schedule to Cap. 155 does include interest in
land (Section 88). In Cap. 150 land is defin-
ed as including interests. Section 7(1)(b).
Reason why prohibition limited to companies
under Ordinance is that acquisition by compan-
ies not registered is illegal by proviso to
section 328. Ridiculous result if non-regis-
tered companies did not require consent and
only registered companies required consent.
Proviso to section 328 construed by reference to
mischief. Land must include interests in land.
MAXWELL 10th edition p.68 - Interpretation of
Statutes. Proviso pointless without Land Con-
trol Ordinance.

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2. Not much difference even if land catches only legal estates in this case because equitable interest is only one step removed from legal estate. Cap. 152 enacts that deposit of deeds etc. has same effect as deposit of title deeds in England.

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10 Effect - HALSBURY 3rd edition Vol. 23 233; Vol. 27 para 257 p.166: "contract for a legal mortgage". If acquisition of legal estate is ultra vires 2nd defendant it would be wrong to award specific performance of agreement, effect of which is to assist defendant to achieve an ultra vires purpose. He can call for legal estate under legal mortgage.

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20 3. Said Registry in Crown Lands Ordinance conclusive until rectified - section 148. No provision as to conclusiveness of registration. Contrast section 23 of Registration of Titles Ordinance Cap. 160. Certificate of title is sufficient. Unnecessary to examine various titles. A conveyance adducing a title under section 155 will have to examine conveyance themselves to ascertain their effect. Registrar does not guarantee anything by putting a memorial in the register.

4. "Person" in section 7. Contended by Defendants that this means individual. "To any other person".

30 (a) Interpretation Ordinance - Prima facie person includes company. Onus on defendants to show different meaning. One recoils from saying parts of Ordinance do not mean what they say or parts otiose. I agree "to any other person" redundant, or one deletes section 7(4). On that construction it is unnecessary also section 7(1)(b). If person does not mean company one strikes out 7(4) also last words in section 7(1)(b).

40 Donaldson: Section 7(1)(b) necessary to have some exception. 7(1)(b) only stops me acquiring by an agent.

O'Donovan: I don't say this is artistic - choice of evils. Result remarkable if company not included. Companies could have

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relative freedom of restriction not enjoyed by individual.

5. Edwards v Denning.

I submit Debenture (a) void; (b) inadmissible. Where possible to sever the good part, valid. One can sever part dealing with immovables from part dealing with moveables.

Said one can sever part creating charge from part entitling defendant to go into possession. Right to possession is excellent to and dependent on charge. Defendant still has to get over section 88 "parting with possession". If contract involves obligation on part of plaintiff which is void it is to that extent enforcing this illegal obligation. Privy to plaintiff parting with possession.

10

Clause 2 - one part not serviceable "Company shall forthwith" Last part not divisible into parties. Debenture itself not complete contract between the parties. They did it in two stages: by deeds executed on 1st October and these on 1st November 1951.

20

Present contractual relationship - Debenture cannot be looked at in isolation as it is qualified by conduct of parties by material agreement.

(a) Agreement to create legal mortgage is integral part of debenture. Relies for its force on specific performance.

(b) Impossible to say that on examination of legal mortgages parties any longer to have an equitable mortgage.

30

No difficulty in Edwards v Denning in severing. This debenture can only be tendered in evidence as a debenture and a document creating a charge. In Edwards v Denning it was expressly subject to Governor's consent. Debenture relied on as justifying Bank's possession. If it fails it is relied on as evidence of agreement to create equitable mortgage. Neither legal mortgage if valid, or agreement to create equitable mortgage give right to possession. Not an answer to suit for

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trespass but to a claim for declaration that plaintiff has unencumbered legal estate.

Trespass suit can only be registered on ground that debenture gives a right to possession. Mortgage only enforceable by order of the Court.

Adjourned to 2.15 p.m.

2.15 p.m.

10 O'Donovan: Legal position - Under Indian Law there is a right to go into possession as mortgagee. GOUR Law of Transfer 7th edition para. 2097. Confined to usufructuary possession and English mortgages. English mortgage defined section 58(e) Transfer of Property Act. That was done in this case. 2nd defendant did not go into possession in that character as mortgagee but under debenture. I agree we only have equity of redemption. They have legal estate. That is probably the answer. Donaldson says there is an agreement by plaintiff to give equitable mortgage. This requires deposit and memorandum. There has been a deposit. He wants memorandum

20 Memorandum useless as record of transaction unless transaction exists. Must be shown that there is now an agreement, that there has been a deposit in pursuance to that agreement. All that is now required is registration to enable him to lead evidence. Answer is based

30 on unreal view of facts. No agreement now to grant equitable mortgage. There never has been a deposit. Parties were not at arm's length. No differences until Official Receiver's letter of October 1951 and letter p.50. Parties had acted in concert. 1.10.51 debenture granted. Plaintiffs did not then own land. 1.11.51 land acquired. Plaintiffs contemporaneously at request of defendants executed legal mortgage. Bank content thereafter. Has never called for memorandum until

40 put in counterclaim. Not a case of merger. Prior to 1.11.51 plaintiffs had no title to enable them to grant any form of security. To-day they say they are legal mortgagees. Last part of Clause 2 if separated into independent contracts (1) to grant equitable

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mortgage; (2) contract for legal mortgage.
Could not be an intention to grant equitable
charge over land in which it proposed defend-
ants should have legal estate as mortgagee.
Delay of all these years by Bank in asking for
memorandum plus taking legal mortgage is aban-
donment of right to call for memorandum.
Under Contract Act even if initial bargain it
has been superseded by another bargain, or Bank
has remitted performance of original contract 10
as it was inconsistent with what it later re-
quired. What would have happened if on
2.11.51 Bank had asked for memorandum? It
would have been said that legal mortgage
executed. You can't have both. Bank has to
show that during those 10 years plaintiffs
have been in default in not executing memoran-
dum and conversely that the Bank has been all
along ready and willing to have the equitable 20
mortgage. Bank never willing to have equitable
mortgage. When executed on 1.11.51 it was a
valid mortgage, only became invalid after 4
months because Bank did not get requisite con-
sents. Not a nullity at time of execution.

Indian Contract Act, section 62, 63. Contract
for equitable mortgage superseded. They have
got something worse than equitable mortgage as
it turns out. That does not affect what was
done on 1.11.51. You can't register a memor-
andum when you have registered a mortgage. 30

Section 63 - Remission by promises. Parties
have chosen what form contract should take.
Chosen legal mortgage.

Court: What is effect of deposit? Clause?

O'Donovan: No property held at time of deben-
ture. Must be proved by defendants that there
was a deposit with intent to create security.
Said not open to us to say deposit was not to
create security. One must look at contrac-
tual relationship at time of handing over to 40
see what purpose was. If the day after Bank
agreed to lend money Bank says it will be pur-
chaser and deeds handed over, Bank could not
say if deposit fell through that there was to
create security. Deposit of deeds no part of
mechanics of creation of legal mortgage. Once

legal mortgage executed and registered mortgagee is entitled to deeds as his property. Thereafter deposit of deeds can create nothing. Deposit on 5th October could not be by way of equitable mortgage. Only person who can create mortgage by way of deposit is owner of deeds. One would hold deeds to order of National Bank of India. It is a lien on a document. When Mackie-Robertson held deeds prior to 1.11.51 he could not hold them as deposit by plaintiffs as not their property. From 1.11.51 capacity in which Bank held documents was as legal mortgagee. Not enough to show there was a deposit. Must be shown that deposit has continued. Bank's ascertain of position as legal mortgagees inconsistent with claim made in counterclaim that it was a deposit. Cannot call on us to do something which was remitted because things have turned out badly. Not now, or ever since November 1951 an agreement for equitable mortgage or a deposit. Bank have not during last 10 years been willing for equitable mortgage. They have been unwilling. Character of deposit is question of fact, not coloured by what happened subsequently.

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sic

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C. Cap. 150 and 155 said to have no application to charges on future of unascertained land. Nothing to say it should not. Large gap. All that parties would have to do is to contract in anticipation of acquiring property. Debenture is fixed charge. Fixed charge when land is acquired. Then becomes a document which charges land. Difficulty in getting covered in 4 months for charges which might be acquired after 4 months. This remedied by Ordinance 36/58.

D. Declaration. 2nd Debenture. Difficulty illusory. Declaration only sought in personam. Rights of 2nd debenture holder saved anyway. I submit my title proved. Certified copy of register in evidence. Shares only one encumbrance, i.e. mortgage. 2nd mortgagee has not registered, nor has consent been applied for. Title deeds in defendants' possession. No other equitable interest created.

E. Possession. This is inter parties. I don't

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need to clear out of way every possible person who could intervene, e.g. landlord need only allege lease. Only prior right necessary as against trespasser.

F. Mesne profits follow automatically from trespass if proved. Lease and licence alleged.

Armstrong v Sheppard distinguished. There entry on land was because of a licence. Here debenture holders entered qua debenture holder in virtue of right of entry. Could have entered without permission.

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G. Continuing damages. Two actions would be necessary. Matter concluded by Southport Tramway Co. v Gandy, (1897) 2 Q.B. 66, 69. Mesne profits are damages for trespass. This quoted in Clerk & Lindsell as general authority not limited to landlord and tenant.

Donaldson: I was under impression that this rule limited to landlord and tenant. Distinction may be between holding over and entry without legal authority. Issue was whether you could go beyond judgment.

20

Counterclaim. O'Donovan abandons statutory attack save as to section 328. Now on facts. Section 328 - Proviso added in 1945 Odd that section 7(4) and 88(4) exempting us by name was enacted at same time they were taking away our right to hold land. Must have known we were not registered under Part XI.

30

1950 - section 7 amended. Still well known we were under Part XIII. Legislature took view that legal interest was meant by "land".

Deposit. Dates important.

5.10.51 Mackie-Robertson first held deeds to order of bank.

1.11.51. Date of conveyance to plaintiffs; later on 1.11.61 conveyance by plaintiffs to bank. on 5.10.51 Mackie-Robertson in law held deeds to order of Kenboard subject to rights against them. Bank had no rights

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against Kenboard except as arose from discharge of Barclays overdraft of Kenboard. Kenboard not prepared to sell until overdraft paid off. This taken as part of purchase price provided by Bank. On Bank paying off overdraft Bank had deeds as security for Kenboard's indebtedness. All knew property being sold to plaintiffs as soon as property passed to plaintiffs.

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10 (1) Defendants give up claim against Kenboard and assumes right of repayment against plaintiffs. At the moment of conveyance Mackie-Robertson holds deeds as security. You can't have legal mortgage at same moment as conveyance. If document is effected legal mortgage equitable mortgage goes by merger. If not a legal mortgage you are left with equitable mortgage. As to 4 months - Crown Lands Ordinance, section 88(3) "have received". Instrument inchoate until consent effective.

20 Question is whether there is merger. I submit not until known whether condition would eventuate. No option. These rights are cumulative.

2. O'Donovan cannot point to any consensual remission or release. No consideration.

Query whether this necessary.

C.A.V.

B.R. Miles, J.

30.10.61

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O'Donovan Q.C. B. Giorgiadis for plaintiffs.

Harris for defendants.

30 Judgment delivered.

O'Donovan: I see no reason for depriving successful party of costs. I suggest one set of costs be set off against the other.

Harris: If it could be ordered that all costs already awarded be included each side bear own costs.

O'Donovan: Resolutions were put in on basis that

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if preliminary issue fails on those facts no costs awardable. I ask for costs to follow event.

Harris: I ask that costs be paid out of such assets as are in hands of liquidator. If assets applied to payment of own costs we are entitled for liquidator to pay us.

Pacific Coal Syndicate (1913) 2 Ch. 26, 28.
If any assets paid away liquidator liable personally. Stated as good law in BUCKLEY 12th edition, 514. 10

O'Donovan: I suggest liberty to apply.

Order: The order will be that the plaintiffs' claim is dismissed with costs thereon and the counterclaim is dismissed with costs thereon. Liberty to apply.

B.R. Miles, J.

30.10.61.

I certify that the case is fit for Queen's Counsel and junior counsel. It was extremely complex in point of law. 20

B.R. Miles, J.

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COLONY AND PROTECTORATE OF KENYA

IN HER MAJESTY'S SUPREME COURT OF KENYA AT
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CIVIL CASE NO.658 OF 1958

10 KENTILES LIMITED (In Liquidation) AND
THE OFFICIAL RECEIVER as the Liquidator
thereof ... PLAINTIFF

versus

HUBERT RICHARD BRICE, AND
NATIONAL AND GRINDLAYS BANK
LIMITED ... DEFENDANTS

J U D G M E N T

The plaintiff Company in this case
claims:

- 20 (1) an injunction to restrain the
defendants by themselves, their
servants or agents or otherwise
from entering on certain land
known as L.R. 57 Kasarini.
- (2) a declaration that the plaintiff
is the free and unencumbered own-
er of the said land and everything
thereon.
- (3) Possession of the said property.
- (4) An account.
- (5) Mesne profits.
- 30 (6) Damages.

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The action is one of trespass.

The Plaintiff is described as "Kentiles Limited (In Liquidation) and The Official Receiver as Liquidator thereof." The first defendant, Hubert Richard Brice, is sued as the person who actually took possession of the property on behalf of the second defendants in the purported exercise of powers conferred upon the second defendants under a debenture.

No oral evidence was called at the hearing because as a result of the co-operative attitude of learned counsel on both sides the facts were agreed and certain documents put in evidence by consent. This has greatly saved the time of the Court. The questions which arise for determination are purely legal, and turn in the main upon the interpretation of section 7 of the Land Control Ordinance (Cap.150), section 88, and 126 and 127 of the Crown Lands Ordinance (Cap.155) and section 328 of the Companies Ordinance (Cap.288). 10 20

The facts are as follows:

The plaintiff company was incorporated in Kenya on the 18th September, 1951 with a share capital of £500,000 in £1 shares. The certificate under section 95(3) of the Companies Ordinance was issued on the 27th September, 1951.

In September, 1951, the plaintiff company entered into negotiations with the second defendants who were then known as the National Bank of India Limited for a loan on security of £90,000. On the 26th September it was resolved at a meeting of directors that subject to the issue of a certificate under section 95(3) of the Companies Ordinance, the offer of the National Bank of India Limited be accepted. At a further meeting of directors on the 1st October, 1951, a form of debenture was considered as was also an Indenture of Mortgage of the land L.R. 57, Kasarini, hereinafter referred to as "the suit property", which the plaintiff company proposed to purchase. This was to be a collateral security to the debenture. The debenture was duly registered in the Companies Register and particulars filed on the 4th October, 30 40

1951. A Certificate was issued under section 82(2) of the Companies Ordinance on the same day. It was also resolved at the meeting that an equitable mortgage ranking as a second charge be created in favour of East African Industries Limited.

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10 On the 1st November, 1951 the plaintiffs acquired the suit property by conveyance. On the same date it created a legal mortgage in favour of the National Bank of India Limited. This was registered in the Crown Lands Registry under section 126 of the Crown Lands Ordinance, but no consent thereto was obtained from the Land Control Board under section 7 of the Land Control Ordinance nor was the consent of the Governor obtained under section 88 of the Crown Lands Ordinance. It is conceded that the suit property is land in the Highlands as described in the Seventh Schedule to the Crown Lands Ordinance. One of the questions in this case is the validity of this legal Mortgage.

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Particulars of the mortgage were registered in the Companies Register on the 5th February, 1952, an extension of time having been granted under section 85 of the Companies Ordinance by the Court. On 20th October, 1951, Messrs. Kaplan and Stratton submitted an application form for both consents to the Land Control Board. This was in accordance with the usual practice since the powers of the Governor under section 88 of the Crown Land Ordinance had been delegated to the Commissioner of Lands. On 31st October 1951, the secretary of the Land Control Board replied to Messrs. Kaplan and Stratton to the effect that the consent of the Land Control Board was not necessary to this transaction. (see letter No.18, Volume A of correspondence). Notwithstanding the somewhat peculiar reasons given in the letter the application was not proceeded with and the present position is that neither of the consents have been obtained to the legal mortgage.

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On 17th November, 1956 at a meeting of directors of the plaintiff company the board were informed by their legal advisers that the plaintiff company was insolvent and it was resolved that a petition be presented for winding

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up by the Court. The petition was presented on 19th November, 1956.

On 20th November, 1956, the second defendants appointed the first defendant receiver and manager of the plaintiff company's property, under the debenture of 1st October, 1951.

On 14th December, 1956, the Court appointed the Official Receiver provisional liquidator with powers restricted to the taking of possession of the reversion of the company's property in the hands of the debenture holders' receiver.

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A winding up order was made by the Court on the 11th January, 1957, the Official Receiver being appointed provisional liquidator.

On 28th October, 1957 the Official Receiver wrote to the manager of the National Bank of India Limited (letter p.50) suggesting that in view of section 328 of the Companies Ordinance the Bank had no title to deal with the suit property. This letter was written because the Official Receiver had received information that the Bank was about to dispose of the company's assets.

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On 7th May, 1958 the plaint was filed in this action.

The first defence is that the plaint is bad in law and discloses no cause of action vested in or attaching to either the plaintiff or the Official Receiver as liquidator of the plaintiff company.

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It is further pleaded that the second defendant is in possession of the premises; thirdly it is said that the second defendants have entered into possession by virtue of the power contained in the debenture to appoint a receiver and manager; fourthly, the second defendant says that he is the holder of the legal estate in the suit property by virtue of the indenture of mortgage dated the 1st November, 1951; fifthly, the second defendant says by way of alternative that, if the legal mortgage is not valid, there was a deposit of title deeds by the plaintiffs with intent to create

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a security and an agreement contained in the debenture to execute a memorandum of equitable mortgage and that the second defendant is accordingly entitled to resist a claim for possession until a memorandum is executed by the plaintiffs.

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10 There are also a number of ancillary defences with which I will deal later and a counter-claim, for various orders and declarations arising out of the above defences.

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I will first consider the technical point raised in paragraph (1) of the defence as to the competence of this action on the part of the plaintiff or the Official Receiver.

20 As previously mentioned the order appointing the Official Receiver provisional liquidator made by Pelly Murphy, J. on the 14th December, 1956, expressly restricted the powers of the provisional liquidator to taking possession of the reversion of the property in the hands of the receiver. The winding up order made by Edmonds, J. on the 11th February, 1957 did not confer any special powers on the provisional liquidator nor did it remove the restriction imposed by Pelly Murphy, J. It is contended on behalf of the defendants that this restriction is still in force and that the Official Receiver is still a provisional liquidator; consequently he has no powers to commence an
30 action, such powers being conferred on the liquidator by section 190(1)(a) of the Companies Ordinance, Cap. 288.

This is in essence a preliminary objection, since if it is sound, the action fails in limine, but it was not argued as such for reasons of convenience and it was left to me to decide the point in my judgment.

40 Section 184 of the Companies Ordinance, Cap.288, provides that on a winding up order being made:

"(a) the official receiver shall by virtue of his office become the provisional liquidator and shall continue to act as such until he or another person

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becomes liquidator and is capable of acting as such;

(b) the official receiver shall summon separate meetings of the creditors and contributories of the company for the purpose of determining whether or not an application is to be made to the court for appointing a liquidator in the place of the official receiver;

(d) in a case where a liquidator is not appointed by the court, the official receiver shall be the liquidator of the company;"

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There is no difference between the law of Kenya and the law of England so far as the appointment and powers of a liquidator are concerned and it is useful to refer to HALSBURY'S LAWS OF ENGLAND, Third edition p.564.

" If no application is made to the Court for the appointment of a permanent liquidator in the place of the Official Receiver or if no liquidator is appointed by the Court, the Official Receiver will be the liquidator".

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At p.578 it is stated:

"1051. There are three kinds of liquidators in a winding up by order of the Court, namely, (1) an interim provisional liquidator, who may be appointed at any time after the winding-up petition has been presented; (2) the official receiver acting as provisional liquidator ex officio from the time when the winding-up order is made until he is displaced by the appointment of some other person as permanent liquidator, or himself becomes permanent liquidator by reason that no other person is appointed; and (3) the liquidator proper, or permanent liquidator, who may be the official receiver himself or some other person appointed by the Court after the first meetings of the creditors and contributories have been held and the result of their views on the question who is to be the liquidator has been reported to, and brought before the Court."

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Two points seem to me to emerge from these passages; first that unless the creditors and contributories of the company decide to appoint some other person than the Official Receiver as liquidator the Official Receiver becomes automatically the permanent liquidator of the company, no application to the Court being necessary for this purpose. Secondly, that it is necessary at some stage for a permanent liquidator to be appointed. It is not possible to carry through the whole winding up by the provisional liquidator; the word "provisional" itself suggests a temporary appointment. The question is at what stage does the Official Receiver become a permanent liquidator? In my opinion the stage is either when the meeting of contributories and creditors decide not to appoint a person other than the Official Receiver as permanent liquidator, or, at the latest when the report of the meeting is filed in the Court; this was done on the 11th April, 1958. The plaint was filed on the 7th May, 1958 so that it does not matter in the present case which date is taken. The powers of the liquidator include the power to commence an action in the name of and on behalf of the company with the sanction of the Court or of the committee of inspection, under section 190(1) (a) of the Companies Ordinance. I hold, therefore, that there is no substance in this objection.

I now proceed to the question of the validity of the indenture of mortgage of the 1st November, 1951. This is attacked by the plaintiffs on two grounds; first that the second defendants are debarred from holding lands in the highlands by virtue of section 328 of the Companies Ordinance, Cap. 288. This section is contained in part XIII of the Companies Ordinance, which is headed "Companies incorporated outside the Colony carrying on business within the colony." The relevant provisions of this part are:

"327. Every company incorporated outside the Colony which, at the commencement of this Ordinance has a place of business in the Colony and every such company which, after the commencement of this Ordinance establishes a place of business within the Colony, shall, within six months from

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the commencement of this Ordinance or within one month from the establishment of the place of business, deliver to the registrar for registration -

- (a) a certified copy of the charter, statutes, or memorandum and articles of the company, or other instrument constituting or defining the constitution of the company, and, if the instrument is not written in the English language, a certified translation thereof; 10
- (b) the full address of the registered or principal office of the Company;
- (c) a list of the directors of the company, containing such particulars with respect to the directors as are by this Ordinance required to be contained with respect to directors in the register of the directors of a company; 20
- (d) the names and addresses of some one or more persons resident in the Colony authorised to accept on behalf of the company service of process and any notices required to be served on the company,

and in the event of any alteration being made in any such instrument or in such address or in the directors or managers or in the names or addresses of any such a person as aforesaid, the company shall within three months of such alteration deliver to the registrar a notice of the alteration. 30

328. A company incorporated outside the Colony which has delivered to the registrar the documents and particulars specified in paragraphs (a), (b), (c) and (d) of the last foregoing section shall have the same power to hold lands in the Colony as if it were a company incorporated under this Ordinance: 40

Provided that no company incorporated outside the Colony shall have power to

acquire land situate in the Highlands (as described in the Seventh Schedule to the Crown Lands Ordinance) unless such company is registered in accordance with the provisions of this Ordinance."

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By section 2 of the Banks Titles to Land (Amendment of Laws) Ordinance, No.36 of 1958, the proviso to section 328 is amended by adding at the end thereof the words:

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10 "or is one of the banks or bodies of persons with whom title deeds may be deposited by way of equitable mortgage or charge by reason of paragraph (b) of sub-section (4) of section 7 of the Land Control Ordinance".

Section 1 of the 1958 Ordinance provides that nothing in section 2 shall affect any action, suit or proceedings commenced before the 13th day of May, 1958.

20 Mr. Donaldson, on behalf of the defendants contends that the substantive part of section 328 of the Companies Ordinance does not debar the second defendants from holding land in the Highlands and that it is not necessary for the bank to have to rely upon the exception to the proviso made by the Banks Title to Land (Amendment of Laws) Ordinance, 1958. It is useful to compare the provisions of the Companies Ordinance with regard to registration with those of the English Companies Act, 1929.

30 Under both enactments there are four types of company. First there are what may be termed "ordinary companies" incorporated under Part II of the Kenya Ordinance; section 15, sub-section (2), of which expressly confers upon a company registered under this part the power to hold land. The same scheme appears in the Companies Act, 1929, part I. Section 13 of that Act corresponds to section 15 of the

40 Kenya Ordinance, but makes no reference to land. Land is dealt with in a separate section, namely section 14, sub-section (1), which provides that a company:

"Incorporated under this Act shall have the power to hold lands and as regards lands in any part of the United Kingdom without licence in mortmain."

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This is a reference to the Mortmain and Charitable Uses Act of 1888. In England a foreign company does not have the benefit of section 14, but requires a licence or other statutory assistance to hold land. The provisions of the Mortmain and Charitable Uses Act of 1888, however, only apply to land in England, see Mayor, Aldermen and citizens of Canterbury v Wyburn, 1895, A.C. 89.

The second class of company is a company incorporated under repealed laws which are dealt with in part X of the Kenya Ordinance and part IX of the 1929 Act; these provisions do not call for comment. 10

The third class of company is that dealt with in part XI of the Kenya Ordinance and Part IX of the English Act, namely "companies not formed under this Ordinance authorised to register under this Ordinance". It was, I think, conceded that the second defendants would be entitled to register under this part but Mr. Donaldson points out that this would hardly be a practical commercial proposition. 20

The fourth class are companies incorporated outside the Colony carrying on business within the Colony. The relevant provisions with regard to these are contained in part XIII of the Kenya Ordinance and part XI of the English Act. Section 328 of the Kenya Ordinance is founded upon section 345 of the Companies Act, 1929. 30

Mr. Donaldson argues that there being no Mortmain and Charitable Uses Act in Kenya statutory powers such as are conferred by section 15(2) of the Companies Ordinance are not needed. The capacity of a juridical person is governed by the law applicable to its incorporation. He contends that section 328 cannot refer to a company registered under part XI because by virtue of section 312 such a company becomes: 40

"incorporated as a company under this Ordinance".

Accordingly he says the proviso to Section 328

must be dealing with a part XIII company.

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10 He suggests that a possible view is that the intention was to prevent a foreign company holding land in the Highlands before registration under Part XIII, although entitling it to hold other lands after delivery of the specified documents to the registrar. There would appear in my opinion to be little point in restricting the foreign company from holding land in the highlands for what must be a very short period in the normal course of events, and I think that this is a somewhat artificial construction of the proviso.

20 It is certainly true to say that by virtue of section 312 a company which is registered under part XI becomes a company incorporated in Kenya, but it may nonetheless remain a company incorporated outside the colony. The effect of registration under part XI is to relieve it from the disability with regard to holding land imposed by section 328. Section 316 applies to a part XI company all the provisions of the Ordinance which include the power to hold land conferred by section 15(2). On Mr. Donaldson's argument the amendment to the proviso effected by the Banks Title to Land (Amendment of Laws) Ordinance, 1958 becomes otiose and one is always reluctant when constructing one provision in an enactment to give it a meaning which results in another provision becoming superfluous.

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Mr. Donaldson's argument appears to me to founder upon the following words in the proviso :

"Unless such company is registered in accordance with the provisions of this Ordinance".

40 It seems to me that these words must mean something more than the mere delivery for registration of the documents referred to in section 327, otherwise the provision is meaningless. Moreover, the proviso states:

"Unless such company is registered..."

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Under section 327 it is not a company which is registered, but the documents and particulars therein specified. No certificate of registration of the company is supplied as is done in the case of companies registered in the other parts of the Ordinance. For these reasons I am unable to accept Mr. Donaldson's argument that the proviso applies to a part XIII company.

It may be that the draftsman of the Companies Ordinance when incorporating section 15 overlooked the fact that the corresponding provision in the English Act was necessitated by the Mortmain legislation but it is not an uncommon phenomenon in Colonial legislation to find the draftsman slavishly copying an English Act without realising all the implications. I hold accordingly that apart from the amendment to the proviso to section 328 the second defendants are barred from holding lands in the Highlands and, consequently, cannot acquire the legal estate in the suit property. Since it is provided that this amendment shall not affect any action, suit or proceedings commenced before the 13th day of May, 1958, it follows that the second defendants cannot rely upon the amendment as a defence in the present case. The effect of the amendment on the counterclaim is another matter and may have to be considered later.

In view of my construction of section 328 it is strictly unnecessary to consider the second ground upon which the validity of the indenture of mortgage of the 1st November, 1951 is attacked but, since there was considerable argument upon the point, it would be desirable for me to express my opinion upon it.

It is contended on behalf of the plaintiffs that no consent of the Land Control Board having been obtained under the provisions of section 7 (1) of the Land Control Ordinance, Cap. 150 and no consent of the Governor thereto having been obtained under section 88(1) of the Crown Lands Ordinance, Cap. 155, the instrument is void. The provisions of these sections are as follows:

"Cap. 150. The Land Control Ordinance.

7(1). No person shall, except with the

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consent in writing of the Board in the exercise of its powers under sub-section (1) of section 8 of this Ordinance -

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- 10 (a) sell, lease, sub-lease, assign, mortgage or otherwise by any means whatsoever, whether of a like nature to the foregoing or not, alienate, encumber, charge or part with the possession of any land; or any right, title or interest, whether vested or contingent, in or over any land to any other person;
- (b) acquire any right, title or interest in or over any land for or on behalf of any person or of any company registered under the Companies Ordinance, 1933;
- 20 (c) sell, assign, transfer or otherwise dispose of, in any manner whatsoever, any share, share warrant, debenture or stock in any company which owns any interest in any land situated in the Highlands, or in any company which may hereafter acquire any interest in any such land;

Provided that nothing in this subsection shall apply to -

- 30 (i) any gift of land by way of testamentary disposition;
- (ii) any such transaction made by or in favour of the Crown;
- (iii) any such transaction to which the Commissioner has given his consent since the date on which this Ordinance is deemed to have come into operation."

"Cap. 155. The Crown Lands Ordinance.

- 40 88(1) No person shall, except with the written consent of the Governor, sell, lease, sub-lease, assign,

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mortgage or otherwise by any means whatsoever, whether of the like kind to the foregoing or not, alienate, encumber, charge or part with the possession of any land which is situate in the Highlands, or any right, title or interest whether vested or contingent, in or over any such land to any other person, nor, except with the written consent of the Governor, shall any person acquire any right, title or interest in any such land for or on behalf of any person or any company registered under the Companies Ordinance; nor shall any person enter into any agreement for any of the transactions referred to in this sub-section without the written consent of the Governor;

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Provided that nothing in this sub-section contained shall affect:

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- (a) any such transactions made by or in favour of the Crown:
- (b) any gift of land by way of testamentary disposition."

Mr. Donaldson, on behalf of the defendants, argues that no consent was required under either Ordinance by the second defendants because the word "person" in the relevant provisions of the Ordinance does not include a company. Under section 3(1) of the Interpretation and General Provisions Ordinance, No.38 of 1956 the word "person" is defined in that Ordinance as including:

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" Any company or association or body of persons corporate or unincorporate".

This definition, of course, applies only:

"Unless there is something in the subject or context inconsistent with such construction or interpretation."

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Mr. Donaldson contends that the definition would be inconsistent with such construction or

interpretation in the case of these Ordinances.

He draws attention first to section 7 (1)(a) of the Land Control Ordinance and he points out that the words

"to any other person"

10 at the end of the paragraph are redundant if the word "person" has the wider meaning, since it is obvious that an individual cannot sell to himself. I agree, of course, that in that sense the words are redundant but I do not think that they are any more redundant on one construction than another. There is rather more force in Mr. Donaldson's argument that the concluding words of paragraph (b)

"or of any company registered under the Companies Ordinance, 1933"

are superfluous if the word "person" already included a company.

20 Section 8(1)(b)(i) also creates some difficulty if the plaintiffs' construction be adopted because the result would be that, although it was a relevant consideration whether a company owned sufficient land there is no provision enabling the Board to refuse consent on the ground that the shareholders of the company owned sufficient land.

30 Section 88 of the Crown Lands Ordinance follows a similar pattern and Mr. Donaldson draws attention to section 90 which refers to persons

"of a different race to the person by whom such land is sold "

There is certainly force in his contention that on the face of it the word "person" there must refer to an individual and, of course it is true that one must give the same meaning to a word wherever it appears in the same section or part of the Ordinance.

40 The same phrase appears in section 95(1).

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Section 91, which deals with penalties for various offences, does not refer to a company and there is no provision for penalties in the case of companies as there is in section 99 (2). All these provisions certainly do lend some support to Mr. Donaldson's argument that the narrower construction is appropriate here, but if that is so, the result is that both section 7(4) of the Land Control Ordinance and section 88(4) of the Crown Lands Ordinance are quite unnecessary. Again one is reluctant to construe an enactment in such a way that various parts of it are unnecessary and it would certainly be surprising if the provisions of section 7 and section 88 did not extend to companies, with the result that companies could enjoy a relative freedom from restriction which was not possessed by individuals. Moreover there will be a further anomaly in that companies registered under the Companies Ordinance would require consent under section 7(1)(b) whereas Part XIII companies which are not registered would require no consent. When one looks at these provisions as a whole and also the provisions of section 328 of the Companies Ordinance it is clear that so far from giving companies greater latitude than individuals, the reverse was intended.

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Mr. Donaldson argues that the control was intended to apply in three different ways:

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1. By prohibition of the disposal without consent by one individual to another
2. The prohibition without consent of the acquisition of land by an individual for himself, or another individual or a part XIII company.
3. By prohibition on the transfer of shares of a company within the meaning of the Companies Ordinance.

Although there is force in these arguments, for the reasons mentioned I have come to the conclusion that the ordinary rule of interpretation applies, although I must confess that I have arrived at this view with no little hesitation since incongruities and inconsistencies

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would seem to result from either construction.

Mr. Donaldson's third argument upon the validity of the indenture of mortgage is that since it has been registered under the Crown Lands Ordinance the register is conclusive evidence that all the requirements of the Land Control and Crown Lands Ordinances have been complied with unless there has been a rectification of the register under section 148 of the Crown Lands Ordinance. As to this I would observe that there is no express provision in the Ordinance that the register is to be conclusive on any matter and there is no provision as, for example, in section 23 of the Registration of Titles Ordinances, Cap.160, which provides that a certificate of title is to be held conclusive evidence of proprietorship. I do not think that the plaintiffs are precluded by the mere fact of registration from contesting the validity of the legal mortgage. To adopt Mr. Donaldson's argument would be to read into the Crown Lands Ordinance something which is not there.

For these reasons I hold that the indenture of mortgage of the 1st November, 1951 is void in so far as it is relied upon by way of defence.

A further difficulty in the way of the defendant bank relying upon the legal mortgage as a defence is that the mortgage would not by itself entitle them to take possession of the suit property. They could only do this by virtue of an order of the Court obtained in a suit for foreclosure. In fact the bank at no time purported to go into possession by virtue of the indenture of mortgage. They did so by means of the receiver appointed under their powers in the debenture.

The question arises now as to what law applies to the counterclaim so far as it is based on the legal mortgage. The counterclaim was filed after the 13th May 1958.

Order VIII r.2 provides that a "defendant in a suit may set-off or set up by way of counterclaim against the claims of the

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plaintiff any right or claim, whether such set-off or counterclaim sound in damages or not and such set-off or counterclaim shall have the same effect as a cross suit, so as to enable the Court to pronounce a final judgment in the same suit, both on the original and on the cross-claim".

Rule 12 provides that in any case where the suit of the plaintiff is stayed or discontinued the counterclaim may nevertheless be proceeded with. These rules correspond to Order 19, rule 3 and Order 21, rule 16 of the Rules of the Supreme Court in England. 10

" A counterclaim is to be treated for only purpose for which justice requires it to be so treated as an independent action", (per Bowen L.J.) in Crown v Bobbett, 22 Q.B.D. at page 548, "In all purposes except those of execution a claim and counterclaim are independent actions" (per Lord Esher M.R. in Stumore v Campbell (1892) I.Q.B. at p. 317). 20

It would appear therefore that the law applicable to the counterclaim is the law after the passing of the Banks (Title to Land) Amendment of Land Ordinance 1958. It may seem odd that a Court must apply two different legal tests to the validity of the same instrument on the claim and counterclaim but I see no escape from this conclusion. In view, however, of the conclusion at which I have just arrived on the second ground advanced by Mr. O'Donovan this particular point is perhaps academic. 30

The defendants justify their entry on the suit property by virtue of the debenture of the 1st October, 1951. The relevant clauses of this are clauses 1, 2, 3 and clause 6(b) and 7 and 8(a). These are in the following terms:-

"1. The Company hereby charges with the payment and discharge of all moneys and liabilities intended to be hereby secured (including any expenses and charges arising out of or in connection with the acts authorised by Clauses 5, 8 and 9 hereof) ALL its undertaking goodwill assets and property whatsoever and wheresoever both 40

present and future including its uncalled capital for the time being.

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10 2. The charge created by this Debenture shall rank as a first charge on all the property hereby charged and as regards all immovable property of the Company (to be mortgaged as hereinafter provided shall constitute a fixed charge and as regards all other property hereby charged shall constitute a floating security but so that the Company is not to be at liberty to create any mortgage or charge upon any of the property comprised in this security to rank either in priority to or pari passu with the charge hereby created. The Company shall forthwith upon the execution of this Debenture deposit with the Bank the title Deeds of all immovable properties now vested in the Company and shall from 20 time to time likewise deposit with the Bank the title deeds of any immovable property which may hereafter be acquired by the Company (all such deposits of title deeds being by way of equitable mortgage as collateral security for the repayment of the principal moneys and interest hereby secured) and shall at its own expense whenever called upon by the Bank so to do execute legal mortgages or charges as the 30 case may require in favour of the Bank over any such immovable properties.

40 3. The security hereby given to the Bank shall be without prejudice and in addition to any other security whether by way of pledge legal or equitable mortgage or charge or otherwise howsoever which the Bank may now or at any time hereafter hold on any other property for or in respect of all or any part of the indebtedness of the Company to the Bank or any interest thereon.

6. The principal moneys and interest hereby secured shall immediately become payable without demand:

(b) if an order is made or an effective resolution is passed for the winding up of the Company; or

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7. At any time after the principal moneys hereby secured become payable either as a result of lawful demand being made by the Bank or under the provisions of Clause 6 hereof the Bank may appoint by writing any person whether an Officer of the Bank or not to be a receiver and manager of the property hereby charged or any part thereof and may in like manner from time to time remove any receiver and manager so appointed and appoint another in his stead.

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8. A receiver and manager so appointed shall be the agent of the Company and the Company shall alone be liable for his acts defaults and remuneration and he shall have authority and be entitled to exercise the powers hereinafter set forth in addition to and without limiting any general powers conferred upon him by law:

- (a) to take possession of collect and get in all or any part of the property hereby charged and for that purpose to take proceedings in the name of the Company or otherwise as may seem expedient;"

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The contention advanced on behalf of the plaintiffs is that this debenture is void by reason of the absence of consents required by sections 7(1) and 88(1) of the respective Ordinances, also that it is void for lack of registration under section 126 of the Crown Lands Ordinance and is inadmissible in evidence under section 127(2) thereof.

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It will be convenient at this point to refer to the decision of the Privy Council in Denning v Edwards, (1960), 3 W.L.R., 801, which affirmed the decision of the Court of Appeal for Eastern Africa reported in 1958 E.A. 628.

I do not propose to recite the facts in that case, which are remote from the present, but to refer to the judgment of the board which is relevant on the construction of the legislation applicable to this case. Dealing with the question of registration Viscount Simonds, at p.805, approved the observations of the

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President of the Court of Appeal for Eastern Africa :

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10 "Section 49 of the Indian Registration Act makes 'documents' required by section 17 to be registered not receivable as evidence of any transaction affecting immovable property unless registered. This disqualifies the instrument per se in so far as it is to be received as evidence of any transaction affecting immovable property. On the other hand, section 127 of the Kenya Crown Lands Ordinance says: 'No evidence shall be receivable in any civil court ... of a sale, lease charges etc.' What is rejected by section 127 is not the unregistered instrument per se in so far as it is to be received as evidence of any transaction affecting immovable property, but evidence of certain specified transactions, and of those only."

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The question arises therefore whether the debenture is to be regarded as the instrument effecting a charge; I think there can be no doubt that it is. I would observe in the first instance that this is not, so far as immovable property is concerned a floating charge so as to be entitled to the protection of section 7(5) of the Land Control Ordinance and 88(5) of the Crown Lands Ordinance. So far as immovable property is concerned it creates a fixed charge thereon as soon as it is acquired by the Company. There is no other document apart from the debenture which is necessary for that purpose.

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Now, at the date of the debenture the company possessed no immovable property, although it was, of course, well-known that it intended to do so and it was for that purpose that the debenture was created, but I can find nothing in the provisions of section 7 of the Land Control Ordinance, section 88 or section 126 of the Crown Lands Ordinance which requires that an instrument creating a charge over future or unascertained land is affected by these sections. There would, no doubt, be considerable administrative difficulties in so construing these provisions. Under section 7(3) of the

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Land Control Ordinance an agreement for sale, lease, mortgage etc. must be reduced into writing and every such agreement shall be void for all purposes (b) if the board has not signified its consent thereto within a period of four months from the date of the agreement.

There is no such time limit in section 88 (3). The instrument becomes void under that section from the date of inception. Similarly, under section 126 of the Crown Lands Ordinance the transaction would be void in the absence of registration ab initio. It would be impossible in many instances to obtain the consent of the Land Control Board within four months from the date of the agreement because the land might not have been acquired within that period and, of course, an even greater difficulty would occur under section 88 and section 126. The debenture contains no reference to any land which is the subject of the two Ordinances and there would be nothing to register. It may well be that there is a lacuna in the legislation, although it has never been suggested previously, so far as I am aware that a debenture as such requires either consent or registration under the Ordinances.

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It is clear from the decision in Denning v Edwardes (supra) that one must look at the purpose for which an instrument is tendered in evidence and it may well be that an instrument inadmissible, in the absence of registration, for one purpose may be admissible for another. It is conceded that the present debenture would be admissible in evidence so far as it affects movables. For the reasons given I do not consider that there is anything to prevent the defendants relying upon the debenture insofar as it gives them the right to appoint a receiver and to justify their entry into possession of the suit property. On this ground, therefore, they have a valid defence to the plaintiff's claim.

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I now come to the question of the validity of the equitable mortgage by deposit of title deeds. This is relied upon by the defendants both by way of defence and counterclaim.

At the outset it would be convenient to

deal with the plaintiff's contention that the defendant bank is not entitled under section 328 of the Companies Ordinance, Cap. 288, to acquire an equitable interest in lands in the Highlands. It is said that land in this proviso is not confined to the legal estate in land but extends to any interest in land.

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10 The Companies Ordinance does not contain any definition of land, but section 2 of the Land Control Ordinance defines land as:

"Any land in the Highlands as described in the seventh schedule, Crown Lands Ordinance and includes any right over or in respect of immovable property and standing trees or timber on such land."

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Section 88(1) of the Crown Ordinance applies to:

20 "Any right, title or interest whether vested or contingent in or over any such land."

30 In view of the express reference to this latter Ordinance in the proviso to section 328 it is reasonable to assume that the three Ordinances should be read together and at first sight it might appear that there was considerable force in Mr. O'Donovan's argument. But here again one is faced upon this construction with two further examples of inconsistency in legislation because, if Mr. O'Donovan is right, section 7(4)(b) of the Land Control Ordinance and section 88(4) (b) of the Crown Lands Ordinance, which exempt the defendant bank by name from the provisions of the respective sections from obtaining consents to deposits of title deeds by way of equitable mortgage, cannot be reconciled with section 328.

40 Sections 7(4)(b) and 88(4)(b) are not provisions which enable the bodies named to hold equitable interests in land. The existence of these sub-sections itself presupposes such power. They merely exempt the bodies named from the necessity of obtaining consent.

The proviso to section 328 was added in

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1945. Section 7(4) was enacted in 1949. Section 88 was enacted in 1944. It could not have been the intention of the legislature to take away by the proviso to section 328 what it had given in section 88(4); it must have been known that the defendant bank was not registered under part XI of the Companies Ordinance.

Mr. O'Donovan contends that unless the word "land" is given a wider meaning the effect would be tantamount to giving the defendant bank a right to a legal mortgage by virtue of the deposit of title deeds, because, under section 2 of the Equitable Mortgages Ordinance, Cap. 152, the effect of delivery of documents with intent to create a security shall:

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"have the same effect on the immovable property sought to be charged as a deposit of title deeds in England at the date of this Ordinance."

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The position in England, as stated in HALSBURY'S LAWS OF ENGLAND, Third edition, Vol. 27, p.166, is :

" A deposit of title deeds is regarded as an imperfect mortgage which the mortgagee is entitled to have perfected, or as a contract for a legal mortgage which gives the party entitled all such rights as he would have had if the contract had been completed."

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The result, says Mr. O'Donovan, would be that the defendant bank would, by virtue of the restricted meaning of the word "land" in the proviso be able to obtain a legal mortgage by the back door. As to whether he is right upon this I do not propose to express an opinion, but even if he is, the same result must ensue in the case of section 7(4) of the Land Control Ordinance and section 88(4) of the Crown Lands Ordinance. If Mr. O'Donovan is right, the defendant bank would be able to obtain a legal mortgage without the consent of the Land Control Board or the Governor. This argument does not carry the matter any further. In my view, therefore, the only possible

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meaning to be attached to the word "land" in the proviso to section 328 is a legal estate in land.

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10 The defendants' case is that they are entitled to an order directing the plaintiff company to execute a memorandum of deposit of the title deeds which can be registered by the defendants under the proviso to section 127 of the Crown Lands Ordinance and they say further, by way of defence, that the plaintiff company is not entitled to possession of the suit property in the interval.

20 So far as the consents of the Land Control Board and the Governor are concerned the defendant bank expressly comes within the exception contained in section 7(4) of the Land Control Ordinance and section 88(4) of the Crown Lands Ordinance. No question, therefore, arises as to that. It is said, however, on the part of the plaintiffs that the debenture is inadmissible in evidence because it requires registration under section 126 of the Crown Lands Ordinance. In the absence of registration it cannot, by virtue of section 127(2) be received in evidence in any civil court so that the defendant bank is unable to prove the agreement for the creation of an equitable mortgage by deposit of title deeds. The defendants say that it is not the debenture which actually affects the equitable mortgage, the debenture is a document they say:

30 "not in itself creating, declaring, assigning, limiting or extinguishing any right, title or interest to or in land registered under this part, but merely creating a right to obtain another document, which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest"

and is accordingly exempt from registration under section 126.

40 The question arises, therefore, whether the debenture is itself a document effecting the equitable mortgage. Mr. O'Donovan contends that it is and he cites Paul v Nath Saha, (1939) 2 A.E.R. at p. 737, which is a decision of the Privy Council. The facts were :

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" Towards the end of 1923, the respondents arranged with the appellants for a loan of Rs. 25,000, for which certain property in Calcutta, owned by the borrowers, was to be the security. A document was subsequently signed on behalf of the respondents setting out the terms and conditions of the advance, namely, that the loan was to be made by two documents of title relating to the Calcutta property, and, after the balance of the loan had been received, the mortgagors would execute in favour of the mortgagee a memorandum evidencing the deposit and embodying the terms and conditions of the loan. These conditions were carried out, and, on receipt of the second portion of the loan in 1924, the respondents executed the memorandum of agreement referred to. This memorandum, which was not registered, stated that it was thereby agreed that certain deeds should be held as a security on the property, and referred to proceedings for the protection of this security or for procuring the payment of the moneys thereby secured. It conferred a power of sale, but referred parenthetically to the title deeds having been delivered with intent to create a security. The respondents contended that the memorandum constituted the bargain between the parties, and that, inasmuch as it was not registered, it was inadmissible in evidence, and that the mortgage was consequently unenforceable. The appellants contended that the memorandum did not effect or constitute any transaction between the parties, but merely recorded a transaction already completed, and, therefore, did not require registration :-

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Held: the memorandum in question was not a mere memorandum of a security created by deposit of deeds, but was itself the operative instrument creating the security."

As the editorial note points out, what was there considered was the distinction between a mere memorandum of a deposit of documents and an instrument which goes beyond a mere memorandum

and thus constituted the security upon which the money is advanced.

10 In the present case the debenture contains no reference in clause 2 or 3 to any specific property; it, therefore, could not be registered under the Crown Lands Ordinance. The registrar would not accept it for registration since it does not confer any interest in land registered under part XII of the Crown Lands Ordinance. The only document which could be registered would be the memorandum of deposit, whenever that is executed because it is that document alone which specifies the property in question. The situation in fact would be precisely that which arose in Pranjivandas Mehta v Chan Ma Phee, 43 Ind. App. 123, where the headnote states:

20 "When documents of title to immovable property have been deposited as security for a deed and a memorandum is subsequently signed by the parties stating that a part only of the property is security for the debt, the memorandum is conclusive evidence that the charge in favour of the creditor extends only to that part of the property."

Lord Shaw of Dumfermline said, at p.125:

"In the words of Lord Cairns in the leading case of Shaw v. Foster:

30 'Although it is a well established rule of equity that a deposit of a document of title, without more, without writing or without word of mouth, will create in equity a charge upon the property referred to, I apprehend that that general rule will not apply where you have a deposit accompanied by an actual written charge, in that case you must refer to the terms of the written document, and any implication that might be raised, supposing there was no document, is put out of the case and reduced to silence by the document by which alone you must be governed.'

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In the context of the present case I cannot see that there is any other document which could create an equitable mortgage except the memorandum of deposit which would be the document specifying the property which is the subject of the equitable mortgage. This is consistent with the proviso to section 127 which, in the case of an equitable mortgage by deposit of documents of title does not require anything to be registered other than the memorandum. This construction is at all events intelligible and workable. It is not the case when a deposit of title deeds is made in pursuance of this debenture that the memorandum is merely a record of something that has been done in the past. In my view, therefore, the debenture at most is a document which comes within section 127(e) of the Crown Lands Ordinance and it is not inadmissible in evidence merely by reason of the fact that it constitutes an agreement for an equitable mortgage of future acquired land.

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This, however, does not carry the defendant bank home. A further question now arises as to whether in the circumstances of the present case there was a deposit of title deeds by the plaintiff company with intent to create an equitable mortgage and it is here that it seems to me the case for the defendant bank breaks down on the facts. It may be pointed out that the claim that there was an equitable mortgage by deposit of title deeds is itself inconsistent with the assertion of a legal mortgage. According to the proof of evidence of Mr. Mackie-Robertson, which was admitted by consent, the position was as follows:

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At the close of 1951 the suit property had been mortgaged by Kenboard Limited, who were the vendors to the plaintiffs, in favour of Barclays Overseas Development Corporation and of a Mr. Block and the relative title deeds came into possession of the firm of Kaplan and Stratton from Barclays Bank about the 2nd September, 1951, and were held by Mr. Mackie-Robertson to Barclays' order. Mr. Mackie-Robertson then goes on to say :

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"My instructions (as part of the

re-construction of the Kenboard Group) entailed the formation of Kentiles Limited to take over the business of brick and tile manufacturers from Kenboard Limited, including the property at Kasarini and certain financial arrangements with the National Bank of India Limited out of which the monies then owing to Barclays Overseas Development Corporation were to be repaid.

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"5. The negotiations with the defendant Bank (then known as "The National Bank of India Limited") for the facilities which the new company would require had, in fact, been carried out direct with the Bank by Mr. Zuckermann, the principal shareholder of Kenboard Limited, and Mr. Clough whom Mr. Zuckermann had selected for appointment as Managing Director of Kentiles Limited after formation, and before I came into the picture at all, but I did on one occasion - probably early September, 1951, accompany Mr. Zuckermann to a meeting with Mr. Irving, the then Manager of the National Bank. The object of this meeting was primarily to inform him (Irving) of the arrangements we had concluded with Barclays for the liquidation of the liabilities there and the consequent release of the titles which would enable the arrangements with the National Bank to proceed. I had been instructed generally by Kentiles Limited, embracing the whole matter, and necessarily entailing steps to have the titles released from the then encumbrances in favour of Barclays and Mr. Block, to make them available to the National Bank.

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6. In my view I was never at any time holding these title deeds to the order of either Kenboard Limited or Kentiles Limited. It was always on behalf of one Bank or the other. I could not at any time claim a lien for due fees by Kentiles Limited or Kenboard Limited. I was initially holding the titles to Barclays' order and, in order to get them released from that, I had to obtain and deliver to

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Barclays a letter of guarantee from the National Bank. That letter I obtained from the National Bank on the condition and understanding that the letter would release the title deeds from Barclays lien and immediately render them subject to a lien in favour of the National Bank. Therefore as soon as the letter of guarantee was passed to Barclays i.e. from about 5th October, 1951, I regarded myself as holding these deeds to the order of the National Bank.

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7. My letter of 6th October to Barclays was crossed by their letter dated 5th October authorising my firm to deliver the title deeds to Kenboard Limited unconditionally. That letter dated 5th October I acknowledged and said I was releasing the deeds to Kenboard Limited. Kenboard Limited was Barclays' customer - Kentiles Limited never was. I got a receipt from Kenboard Limited but I knew by that date that the Conveyance had already been signed by Kenboard Limited and of the undertakings given by me to the National Bank, so that despite the terms of the letter of 5th October 1951 from Barclays Bank I did not release the title deeds to Kenboard Limited at all, but immediately on receipt of the letter of 5th October from Barclays, held them to the order of the National Bank. I was holding those title deeds to the order of the National Bank in pursuance of an arrangement made between Kentiles Limited and the National Bank."

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The position, therefore, was that on the 1st October, 1951, which was the date of the debenture, the plaintiffs did not own the suit property; they did not acquire this until the 1st November. Prior to the 1st November Mr. Mackie-Robertson could not have held the title deeds by way of deposit with intent to create an equitable mortgage because the deeds were not then the property of the plaintiff company. The plaintiff company contemporaneously, at the request of the defendant bank, executed what they thought was valid legal mortgage. The

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defendant bank could not have called on the 2nd November, 1951, for a memorandum of deposit of title deeds because a legal mortgage had been executed and the lower security would merge in the higher. The legal mortgage having been executed and registered the bank would be entitled to the title deeds as legal mortgagees. At no time during the last ten years has the defendant bank ever called upon the plaintiff company to execute a memorandum or taken up the attitude that it had an equitable mortgage. It is clear that the intention of the parties in November, 1951, was to create a legal mortgage and nothing else. The fact that the legal mortgage now turns out to have been invalid is irrelevant. The mistake was a mistake of law as to its efficacy. Insofar as there was a contract for an equitable mortgage it was superseded by the legal mortgage. This would be the effect under section 62 and 63 of the Indian Contract Act. It is impossible upon the admitted facts of this case to draw the inference that there was a deposit with intent to create a security at the material time, namely in November, 1951, and unless the defendant bank can establish this, their counterclaim and, consequently, their defence, must fail, and I hold that they do.

In these circumstances it is not necessary for me to consider whether the defendant bank would have been entitled to resist the plaintiff's claim on the principle of Walsh v. Lonsdale, 21 Ch. Div. p.9, as exemplified in Hurst v. Picture Theatres Limited, (1915) 1 K.B. 1. I would only observe that it is very doubtful how far the equitable principles laid down by Walsh v. Lonsdale apply under Indian law, see for instance Ariff v Jadunath Majumdar, 58 Ind. App. 91.

Having held that the plaintiffs' claims fail on the grounds mentioned above it is perhaps unnecessary to consider what I might call the subsidiary defence raised, but since argument was addressed to me upon them I will briefly deal with them.

It is said here that the plaintiffs must

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succeed on the strength of their own title and not on the weakness of that of the defendants. If any authority for this proposition is needed it is to be found in Danford v. Macnaulty, 8 A.C. 456. Mr. Donaldson contends that since the plaintiffs have created a second debenture in favour of another party they are not entitled to a declaration that they are the free and unencumbered owners of the freehold estate. The answer to this is that such a declaration would only operate inter parties and would not be binding upon any third person who is not a party to this suit. The declaration would not be a declaration in rem. This will also apply to the plaintiffs claim for possession.

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It is further said in answer to the claim for mesne profits and damages that the Defendants entered into possession by leave of the plaintiffs, which leave was not withdrawn until the 28th April, 1958 and reliance is placed upon the evidence of Mr. Mackie-Robertson and also that of the first defendant to the effect that on the 22nd November, 1956 Mr. Mackie-Robertson accompanied the first defendant to Kentiles Limited and handed the place over to him. I do not think that there was any consent on the part of the plaintiffs in the sense of a waiver or abandonment by them of any of their legal rights. When the plaintiff admitted the first defendant to the premises they did not do so out of their abundant grace. They had no option in the matter. Mr. Brice was acting under powers conferred by the debenture and the plaintiffs could not have resisted his entering even had they wished to do so. The amicable circumstances in which possession was handed over may, I think be most aptly described in the words of a learned Judge of the Probate, Divorce and Admiralty Division in a somewhat different context as merely "smoothing the asperities of litigation".

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The question of damages does not arise in

view of my previous findings and it has in any event been agreed that their assessment will be referred to some appropriate tribunal. The principle of assessment, however, was raised before me and it was contended by Mr. Donaldson that trespass to land being a continuing tort, a cause of action arises de die in diem and that damages cannot be assessed for the period after the date of filing of the plaint. Mr. O'Donovan has cited Southport Tramways Company v Gandy, (1897) 2 Q.B. p.66, where it was held that:

"Mesne profits should be calculated up to the date of the plaintiffs obtaining possession."

This was a case of a tenant holding over and not of a trespass ab initio but I do not see any difference in principle between the two. Mesne profits are in effect damages for trespass and I take the view that should the occasion so arise damages would be awardable in this case up to the date of possession. For the reasons indicated, however, I hold that the plaintiffs' claim fails and that the defendants' counter claim also fails.

They are, accordingly, both dismissed. I will hear argument as to costs.

(SD) B.R. MILES
JUDGE

30.10.61.

Nairobi.

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DECREE DATED 30TH OCTOBER 1961

IN HER MAJESTY'S SUPREME COURT OF KENYA AT

NAIROBI

CIVIL CASE NO. 658 OF 1958

KENTILES LIMITED (In Liquidation) and
THE OFFICIAL RECEIVER as Liquidator
thereof ... PLAINTIFF

- versus -

HUBERT RICHARD BRICE ... FIRST DEFENDANT 10

- and -

NATIONAL OVERSEAS & GRINDLAYS
BANK LIMITED ... SECOND DEFENDANT

DECREE

CLAIM

WHEREAS the Plaintiffs in the above mentioned
suit claimed :-

(i) An injunction to restrain the Defendants,
whether by themselves or by their serv-
ants or agents or otherwise, from enter-
ing on the said land and buildings known
as Land Registration No.57 Kasarini. 20

(ii) A declaration as against the First and
Second Defendants that the Plaintiff
Company is the free and unincumbered
owner of the freehold estate in the said
land and buildings known as Land Regis-
tration No.57 Kasarini, together with
all machinery and other fixed equipment
belonging thereto and is the absolute
owner of all movable assets thereon ex-
cepting only such movable assets as were
in the possession of the Plaintiff Com-
pany on the 22nd day of November 1956 30

and are now the subject of a charge in favour of the Second Defendant by virtue of the said debenture dated the 1st day of October 1951 and the appointment of a Receiver on the 22nd day of November, 1956.

In the
Supreme Court
of Kenya at
Nairobi

No.8

- 10 (iii) An order for delivery of possession of the said property more particularly described in the second paragraph of this Prayer.
- (iv) An account
- (v) Mesne profits.
- (vi) Damages,
- (vii) Costs.
- (viii) Further or other relief.

Decree
30th October
1961
continued

COUNTERCLAIM

AND WHEREAS the Second Defendant counterclaimed in the above-mentioned suit for :-

- 20 (i) An order that the Plaintiffs' suit be dismissed with costs.
- (ii) A declaration that by virtue of the indenture of mortgage this Defendant is the legal mortgagee of the lands known as Land Reference No.57 (save and except so much thereof as is comprised in the plot known as L.R.57/16 and referred to as the "excluded lands").
- 30 (iii) A declaration that this Defendant is entitled to require the Plaintiffs or one of them to deliver to it duly executed an appropriate memorandum of deposit of title deeds of the lands known as Land Registration No.57 (save and except so much thereof as is comprised in the plot known as L.R. 57/16) by way of equitable mortgage as collateral security for the repayment to this Defendant of

In the
Supreme Court
of Kenya at
Nairobi

No.8

Decree
30th October
1961
continued

the principal moneys and interest intended to be secured to it by the said debenture.

- (iv) An order that the Liquidator of the Plaintiff Company be directed forthwith at his own expense or that of the said Company to complete and execute in favour of this Defendant and when so completed and executed to deliver to this Defendant an appropriate memorandum of deposit of the title deeds by way of equitable mortgage and to do all things necessary to enable the same to be duly registered against the title to the lands comprised in the said title deeds. 10
- (v) If necessary an order that an account be taken of the moneys now due by the Plaintiffs or either of them to this Defendant and secured or intended to be secured by the said debenture. 20
- (vi) An order that this Defendant is entitled to its costs of and in connection with its Counterclaim when taxed the same to be paid by the Plaintiffs or one of them with its demand.
- (vii) Further or other relief.

THE ABOVE MATTER COMING ON FOR HEARING in the Supreme Court before the Honourable Mr. Justice Miles on the 18th, 19th, 20th and 21st days of September 1961 in the presence of Mr. Bryan O'Donovan one of Her Majesty's Counsel and Mr. Georgiadis of Counsel for the Plaintiffs and of Mr. John Donaldson one of Her Majesty's Counsel and Mr. Gerald Harris of Counsel for the Defendants when judgment was reserved and the matter coming on again this day in the presence of Counsel for the same parties for judgment. 30

IT IS ORDERED DECREED AND DECLARED as follows:-

1. That the Plaintiffs' suit be and it is hereby dismissed with costs. 40
2. That the Defendants' Counterclaim be and

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.9

Notice of
Appeal of 2nd
Defendant
10th November
1961
continued

Bank Limited the second Defendant herein being dissatisfied with the decision of the Honourable Mr. Justice Miles given herein at Nairobi on the 30th day of October, 1961, intends to appeal to Her Majesty's Court of Appeal of Eastern Africa against such part of the said decision as decides that the Counterclaim of the second Defendant should be dismissed with costs.

DATED this 10th day of November, 1961.

10

(SD) L.G.E. HARRIS,

HAMILTON HARRISON & MATHEWS,
Advocates for the Appellant.

To the Registrar of the Supreme Court at Kenya at Nairobi and to The Official Receiver, Crown Law Offices, Nairobi.

The address for service of the appellant is care of Messrs. Hamilton, Harrison & Mathews, Stanvac House, Queensway, Nairobi.

NOTE: A respondent served with this Notice is required within fourteen days after such service to file in these proceedings and serve on the Appellant a notice of his address for service for the purposes of the intended appeal, and within a further fourteen days to serve a copy thereof on every other respondent named in this Notice who has filed notice of an address for service. In the event of non-compliance the Appellant may proceed ex parte.

20

30

Filed the 11th day of November, 1961 at Nairobi.

REGISTRAR.

NO.10
NOTICE OF CROSS APPEAL BY PLAINTIFFS
DATED 23RD NOVEMBER 1961.

In the Court
of Appeal for
Eastern Africa
at Nairobi

COLONY AND PROTECTORATE OF KENYA

No.10

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN
AFRICA

Notice of
Cross Appeal
by Plaintiffs
23rd November
1961

AT NAIROBI

CIVIL APPEAL NO. OF 1961

In the Matter of an intended Appeal

10

Between

NATIONAL & GRINDLAYS BANK LIMITED APPELLANT

and

KENTILES LIMITED (in Liquidation) and
the OFFICIAL RECEIVER as Liquidator
thereof ... RESPONDENT

Appeal from Judgment and Decree of the
Supreme Court of Kenya at Nairobi (Mr.
Justice Miles) dated 30th October, 1961,
in Civil Case No. 658 of 1958

20

Between

KENTILES LIMITED (in Liquidation) and
THE OFFICIAL RECEIVER as Liquidator
thereof ... PLAINTIFF

and

HUBERT RICHARD BRICE FIRST DEFENDANT

and

NATIONAL OVERSEAS AND GRINDLAYS BANK
LIMITED (now known as NATIONAL AND
GRINDLAYS BANK LIMITED) SECOND DEFENDANT

30

NOTICE OF CROSS APPEAL

TAKE NOTICE that, on the hearing of this

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.10

Notice of
Cross Appeal
by Plaintiffs
23rd November
1961
continued

Appeal KENTILES LIMITED (in Liquidation) and the OFFICIAL RECEIVER as Liquidator thereof the Respondent above named will contend that the decision above mentioned ought to be varied to the extent and in the manner and on the grounds hereinafter set out, and that such part thereof as decides that the counterclaim of the Appellant be dismissed with costs ought to be affirmed upon grounds other than those relied upon by the Court below, which said grounds are hereinafter set out:

10

1. That the learned Judge erred in law in holding that the Appellant was entitled to rely upon the debenture referred to in the defence in so far as it gave the Appellant a right to appoint a receiver and to justify its entry into possession of the suit property.

2. That the learned Judge erred in law in failing to hold that the said debenture was wholly void

20

(a) because of the absence of registration under the Crown Lands Ordinance,

(b) because of the absence of the consents required by Section 7 (1) of the Land Control Ordinance and Section 88 (1) of the Crown Lands Ordinance,

(c) because, by virtue of Section 328 of the Companies Ordinance, the acquisition of land situate in the Highlands (as described in the Seventh Schedule to the Crown Lands Ordinance) was ultra vires the Appellant.

30

3. That the learned Judge erred in law in failing to hold that the power to appoint a receiver and the right to enter into possession of the suit property which the said debenture purported to confer upon the Appellant, were an integral part of, and mode of enforcement of, the security which the said debenture purported to create, and were not available to the Appellant because the said security was void.

40

4. The learned Judge erred in law in holding that the Appellant's counterclaim was governed

by the Banks' Title to Land (Amendment of Laws) Ordinance, 1958, and in failing to hold that as the said Ordinance did not apply to the suit filed by the Respondent, or to any issue arising in such suit or any relief claimed by the Respondent, upon the final determination of the suit, the issues raised in the counterclaim would be res judicata.

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.10

Notice of
Cross Appeal
by Plaintiffs
23rd November
1961
continued

- 10 5. The learned Judge ought to have dismissed the counterclaim on the following grounds and erred in law in so far as he decided otherwise:
- (a) that the Proviso to Section 328 of the Companies Ordinance applied to any right title or interest in or over land in the Highlands and therefore that the relief claimed was ultra vires the Appellant,
- 20 (b) that in the alternative, the specific relief claimed would, if granted, entitle the Appellant to obtain a legal mortgage which would be ultra vires the Appellant,
- (c) that the Respondent was entitled to the declaration sought in the plaint,
- (d) that the said debenture purported in itself to create an equitable mortgage and therefore required to be registered.
- 30

WHEREFORE THE RESPONDENT PRAYS :-

That such part of the Judgment and Decree as decide that the Respondent's suit be dismissed with costs be set aside and Judgment be entered for the Respondent as prayed,

That such part thereof as decides that

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.10

Notice of
Cross Appeal
by Plaintiffs
23rd November
1961
continued

the counterclaim be dismissed with costs be
affirmed upon the grounds hereinbefore set
out.

DATED at Nairobi this 23rd day of November,
1961.

KENTILES LIMITED (in Liquidation)
and the OFFICIAL RECEIVER as
LIQUIDATOR thereof.

(Sd.) H.F. HAMEL

THE OFFICIAL RECEIVER AND
LIQUIDATOR.

10

Drawn by:-

Byron Georgiadis,
Advocate,
Church House,
Government Road,
Nairobi

(Sd.) BYRON GEORGIADIS

ADVOCATE FOR THE RESPONDENT.

Filed by:-

The Official Receiver and Liquidator,
Registrar General's Department,
Crown Law Office,
Nairobi.

20

TO the Honourable Judges of Her Majesty's
Court of Appeal for Eastern Africa.

AND TO

Messrs.Hamilton Harrison & Mathews,
Advocates,
Stanvac House,
Nairobi,

ADVOCATES FOR THE APPELLANT.

30

The address for Service of the Respond-
ent above-named is The Official Receiver and
Liquidator, Registrar General's Department,
Crown Law Offices, Nairobi.

FILED the 23rd day of November, 1961 at
Nairobi.

(Sd.)

for REGISTRAR OF THE COURT OF APPEAL.

NO.11

ORDER EXTENDING TIME FOR LODGING
APPEAL DATED 29TH JANUARY 1962.

In the Court
of Appeal for
Eastern Africa
at Nairobi

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN
AFRICA

No.11

CIVIL APPLICATION NO. NAI. 2 OF 1962.

Order extending
time for
lodging Appeal
29th January
1962

IN THE MATTER OF AN INTENDED APPEAL

Between

NATIONAL & GRINDLAYS BANK LIMITED APPLICANT

10

and

KENTILES LIMITED (In Liquidation)
and THE OFFICIAL RECEIVER as
Liquidator thereof

RESPONDENTS

Appeal from a Judgment and Decree of
the Supreme Court of Kenya at Nairobi
(Mr. Justice Miles) both dated 30th
day of October, 1961 in Civil Suit
No. 658 of 1958.

Between

20

KENTILES LIMITED (In liquidation)
and THE OFFICIAL RECEIVER as
Liquidator thereof

PLAINTIFFS

versus

HUBERT RICHARD BRICE

1ST DEFENDANT

NATIONAL & GRINDLAYS BANK
LIMITED

2ND DEFENDANT

In Chambers this 29th day of January, 1962

Before the Honourable Mr. Justice Newbold a Justice
of Appeal.

30

O R D E R

UPON the Motion by Notice filed by the
Applicant on the 18th day of January, 1962,
AND UPON READING the said Notice of Motion
and the Affidavit of FRANCIS RICHARD STEPHEN,
Advocate, sworn on the 18th day of January,
1962, and the letters from the Respondent and

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.11

Order extending
time for
lodging Appeal
29th January
1962
continued

advocates for the Applicant dated the 22nd and 26th January, 1962 respectively. pursuant to Rule 9(3) of the Rules of the Court, IT IS ORDERED that the time for lodging the intended appeal be and is hereby BY CONSENT extended by a period of 60 days from the date of this application AND THAT the costs of this application be costs in the intended appeal.

GIVEN under my hand and the Seal of the Court at Nairobi this 29th day of January, 1962.

10

ISSUED on the day of 1962.

REGISTRAR
COURT OF APPEAL FOR EASTERN AFRICA.

No.12

Memorandum of
2nd Defendant's
Appeal
17th March 1962

NO.12

MEMORANDUM OF SECOND DEFENDANT'S
APPEAL DATED 17TH MARCH 1962

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN
AFRICA

AT NAIROBI

CIVIL APPEAL NO.21 OF 1962.

20

Between

NATIONAL AND GRINDLAYS BANK LIMITED APPELLANT

and

KENTILES LIMITED (IN LIQUIDATION)

AND THE OFFICIAL RECEIVER (AS

LIQUIDATOR THEREOF)

RESPONDENTS

(Appeal from a Judgment and Decree of Her Majesty's Supreme Court of Kenya at Nairobi (Mr. Justice Miles) both dated 30th October 1961

30

in

Civil Case No. 658 of 1958

KENTILES LIMITED (IN LIQUIDATION)
AND THE OFFICIAL RECEIVER (AS
LIQUIDATOR THEREOF)

Plaintiff

versus

HUBERT RICHARD BRICE
NATIONAL AND GRINDLAYS BANK
LIMITED

First Defendant

Second Defendant)

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.12

Memorandum of
2nd Defendants'
Appeal
17th March 1962
continued

MEMORANDUM OF APPEAL

10 National and Grindlays Bank Limited, the
Appellant above-named, appeals to Her Majesty's
Court of Appeal for Eastern Africa against such
part of the decision above mentioned as decides
that the Counterclaim of the Appellant should
be dismissed with costs on the following
grounds, namely:-

1. The learned Judge misdirected himself if
and insofar as he held that either

- 20 (a) by reason of section 328 of the Com-
panies Ordinance (Cap. 288); or
- (b) for want of registration under part
XII of the Crown Lands Ordinance (Cap.
155); or
- (c) for want of consent under section 88
of the said Crown Lands Ordinance or
under Section 7 of the Land Control
Ordinance (Cap.150);

30 the mortgage dated 1st November, 1951 and re-
ferred to in paragraph 7 of the said Counter-
claim was for the purpose of the said Counter-
claim invalid or ineffective to confer upon
the Appellant a legal estate in fee simple in
the lands (herein and in the said Counterclaim
referred to as "the suit premises") consisting
of the plot known as L.R. 57 save so much
thereof as is comprised in the plot known as
L.R. 57/16.

2. The learned Judge erred in law in holding

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.12

Memorandum of
2nd Defendant's
Appeal
17th March 1962
ccntinued

that the Appellant did not by virtue of the said mortgage become on 19th November 1951 the legal mortgagee of the suit premises.

3. The learned Judge misdirected himself in law and on the facts if and insofar as he failed to hold that the debenture dated 1st October 1951 and referred to in paragraph 6 of the Counterclaim created in favour of the Appellant by way of security for the repayment by the Respondent Company of the moneys therein referred to an effective floating charge over all lands which from time to time became and for the time being remained the property of the said company. 10

4. The learned Judge misdirected himself in law and on the facts if and insofar as he failed to hold that the said debenture created in favour of the Appellant and by way of security for the repayment by the said Company of the moneys therein referred to an effective fixed charge over the suit premises immediately upon the passing on 17th November 1956 of the resolution for the winding-up of the said company. 20

5. The learned Judge erred in law and in fact by finding that prior to 1st November 1951 Mr. Mackie-Robertson could not have held the title deeds of the suit premises by way of deposit with intent to create an equitable mortgage and by failing to find that at all material times the said Mr. Mackie-Robertson held the said deeds as agent of the Appellant by way of deposit by the said Company with the intent of creating an equitable mortgage thereon in favour of the Appellant. 30

6. The learned Judge misdirected himself in law and on the facts in failing to hold that, for the purposes of the said debenture and in particular of the clause numbered (2) therein, there had been a valid and effective deposit by the said Company of the title deeds of the suit premises for the purpose of creating a collateral security for the repayment of the principal moneys and interest secured by the said debenture. 40

7. If the finding of the learned Judge that

the said mortgage was invalid be correct (which the Appellant does not admit) the learned Judge erred in law in holding that upon the execution of the said mortgage the right of the Appellant to call for a memorandum of deposit of title deeds conferred by the said debenture merged as a lower security in the higher security purported to be created by the said mortgage and accordingly the Appellant is now entitled (if the said finding as to the invalidity of the mortgage be correct) to call for the execution and delivery to it of a valid memorandum of deposit as aforesaid.

10

20

30

40

8. The learned Judge erred in law in refusing to grant to the Appellant a declaration that it was entitled to require the Respondents or one of them to deliver to the Appellant duly executed an appropriate memorandum of deposit of the title deeds of the suit premises by way of equitable mortgage as collateral security for the repayment to the Appellant of the principal moneys and interest intended to be secured to it by the said debenture and in failing to direct the said Official Receiver as Liquidator of the said Company forthwith at his own expense or that of the said Company to complete and execute in favour of the Appellant and when so completed and executed to deliver to the Appellant an appropriate memorandum of deposit of the title deeds of the suit premises by way of equitable mortgage as set out therein and to do all things necessary to enable the same to be duly registered against the title to the lands comprised in the said title deeds.

9. If by reason of any defect therein or of any want of registration thereof under the Crown Lands Ordinance (Cap.155) or of any want of consent thereto under the said Ordinance or the Land Control Ordinance (Cap.150) or of any other matter the Appellant is or might be precluded from enforcing either the debenture or the mortgage or any provision thereof (which the Appellant does not admit) the learned Judge misdirected himself in not holding that the Respondents were estopped from relying thereon.

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.12

Memorandum of
2nd Defendant's
Appeal
17th March 1962
continued

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.12

Memorandum of
2nd Defendant's
Appeal
17th March 1962
continued

WHEREUPON the Appellant prays that so much of the Judgment and Decree of the Supreme Court dated 30th October 1961 as dismisses the said Counterclaim with costs should be set aside and Judgment should be entered for the Appellant in the terms of the said Counterclaim or that such other order be made as the Court shall deem fit and that the costs of the Appellant in this Court and in the Supreme Court should be allowed.

10

DATED this 17th day of March, 1962.

HAMILTON HARRISON & MATHEWS,
Advocates for the Appellant.

TO:

THE HONOURABLE THE JUDGES OF
HER MAJESTY'S COURT OF APPEAL
FOR EASTERN AFRICA,
NAIROBI.

and to:

THE OFFICIAL RECEIVER AND LIQUIDATOR,
REGISTRAR GENERAL'S DEPARTMENT,
CROWN LAW OFFICES,
NAIROBI.

20

H.M.COURT OF APPEAL
FOR EASTERN AFRICA
NAIROBI
CENTRAL REGISTRY
FILED ON 17/3/62.

for Registrar,
H.M.Court of Appeal for
Eastern Africa.

30

99.

No. 13.

NOTES OF THE HONOURABLE SIR TREVOR
GOULD ACTING VICE PRESIDENT ON
HEARING OF APPEAL AND HIS RULING
ON PRELIMINARY OBJECTION TO NOTICE
OF CROSS-APPEAL

In the Court
of Appeal
from Eastern
Africa at
Nairobi

No.13.

IN THE COURT OF APPEAL FOR EASTERN AFRICA
AT NAIROBI

CIVIL APPEAL NO. 21 OF 1962

BETWEEN

NATIONAL AND GRINDLAYS BANK LIMITED ...APPELLANT

AND

KENTILES LIMITED (In Liquidation) and
THE OFFICIAL RECEIVER as Liquidator
thereof ...RESPONDENTS

Notes of The
Honourable Sir
Trevor Gould
Acting Vice
President on
hearing of
Appeal and his
ruling on
preliminary
objection to
Notice of
cross-appeal

18th June,
1963.

(Appeal from a judgment and
decree of H.M. Supreme Court
of Kenya at Nairobi (Miles J.)
dated 30th October, 1961

in

Civil Case No. 658 of 1958

Between

Kentiles Limited (In
Liquidation) and The
Official Receiver as
Liquidator thereof Plaintiff

and

Hubert Richard Brice 1st Defendant

National & Grindlays
Bank Limited 2nd Defendant).

NOTES TAKEN BY THE HON. SIR TREVOR GOULD Ag. V-P
18.6.1963 Coram : GOULD, Ag. V-P
10.30 a.m. CRAWSHAW, J.A.
NEWBOLD, J.A.

In the Court
of Appeal
from Eastern
Africa at
Nairobi

Donaldson, Q.C. & Harris for Appellant
O'Donovan, Q.C. & Georgiadis for
Respondents.

No. 13.

Notes of The
Honourable Sir
Trevor Gould
Acting Vice
President on
hearing of
Appeal and his
ruling on
preliminary
objection to
Notice of
cross-appeal

18th June,
1961.

Continued.

Donaldson Respondents - plaintiffs.
Appellants & Bryce Appls.
Bryce did not c.c. Respds were
Appls.
Plaint and c.c. dismissed.
Note of cross appeal given by
Kentiles. 10
Bank objects only to that part
which is substantive appeal.

Salient facts.

Kenboard Ltd (1951) L.R.57 -
Kasarini
Barclays B.D.C. Ltd - creditors
" D.C.O. - Bankers
Kentiles Ltd. Reorganised.
N. & G. Bank
Brice receiver and manager of
Kentiles 20

18/9/51 Kentiles incorporated
20/9/51 Kenboard agreed to sell to them
L.R. 57. Kentiles to discharge
£60,000 due to Barclays B.D.C.
1/10/51 Agreement reached for loan - and
debenture consent.
5 & 6/10/
51 Barclays Bank D. Corpn. paid off
with money provided by my clients
under agreement. 30
1/11/51 Kenboard delivered conveyance.
Kentiles executed what purported
to be legal mortgage to us.
17/11/56 Resolution for winding up by
court.
20/11/56 Bank appointed Bryce as receiver
and manager under debenture.
23/11/56 Bryce took possession.
11/2/57 Order for winding up made by court.
7/5/58 The action was begun by Kentiles
claiming injunction to restrain
entry. Declaration - unencumbered
freehold owner
order for possession.
a/c mesne profits - damages. 40

16/3/59

Bank without Bryce plea & counterclaim.
Declaration - legal mortgage and
alternatively that Appellant was
entitled to request the plaintiffs to
deliver a memo of deposit and for
order that liquidator executed memo.

In the Court
of Appeal
from Eastern
Africa at
Nairobi

No.13.

Judge dismissed claims under debenture.

Neither Bank nor Bryce can appeal on
that.

10

Dismissed counterclaim.

Preliminary point

Can Kentiles and Official Receiver
seek to appeal against dismissal of
action.

Rule 65 is inappropriate. Different
cause of action and a necessary
respondent is not a party to the
appeal.

Rule 65

20

Require it to be given to
appellant and any respondent named
in the notice of appeal.

No provision for stranger. Yet Bryce
had a vested right in his favour
under ? 18 and also judgment. Out
of time.

2nd "decision" means the decision
under the appeal.

30

"Varied" suggests that rather than
reversed. If the causes of action
are different the record may be
defective. It is here. Bryce's
defence does not appear.

Lastly. Under this rule my clients,
the Bank, are unable to serve a
notice on Kentiles or Official
Receiver seeking to uphold their
judgment on diff. grounds.

O. 58, Rule 6.

Notes of The
Honourable Sir
Trevor Gould
Acting Vice
President on
hearing of
Appeal and
his ruling on
preliminary
objection to
Notice of
cross-appeal

18th June,
1963.

Continued.

In the Court
of Appeal
from Eastern
Africa at
Nairobi

No. 13.

Notes of The
Honourable Sir
Trevor Gould
Acting Vice
President on
hearing of
Appeal and his
ruling on
preliminary
objection to
Notice of
cross-appeal

18th June,
1963.

Continued.

Note R's notice.
National Society for Distribution of
Electricity v. Gibbs (1900) 2 Ch.281

Headnote

P.281

P.287 - I wish ... procedure
not (illegible)

Clear principle that where distinct
c/a the /

Treated specially because of way
judge treated it - all parties
present.

10

Here 1 respondent to that appeal
(Bryce) is absent.

Trespass.

Action - legal mortgages.

Above causes all arose out of same
transaction.

Refer to X notices. Make no ref.
to Bryce except on title to action.

20

Para 1. Relates to claim in plaint

2 " " " " "

3 " " " " "

4 & 5 Relate to the c.c. No
objections.

Index 5(c) appears it refers back
to plaint and is objectionable on
same ground.

Submit

Paras 1-3 should be struck out
and 5(c) - and be left to apply if
so advised for leave to appeal out
of time.

30

We gave warning.

Communication bet. parties were
seen by Regr.

(Ot. Have not looked at them).

We are not concerned with technicalities.

O'Donovan

2 points - respondents notice not
an appropriate procedure.

40

R. 65 differs very much from O.58
Rule 6.

A cross appeal is quite distinct
from a respondents notice.

Rule 65 does not support that distinction.
 Not correct to say action and counterclaim actually distinct. Clear c.c. was to supplmt position arising under mtges and debenture - whatever the form of the litigation - its admitted purpose was to determine the rights arising.

10

N. & G. Bank (1959) E.A. 680.
 Upheld dismissed a ground that matter intended to be raised in proposed action were issues in the suit.
 Ex. 686.
 Highlights my submissions that the issues are inextricably linked.
 Paras 1, 2, 3, 4 & 7 of Memo of Appeal challenges the validity, etc.

20

Impossible to separate claim and counterclaim - position of legal eq. mrtges. The Memo of Appeal itself raises virtually all the questions.

If Court against me I ask Ct to accept the note of cross appeal as notice of appeal.

Nat. Socy case 1900 2 Ch. 280.

30

Our case is much stronger - i.e. we have judgment in a French Court.
 Much stronger reason for adopting same course here.

Additionally. The object of the litigation was to determine whether bank and receiver creditor. Both of them seek to construe judgment as being in their favour on that eminent point.

40

If present appeal succeeded that would clarify.
 If it failed - continuation at stalemate.
 Desirable in winding up of insolvent company.

L.F. then says inappropriate because Bryce has not here joined.

Argument is extremely formal. I

In the Court
 of Appeal
 from Eastern
 Africa at
Nairobi

No.13.

Notes of The
 Honourable Sir
 Trevor Gould
 Acting Vice
 President on
 hearing of
 Appeal and his
 ruling on
 preliminary
 objection to
 Notice of
 cross-appeal

18th June,
 1963.

Continued.

In the Court
of Appeal
from Eastern
Africa at
Nairobi

No.13.

Notes of The
Honourable Sir
Trevor Gould
Acting Vice
President on
hearing of
Appeal and his
ruling on
preliminary
objection to
Notice of
Cross-appeal

18th June,
1963.

Continued.

agree that Rule 65 does not envisage service of m/c/a on Bryce. His joinder originally was a formality. Interest same as bank. Fell to possession direct from Bank's debenture. He was represented by same advocates.

Rule 71 - Power to direct amended notice of appeal. As notice stands Bryce has not been made a party. 10

It is only by exercise of powers under s. 71 that he could be served.

I am prepared to go on without him if necessary.

Ultimately, If I am not entitled to re-agitate I ask informally for leave to appeal.

In re Cavanders Trusts 16 Ch. D. 270. - here appellant has everything to do with it. 20

Summary

1. Rule 65 deals with substantive x appeals in terms.
2. In view of way claim and c.c. are inextricable should be accepted.
3. What had been extent compliance on Bryce - could so decree under 71. 30
4. Ask that I be permitted to give ordinary notice of appeal within a week and that hearing continues with appeal alone. L.F. inconsistent with J (c) Cl.i additional ground on which they are entitled to uphold the dismissal of the c.c.

Donaldson

Re 5(6). On reflection it is probably right that it is open to respondent to include what he likes. I should object to it on the argument on the appeal. It confines self to resisting appeal. 40

This point has a sound immoveable basis. Appellant has to give security.
R.58, R.59.

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Liquidator by his joinder is lacking any means
Court would give sympathetic ear.

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10

If there is any leave to be given it should be filed on terms of securing the costs ordered below.
C. claim costs.
Now asks for leave under s. 71. Submit manœuvre to avoid security. Also ultra vires. On true construction of s. 71.
Meaning 'who ought to have been served'.

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20

Suggest common documents.
(My request does not extend to Bryce but no doubt be amended).
I have to protect my clients in the matter of security.
Intermingling. Yes. But not same c/a.

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Continued.

Donaldson

Sect. 69

To A of A

I would expect Bryce to join in with the Bank but he has his rights to separate representation.

30

Adj. 15 minutes
T.J.G.

40

I am of opinion that so far as paragraphs 1, 2 & 3 of the notice of cross appeal are concerned, they should have been the subject of a separate appeal which could have been heard together with the present one. Having regard to the close relation between all the matters in question I think it right to order that the notice of cross appeal may, as to those paragraphs, be treated as a separate appeal against the decision on the claim in the plaint and that the

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existing record be treated as the
record of the new appeal with
such additions as may be agreed
or allowed.

I would have been disposed to make
some order for security for costs
had this application been brought
at an earlier date but consider it
is now too late, and therefore
would make no order.

10

Costs of preliminary point to
appellant in any event.

Sgd. T.J. GOULD.

18.6.63.
2.15 p.m.

On resumption: Bench and Bar as
before.

Donaldson

Seek clarification. How is the
Court dealing with Bryce.

Bench (Maj.)

We are not. He is not at the
moment a party.

Donaldson

Can I raise other point to vary a
support? on the new appeal. O
does not object.

20

By Ct.
(Unam.)

Yes.

Donaldson

Will proceed with counterclaim
appeal.

Judge held Bank precluded from
holding land in Highlands.

1. Not consent under 2 Ordinances -
view Bank submits. s.328 of Coy.
Ord. does not prevent a foreign
coy. holding land in Highlands.
2. Even if it does mortgage validated
retrospectively by sect. 2 of Bank
title to land.
(Amendmt) Ord. No. 36/58.
Consent under the 2 Ords. was not
required for a juridical person.
Only for a natural person.

30

An Eq. Mtge point judge held not
entitled to memo. with the title
deeds because they were deposited
only with the intention of creating
a legal mtge.

40

Held the rt. to call for memo merged.
 As to that Bank says agmt betn parties
 and intent was to create an equitable
 mortgage which should operate until
 an effective legal mortgage was created.
 If it has not been (as held) bank
 entitled to have its equitable mort-
 gage perfected.

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10

By cross notice L.F. raises 3 grounds
 to support

1. Error in saying governed by B.T.C.C.
Ord
2. Section 328 of Coy. Ord, from
obtaining any interest, as well
as legal estate.
3. Debenture relied on as evidencing
the purposes of deposit, and as
agmt to give equitable mortgage
was inadmissible - not argued under
C.L. Ord. Bank says judge right on
these 3.

20

Correspondents 11 48-53.
 Appln. was made for consent See? 4.51
 Probably means 7(3)(b) of Land Control
 Ord. - relates equitable mtges.
 Unfortunately accepted this decision.
 Fact the history. Does not alter
 legal rights.

30

Remainder of letters - emergence of
 objection to our title. Some relating
 damages. But any intent to claim
 damages re loss of market was dis-
 claimed below.

P.63 Debenture

P.65(1) --- 1.15-6 (2)

Was no present real property.

Does not favour real ppty.

Deals with future r. ppty in 2 parts.

40

1. Deposit deeds on eq. mtge
2. To execute legal mtge when required.
 P. 68 para 6(b)
 P.69(7) (b) (a) (d) P.71 (11)(12)
 (9)

Wish submit under 12 we have express
 right to call on receiver for a
 memo.

In addition to (2)

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P. 73 - Regd. under Coy. C'd.
Not regd. under Crown Lands Ordinance.

P. 75 - Mtge.

p. 77 - Revised. Shown registered
under C. Lands Ord.

I argued below regn. conclusive.

I do not propose to pursue that
point here.

P. 79 - 81 - Dealings with title.

P. 85 - Conveyance from Kenboard to
Kentiles. 10

Date 1/11/51.

P. 86 - Recital of earlier contract -
l. 21 Before debenture and mortgage
26/9/51.

P. 89 - Minutes 26/9/51.

P. 90 - Para 6. Para 9 Don't know
date of regn. But see how land
dealt as from 26/9.

Regarded as theirs - business view. 20

P. 91 (10) Capital. Point is when
we have title deeds dealt with will
see my clients paying off B. Bank
on 5/6 Oct - relevant to capacity
in which title deeds held.

P. 92

Scheme we pay 20,000 to Barclays
Take over £40,000 debt. Leave
£30,000 for new company working
capital. 30

P. 98 Admitted by agreement.
Crucial importance.

At this stage para 3 Kentiles had
not been formed.

Para 7

Refer p; 105 4/16/51 400390.09
Referred payment of £20,000 referred
to as payable to Barclays D.C. & O.
Also we gave letter.

So title deeds were held to order
of Barclays Bank. 40

Reversion in Kenboard.

If on 1/10 tendered full amount
Mr. M.R. would have had to account
deeds to Kenboard.

On 5/6 October situation changes.
My clients advanced money. January

letter.
 As from that moment M.R. held the title deeds for my clients (not in subrogation).
 Solicitor. pays off Barclays on behalf of Kentiles.
 Thereafter he holds for Bank of India subject to their interest for Kentiles.

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10

Reference to never having a lien.
 No doubt right.
 He could not put it before rights of Bank so far as work for the companies concerned.
 P. 94-5 Winding-up.
 P.103-4 Appointment of receiver.
 Para 8 of Mackie Robertson.
 Page 96 - winding-up order.
 Judgment pages 107-110
 Apprehend not disputed.

20

The Legal Mortgage.
 Section 328 of Companies Ord.
 Absence of consent. Separate points.
 easiest with 1948 edition.

Submit 4 classes:

1. Kenyan by birth.
2. After Ordinance.
 Part 10. By birth before Ord.
3. Foreign by birth - Kenyan by naturalization. Part XI.
4. Foreign company. Part XIII.
 Sec. 328 is in Part XIII.

30

Sections 1-33. First class.
 Section 15(2) - power to hold land.
 Summary of all juridical powers.
 1929 legislation England s.13(2)
 a.1.14

13(2) Similar to 15(2) No ref. to land.

40

P.14(1) " " " " to land. Complete 15(2)
 Hals. Statutes. Mortmain and C.U.
 Act, 1888.

Submit -

Corpn. of Canterbury v. Wyburn
 (1895) A.C. 95

Shows act does not apply to foreign

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Second Group

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co. (? land). which is why 14(1) is
limited to U.K. land. No need to
go further than that.

Pre-Ord. Part X 302+3

English 316-320

Nothing turns on this

Part XI more important. 304-319.

U.K. 321-336

Don't dispute could have registered
under this part.

10

But practical consequences make it
impossible.Sec. 312 ("incorp. as a company -
under this Ord.")

Not registered. Incorporated.

Sec. 313 If Bank so require they
would become Kenyan companies. Open
to Kenyan legislation - naturalization.Assets both here and abroad. A
Kenyan company for all purposes.

20

Judge suggested coy. could have
dual nationality.I can find no such case. Submit quite
impossible.Incorp. must be under one or other
system of law.

Pt. XIII - 326 - 353 U.K. 344-5
Section 345 is a proviso to the
Mortmain Act just as 14(1) is for
U.K. coy.

30

Submit Kenya's sec. 328 overlooks
point that if no Mortmain Act.Sec. 328 1st part. We already have
power to hold land anywhere in world.Local system could prohibit us
from doing it.

Then you get the proviso. Not a
substantive provision. Shows that it
is cutting down the power given by
the substantive section.

40

My answer is I don't need that
power.

If Kenya legislature wanted to say
U.K. Coy. should not have power to
hold in Highlands should do so.

The "Unless..." Ord. I submit it means unless registered under section 327.

Judge says Part XI. Cannot be right. It then ceases to be a foreign coy. & Part XIII does not apply to it.

Local legislature has insisted on registration before it can hold land in Highlands.

Judge makes point - futile. But more impossible that none of the big banks could hold lands in Highlands.

Truth may be lifting a section from alien legislation without fully appreciating.

Policy - particular race. But place of registration does not affect who are shareholders.

Foreigners could form a Kenya company.

Crown Lands Ord. shows a control.

But may not matter much.

Because Bank Title to Land Ord. is retrospective and amends sec. 328 "serious doubt". Retrospective to dates mentioned. Proviso.

This covers me. Provided Ct satisfied with proviso to section 1 does not affect me. Judge found in my favour on ground c.c. separate suit. Order 8 R. 2 and 12 of C.P. Code & U.K. authorities.

Amon v. Bobbett (1889) 22 Q.B.D.543
Esher at 545-6 547-8

Chappell v. North (1891) 2 Q.B.252
at 255-6 and at 256.

Stumore v. Campbell & Co. (1892)
1 Q.B. 314 at 318 and 318-9.

P.113, 1. 22

P.117, 1.3-4. No authority for the statement.

L.10-15 But this is an act which was designed to remove doubts. Some-one had doubts.

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Legislation might have set doubts at rest in the other way by saying no p.c. could hold H. land. P.123 line 8 holds bank provision applies. That complete legal mortgage and sec. 328.

Now submit judge wrong in concluding consents were required by section 7 of Cap. 150 and sec. 88 of Cap. 155. Point is a short one. Whether person mentioned includes juridicial person.

10

Crown Land s.88

Interpretation says include a company unless context otherwise requires. Sec. 90 Crown Lands Ord. "different note".

Must mean natural person.

I accept residence. Not raised.

Would expect draftsman to say "other companies".

But submit it means natural person throughout.

20

Sec. 91 No provision for penalising directors as in sec. 99.

Sec. 94-6 provide a code re shares and companies.

Sec. 99. Draftsman knew the appropriate device.

Sec. 88 - Contract. 2nd part. Unfair to stop a company having a nominee.

Once company has got the land no need for sec. 88.

30

Sec. 7 of Crown Lands Ord.

7(c) (a) person. "to any other person".

Otiose unless only means natural person.

Why if person means natural person is the exception in sub-sec. 4 necessary. There is no answer to that. Inconsistence whichever way it is looked at. My approach has some consistency.

40

Sec. 8(1)(i) Applicant looked at as an individual

P.118 & 122

P.121, l.27. It is the individual.

No coy. needs consent on my construction.

P.121, l.28. Not fair argument.

113.

Assumes he is right in his interpretation. Can't call that in aid on another doubtful point.

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Adj. to 10 a.m. tomorrow.

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19.6.1963. BENCH & BAR as before
10.00 A.M.

19th June,
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10 Donaldson Now turn to equitable mortgage.
1st ascertain facts.

Vital date is Oct. 4-6. Kenboard discharged its obligation to B. Bank and to the Devp. Corpn. by a payment of £20,000 and delivery of a letter of guarantee signed by National Bank.

Resolution at record page 93, l. 38-48.

20 The proof of M.R. p.99, para 6.
Bank statement at P.105
2ndly Barclays & Dev. Corpn, released the title deeds to Kenboard.
M.R. P.100, l. 6 - 9.

By making payment to Barclays and delivering the letter of guarantee corpn. Kentiles discharged its obligation to Kenboard under the

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sale agmt and received the title
deeds to the property.

Resolutions p.93,11. 38-48.
M.R. p.100, 11 5-9.

There is no exact evidence of the
full obligations - know none.

The title deeds deposited with Nat.
Bank by attornment with authority
of Kentiles pursuant to their
loan arrangement.

10

M.R. p.100,11. 17-20.
He said as he knew of arrangements
with Kentiles & Bank he held docu-
ments to order of Bank. It doesn't
appear he handled cheque. But
statement shows money was paid.
Attornment - dep. with Nat. Bank.

What was the intent with which
the deeds were deposited. By
imputing an intention from
circumstances. As a matter of law.
As bet. debtor and creditor mere
fact of possession of title deeds
raises very strong but rebuttable
presumption that it is security.

20

Guarantee Discount Co. v. Credit
Finance Corpn. 64/62

Sinclair P. at p. 2 "As
between ..."

Newbold P. 5 "Where..."

This is not new law. Convenient
statement.

30

I move to equitable Mtges Ord.
Cap. 152.

As in force at that time.

Effect in English law (as at
1909) but not suggested it has
changed.

27 Hals. 165 para 257.

Guaranty Discount - Sinclair p.2.

Gould J.A. p. 9 "The new mort-
gages..."

p. 19 "as has..."

40

So the mere deposit with intent
creates an equitable mtge and binds

the mortgagor to do all necessary to create (Halsbury).

Sect. 127 of Crown Lands Ord. You don't need the right if he is liable to be defeated by s. provision that he cannot give evidence of it. So duty to execute.

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10

I have so far made no mention of the debenture. If my learned friend can successfully attack the debenture I can rely on the deposit.

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20

Specific provision in debenture. Agreement to execute a legal mortgage whenever called on. Bank may be content with eq. mtge in some cases. Eq. mtge protected them. Section 127 has no application to agreements for mortgages. Only the transaction & sec. 129(e). The deposit. Can't be true construction of the section that you could give evidence in a suit claiming execution of a deposit. In a suit you can prove circumstances entitling delivery of a memo.

19th June, 1963.

Continued.

30

My submission that deposit = eq. mtge is subject to s. 127. Can't say I have an eq. mtge but can prove circumstances. Shown incoherent mtge and can claim its completion.

Pleadings don't allege we are equitable mortgagees.

I submit s. 127 has nothing to do with incoherent transactions - or an agreement.

40

Equitable Mortgages Ord. says - same effect etc.

It is a contingent or conditional equitable mtge. Must go to that Ord. subject to Crown Lands Ordinance.

Operates as an agreement to give an equitable mortgage.

Newbold J.A.

So by 2 actions you can defeat s. 127.

Donaldson

Yes. That follows.

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The other point on the debenture.
Implied.
P. 71. Express provision. Cl. 12:
To facilitate realisation of
assets.

Respondents objections. First
that section 328 of Coy. Ord. pre-
vents our being equitable
mortgagees.

1. I say s. 328 refers to legal
estates "acquire land" - must
relate to legal estates. Beneficial
owners acquire rights. 10

2. (same). If it includes
equitable interest in land so as
to prevent Equitable Mtge section
7(c) of L.C. Ordinance and s.88(4)
of Crown Lands Ordinance are complete
nonsense.

Second. Said that if could obtain 20
memo of deposit it could then obtain
a legal mortgage by suing for it.
That legal mtge would be ultra vires
the bank. Submit when you get to
the stage where you call for legal
mtge it is met by cast iron defence
- ultra vires under sec. 328.

And all an eq. mtge gets is the
rights of a legal mortgage. Does
not make mtgee a legal mortgagee. 30
All we seek is the right. Mortgagor
remains bare legal owner.

Third Debenture creates legal
mortgage which requires to be
registered. Not so. It is an
agreement to create a mortgage if
land acquired and called on.

I say the debenture does not
create a charge on after acquired
property - we are only concerned 40
with real property.

I don't say it is not a charge
when the property is acquired. Not
a charge on property not owned at
date. But it will become a charge
when the property comes into
possession.

I agree the debenture was a charge (and is) on the particular land as from its acquisition. It is also an agreement to give a legal mortgage over it.

Court must look at purpose for which tendered in evidence. I may not be able to give evidence of that charge as it is unregistered. But I do not tender it to prove that charge.

Edwards v. Denning (1961) A.C. 245
At p. 251.

On that I can tender it in evidence for any purpose not to prove the charge.

(I submit C. Lands Ordinance does not apply to debentures)

But I can use the debenture to show the intent with which title deeds deposited, and I use it to show the Receiver's right to go into possession. Not, I think, for any other purpose.

A special point arises out of Cl. 12.

It is completely within sect. 129(e) of Crown Lands Ordinance. Big exception to 127.

I can tender the debenture under that and to cl. 12.

Next it is said wholly void as C.L. Ord. requires registration.

See judgement. My argument. Judge accepted it.

Lastly said void for absence of consents.

Judge considered impossible by time factor.

Clear the Ords could apply to debentures relating to after acquired property - Judge accepted that. A more ? view would be supported by 7(4) and 88(4).

Very odd if I may not tender debenture to prove deposit intent in view of

Rely on these subsections to say that nothing in s.s. 1 prevents me from making an agreement.

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Another answer to point raised
by Newbold.

I can ignore the debenture. Gould
J.A. in Guarantee Corp. case
(dissenting) P. 20 "The unofficial
...."

This says you can rely on the mtge
deed.

(Query this)

Newbold J. p.4.

10

Submit the judgment gave wrong only
in 1 small but important point.

Record p. 127, l.33

P. 128 I accept judge's conclusion.

But at 11.20 - . He is in
error because s. 328 talks of land
situate in Highlands.

Uses definition of Highlands not
of land from Crown Lands Ordinance.

No need to say land has some meaning.
Interpretation Ordinance now defines
Highlands.

20

But not in force then.

P. 124-30 - 1 - 2 - 3

P.133, l.4. Misdirection should be
intent to create a security, not an
equitable mortgage. 133-4

P. 135, l.1. But the deeds were in
the possession of the plaintiff
company even if it did not have the
legal title.

30

Merger - As he has held the legal
mortgage void merger is impossible.

Document is a nullity.

P. 135, l.11. Not right. We had the
deeds before the legal mortgage and
held as security. s. 62 etc. May
be right if mortgage had been
effective.

Refer again to Guaranty Disc. Gould
P.19 "The intent..."

40

Submit this means not inconsistent.
Ghana Commercial Bank v. Chandiram

(1960) A.C. 732 at 745.

"It is not ..."

Submit this supports that my clients
must be deemed to have intended
their rights as equitable security
holders to be preserved unless get
effective legal mortgage.

50

I therefore submit I am entitled to a memorandum - which I shall register.

My case on the counterclaim is very simple. I am legal mortgagee. If not I am entitled to become an equitable mortgagee. On one or other bank is entitled to succeed.

Will leave the other questions until cross appeal opened.

O'Donovan

Points in same order as original Proviso to section 328 of Companies Ordinance. No escape from conclusion that it prohibits a foreign company etc. unless registered under Part XI of Companies Ordinance.

I accept the reasoning of the judge on that issue.

Re-inforced by history of the legislation. Land Control Ord. enacted 1943.

section 88 of C.L. Ord. No. 23 of 1944.

Proviso to section 320 added in 1945.

All that legislation is concerned with capital.

Restriction on transactions, on legal estate and equitable interests.

Reason why foreign company caught unless registered under XI. Foreign company does not have to render annual returns. Defn. of company etc.

Any change in ownership of shares in foreign company would not be known.

If registered here it would be public information at time of attempted acquisition of land by any registered company - its composition would be known.

That I submit is the reason why foreign companys were simply not permitted to hold it unless first registered.

Second submission is that section 2 of Banks T. to L. Ordinance validates it retrospectively.

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I don't dissent that c.c. is a separate action for all purposes that justice requires. Don't dispute the authorities.

Don't meet the precise requirement of this case.

If a defendant by c.c. is able to take advantage of law at time of c.c. if precisely the same issue rises in the suit, which is the earlier it finally disposes of that issue in the suit. Submit not possible for Court to say mortgage ultra vires the bank so far as claim in suit is concerned but not for c.c. declaration. What the court has to decide on the suit is whether the mortgage is ultra vires.

10

Having so decided - end of it. Say claim for freehold declaration, c.c. for mortgage. It is res judicata for all purposes.

20

That follows from s.s. 6 & 7 of the Civil Procedure Ordinance.

Also from O.8. Rule 2 "final judgment". Purpose of finality.

Judge recognises the oddity. (This argument was advanced before the judge).

I part company from judge on this.

30

I say his finding on claim concluded the matter.

Suit filed before the operation date was recognised by this Court in 1959 case Nat. Bank v. Official Receiver (1959) E.A. P.687

If judge first decides the issues on the suit - he cannot afterwards gainsay what he says, on the counter claim.

40

Third point. Juridical person not included. I agree that there are defects in the legislation. Can't remove all inconsistencies to give effect to every word. Here must weight opposing considerations. I rely on those which influenced the judge.

50

Submit it over-riding one is
P.121, 1.20. That argument
should prevail.

Legal mortgage is invalid. Ultra
vires the mtgee. Also created
without requisite consents within
the period after its creation
limited for that purpose.

10

Claim that appellants are in
any event equitable mortgagees -
or entitled to performance of a
contract to become such.

20

Under Equitable Mortgages
Ordinance the fact which creates the
security is the deposit, provided
intention is there.
The effect of section 127 of the
Crown Lands Ordinance is that
evidence of that transaction is
inadmissible because there was no
memo.

I go further and say debenture
is the memo in this case. Sets
out the terms on which deposit
made - if it was.
It is not in the prescribed form
and was never registered.

30

Learned friend says entitled to
rely on bare deposit without
debenture.

Say this is not so - Guaranty
Discount case does not support him.
Salient fact there was a further
payment (by majority) and deposit.
Were it not for that I apprehend
the argument would have prevailed.

40

P. 132 Cairns. Shaw v. Foster
The document here purported to create
a charge. Says so in terms. Must
abide by the terms. If void for
lack of registration or any other
reason. Can't say intended - if
does not work disregard it.

Contrary
Paul v. Nath Saha (1939) 2 All.
E.R. 737

50

If the memo they seek is to be
operative document creating security
it requires registration.

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(Cl.12)

- it merely records it.

Record p.126,1.17-20That is
right.

If it is, it can't be right to say

P.130,1.25 and P.132,1.32

"memo" referred to is the one they
seek.

Inconsistent with p.126

Highlights Equitable Mortgages
Ordinance.

"deposit"

Can only mean deposit creates and
memo records.

It is ordinary memo so not the
operative document.

Appellants are in difficulty. & memo
is of no use to them unless has been
a deposit creating the security. But
they can't lead evidence of the
deposit with intent because no
registered memo.

Reason. C. Lands Ordinance
intended to ensure all interests,
estate, etc. are registered.

Exception where registered memo
of eq. mtge.

Inspection of title to disclose
outstanding interests.

This does not fall within s.129(e)
of Crown Lands Ordinance. The memo
they now seek is not such a docu-
ment - a record.

And the debenture itself is not
such a document.

Further def. Assuming they can
lead evidence about it must show on
1st Nov. 1951 there was a period
when there was an equitable security
by deposit by Kentiles as owners.

Comes very close to a legal fiction.
Conveyance and legal mortgage

executed on same day. Practical
purposes - contemp. If they can -
the post legal mortgage period shows
the capacity in which the bank held
these deeds. Submit at the moment
at which the legal mortgage was exe-
cuted, the bank held the deeds by
reason of the legal mortgage and not
on deposit.

Appeal should fail. My 2nd argument.

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Third argument. They seek equitable relief. Put us in position of equitable mortgagees. If they are ultra vires as legal mortgagees that is a good argument for not giving them what they ask. Equitable interest is meaningless unless it entitles to a legal estate.

10

Finally it was open to any party to omit the performance.

They decided to get a legal mortgage. They did so. They kept it for 10 years. If on 2nd Nov. bank had asked for memo. Would be held you have a legal mortgage.

20

I don't say merger as in judgment. I say s. 63 of Ind. Contract Act. taken a legal mortgage. Assents to that is what he has got.

I distinguish Ghana Bank case as being on its own facts. Decision on intention of parties on those facts.

Here facts show intended to take a legal mortgage. Concede force of argument against me.

Perhaps my better argument is s. 127 of Crown Lands Ordinance.

30

Debenture itself is an operative document. Once it is so in one part of it, it is not possible to sever it (Para.12). General. Particulars have been dealt with. It attaches from moment company acquires it

Word "merely" in the exception is significant.

Means solely.

40

The debenture purports to create a right to int. in land.

Void. 1. Not registered.

2. no consents obtained.

As to being void but good as a contract.

But that is not the position.

When a document purports to create

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an interest and facts for evid. of
registration doesn't matter.
Under s. 126 of C. Lands Ordinance
must register
"All transactions purporting
etc.

Say unregistered lease for 20
years - present demise. Then it is
caught by s. 126 and 127 and not open
to say "I disregard it and rely on it
as a contract to give me another
lease."

10

Learned Friend says Crown Lands
Ordinance does not apply to debentures
at all.

My submission is both sect. 7 and
s. 88 speak of charges created by any
means whatsoever. Result is bizarre
those words are certainly wide enough
to create a charge by a debenture.
Wide enough to include a floating
debenture which may attach.
I agree strange result. But on
contrary could circumvent the
Ordinances.

20

What is caught is the charge
created by the debenture. Can't
argue that couldn't register it
until got the land. If after 4
months couldn't get consent. Does
not mean floodgates open.

30

Adjourned to 2.15 p.m.

On resumption: Bench and Bar as
before.

O'Donovan continues :-

In the cross appeal we contend
debenture wholly void. Challenged.
I agree not quite accurate. Could
be valid as to moveables. Submit
wholly void insofar as it relates to
creating of any right, title or
interest to land. It is no reply
to the objection that it should be
registered to say it creates no
interest and therefore does not
acquire rights.

40

Submit that the form it took: a

debenture, a legal mortgage and handing over of title deeds is caught by the legislation.

There is a distinct limit to what they can do to remedy the situation.

Can't say give us a memo to register.

If that argument available to them the proviso is nugatory.

10

Position can't be allowed to be remedied by this one move. That proviso contains seeds of own destruction is not a result which would readily be acquiesced in.

"Unregistered legal mortgage" If not registered can't say I rely on it as evidence of a situation in which I can ask for a memorandum to qualify as an equitable mortgagee.

20

Last argument about the counter-claim is that acquisition of equitable interest is also ultra vires the appellants. Not an easy argument to maintain as in England under the Mortmain Act trusts were permitted to get round it.

30

The proviso (328) is part and parcel of a system of legislation designed to control not only legal estates but all interest in land. It is therefore necessary to read it in conformity with the legislation immediately preceding it.

40

Particularly L.C. Ordinance and C.L. Ordinance. So as to arrive at a harmonious system. Odd if a foreign company is to be disqualified from owning any land in Highlands because shareholding not open to control and inspection, if it is limited to a legal estate... What really matter are the beneficial interest. Who grows crops?

50

Repugnancy of that construction is correct bet. 328 proviso and 7(4) of L.C. and 88(4) of C.L. Ord. both of which dispense with the necessity of obtaining consent. My learned friend says unless 7(4) is confined to legal estates it makes complete nonsense.

Record P. 128, 1.33 P. 129, 1.4.

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Answer is it given nothing in 7(4)
and 88(4).

In judge's own words
P. 128 last para.

Result is a strange position.
Submit means bank is not obliged to
ask for consent under 7(4) and 88(4).
It can hold lands if registers itself
under Part XI.

(Consent would not avail for legal
mortgages).

You also have to get consent for equit-
able mtge unless you are a specified
bank.

Argument against me is not substantial.
If I am right on that c.c. must fail
as well as over an equitable mortgage.

My own cross appeal

Much already said.

The debenture is put forward as a
defence to an action for trespass or
put forward as evidence of a charge
and effective security which has been
enforced by appointment of a receiver
who has gone into possession.

Judge having held it purports to
create a security than to sever certain
portions and let it operate as a
contract entitling to enter. Answer
is trite. That is the appointment
of receiver is the mode by which you
enforce the security. Unless security
good can't appoint receiver.

My learned friend must go further
than his argument that debenture is a
mere contract to grant an equitable
mtge.

I ask that the appeal be dismissed.
That the cross appeal be allowed as
against the bank. I ask for nothing
as against Mr. Bryce. Ask for
declaration against bank that estate
is unencumbered (in personam)
And for the relief as claimed. Has
been agreed that there be an enquiry
as to mesne profits.

As to iii of prayer it suffices if
it is granted against the bank.

In fact it means no more than that
the proceedings cannot be prejudicial

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to Bryce on damages and costs.

I ask decln. against bank that security void, that the plaintiffs are the owners of an unencumbered estate, and that the bank do deliver up the property and an enquiry be directed into the question of mesne profits and other a/c.

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10 Donaldson

Rare to hear an appeal presented with such brevity.

As to the order for possession he can't have the order for possession as Bryce is rightly there.

I don't dissent from proposition that he is the bank's agent. Agent for debenture holders.

There are stronger objections to the cross appeal.

20

P. 136, 1.28

2 point. First it is true that a decln. bet. the Bank etc. would not bind a third party.

P. 28, 11.23-8. shows there is a second debenture holder as receiver.

Impossible to claim declaration in the terms they ask.

As far as the claim for possession is concerned it operates in rem. If Ct orders me to leave my house and deliver it up to O'Donovan I have to do that.

30

Here Court is invited to order delivery to an insolvent company over head of a receiver. Must treat that debenture as valid until a competent court says it is not.

40

P. 135 Refers to Hurst v. Picture Theatres.

The point I was making re that case was this. I said suppose the bank had no legal right to be in possession but was entitled to have eq. mtge a Court of equity would not permit the bank to be dispossessed when plaintiffs in breach of duty as to memorandum.

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Point arise on the c.c. and my learned friend says equity with him. If equity enters they are all on the side of bank who lent money which was used and lost. Only when Bank asked repayment company alleges no security. Knew they would not have got it otherwise.

In Hurst's case is a reference to Fregley v. Lovelace which is analagous. (1915) 1. K.B. at 7.

I should read the judgment on this cross appeal.

Preliminary point. Judge is right so did not appeal.

P. 124 - 7.

Judge says does not consider registerable and says if he is wrong you can look at it under Denning v. Edwards for limited purpose.

To justify my entry on land. A lien may be analagous. Ord. says mtge or charge. If debenture power purported to sell you would get into the realm of security. He has contractual right to manage. I submit judge quite right.

But there is a further answer. Section 127 of C. Lands Ord. Does include lien.

Is that limited to transactions to mortgage lien, charge - or does it extend to the antecedent agreement. Open question. But there is no ref. to agreement as in some other sections. Edwards v. Denning, sec. 88 is that you are entitled to join evidence of an agreement.

E. v. D. at p. 251 to mid. 252.

1st. point. P. 252 "It is also..."

There the Judicial Committee decided sect. 88 has no application to agreements though mentioned.

Suggest same approach to s.s. 126-7. That may be the reason for why debentures have not been registered.

Can't charge after acquired property can only agree to do so.

Denning v. Edwards not dependent

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on subs. document like 129(e).
 If you agree that shall have a charge
 on after acquired property -
 I agree sell motor car in a month's
 time.

I deliver it in a month. I sell not
 under the agreement but in pursuance.
 Under the debenture I doubt whether
 this sort of point has arisen. In
 English law it is immaterial whether
 it arises "under" or "in pursuance".
 I agree that there is a charge
 immediately after acquired property
 is acquired. The paternal document
 is alright either as giving rise to
 further docs. or under Edwards v.
Denning as by non-agreement.

Sect. 126 & 88 - "All transactions"
 All I need for claim is to show right
 to enter.

I have to go further for c.c.
 He had to make out his better claim.

Learned friend relied on the
 provision in Banks Ordinance. Shortly.
 Every other mtge is freed. Only if
 action commenced.

It is alright to make it in
 respect of agmts entered into before
 and after. This does not do that.
 Someone who had launched proceedings
 would be able to get one and same
 costs. Judge did not accept that.

But it is limited to that action,
 suit or proceedings. That would
 produce inconsistency. - there is
 much of that.

Principle. If have 1 dispute it
 remains settled. If 2 different
 ones, you can get inconsistent
 answers.

When have a change in law - why
 can't court say that at date of c.c.
 you were the legal mortgagee. No
 conflict actually arises. Even if
 company has got declaration that
 they were unencumbered owners still
 can say at another date Bank was
 mortgagor.

Res Judicata can't apply - change in
 law.

No case where a defendant has won

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when it has been possible to plead
res judicata against him in relation
to extra defences which went by the
board.

Next learned friend says the
debenture is the memorandum. How
can it be in relation to a non-owned
property. Wholly defective as such.

Then he says bank held the docu-
ments under the rights of the legal
mtge from its execution. That can't
be right. The moment before the
Legal Mortgage was executed they
must have held in another capacity.
4/10 to 1/11 - and it was as
depositee for security. And short
period between conveyance and mort-
gage when they had the legal estate.

10

As to oddness of having equitable
mtge any licensee can till the soil.

20

My learned friend says Part XI.
Judge right.
Would a bank suddenly change status.
I have covered both reply and answer.

Judge
Crawshaw

Legal mortgage would be pursuant
to agreement in debenture.

O'Donovan

Reply on cross appeal.
Whether unencumbered title proved.
P. 79 - Register shows unencumbered.
Not registered.
P. 28. 1.5. accepted.
in 2nd holder not bound no obstacle.

30

Denning v. Edwards and s. 88.

One of the completed transactions
caught is the entry into possession.
Debenture is invalid for lack of
consent. Been argued agreement for
future. Insofar as it is put forward
as a defence it is put forward as
justification of entry. And the
entry is complete.

40

C.A.V.

Sgd. T.J. Gould
Ag. V.P.
19/6/63

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IN THE COURT OF APPEAL FOR EASTERN AFRICA

AT NAIROBI

CIVIL APPEAL NO. 21 OF 1962

BETWEEN

10 NATIONAL AND GRINDLAYS BANK
LIMITED . . . APPELLANT

AND

KENTILES LIMITED (In Liquidation)
and THE OFFICIAL RECEIVER as
Liquidator thereof . . . RESPONDENTS

(Appeal from a judgment and decree
of H.M. Supreme Court of Kenya at
Nairobi (Miles J.) dated 30th
October, 1961.

20 in

Kentiles Limited (In
Liquidation) and the
Official Receiver as
Liquidator thereof Plaintiff

and

Hubert Richard Brice 1st Defendant

National & Grindlays
Bank Limited 2nd Defendant)

30 NOTES TAKEN BY THE HON. MR. JUSTICE
CRAWSHAW, J.A.

18.6.63

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10.30 a.m. Coram: GOULD, AG. V.P.
CRAWSHAW, J.A.
NEWBOLD, J.A.

Donaldson, Q.C. & Harris for Appellant.
O'Donovan, Q.C. & Georgiadis for Respondents.

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Donaldson: Bank P's by c/claim, but Brice (1st
Deft.) did not join in c/claim.

23 Nov. 1961 gave notice of cross
appeal and sought to uphold dismissal
of c/claim - no objection to that. 10
Object to appeal against dismissal
of their own claim.

18.9. 51 Kentiles incorporated

26. 9.51 Kentiles agreed to buy
from Kenboard on condition
buyer discharged debt to
Barclay.

1. 10.51 Ag. - Buyers & N. B. I.
deb consent

5 & 6.10.51 Barclays paid off J.N.B.I. 20

1. 11.51 conv. & mtge.

17.11.56 w/u resolution.

20.11.56 Brice appointed Receiver
by Bank.

23.11.56 Brice took possession.

11. 2.57 w/u order

7. 5. 58. action begun against both
defts.
nature of claims (see)

16. 3.59 defence & c/claim. 30

J. Held entitled to possession
under Deb. Respt. not entitled to
appeal against this.

Rule 65(1) Can Respt. appeal on

their claim? Rule inappropriate -
different cause of action a nec.
respt. is not a party to cross
appeal.

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Rule require notice to be given
to respt. and any other person
affected by appeal. Brice has vested
right founded in judgment - judgment
in his favour - 18 months out of
date - no notice to Brice to defend
his rights.

"Decision" means one under appeal.
"varied" suggests something.

If course of action are different,
record filed by applt. may be
defective. It is defective, for per
Brice defence does not appear.

20

Bank unable to serve respts.
notice on Respondent requiring to
show that dismissal of P's claim
should be upheld for different
reasons.

0.58 r 6 & note Respts. notice.

Electricity v. Cribbs (1900)
2 Ch. 280, 86 last para 287 last
para - principle stated. Special
circs in that case where J. had
dismissed c/claim simply on grounds
of finding of appeal.

30

Trespass was claimed by P.

Declaration as to legal mtges and
for memo of judgment, was clear of
Deft. - distinct from plaint, but
naturally founded on some transaction.

Cross appeal - found related only
to P's claim.
- found 2 & 3 related
only to P's claim.
- 5 5(c)

40

Submit paras 1 to 3 and 5(c) be
struck out and respt. to be left to
apply to this court for leave to app.

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out of time. I have no instructions for Brice. Warning has been given to Respondents and judgment and/or costs.

Applt. are concerned with substantive rights, not technicalities.

O'Donovan.

Rule 65 differs from O.58 r 6 in a significant way. Former deals in terms with cross appeals. Under sup. Recls cross appeals with disterect from Respts notice - no and distinction in Rule 65.

10

Submit 2 65 intended to apply to both suj. cross appeals and respts. app.

Brice is not respt. named in notice of app.

Action c/claim not validly distinct. Tho found in trespass, its clear purpose was to contest interest in land by Deb. and mtge.

20

N. B. I. V. O. R. (1959) S.A.680

Respts-sought leave to claim security - not pointed app. court dismissed app on grounds that 686 Issues raised in c/claim inexstrubly mixed up with the matter on appeal.

Paras 1, 2, 3, 4, 7, of Memo of Appeal show this; they relate to matters raised in plaint. Impossible to repeat claim that P. os unencumbered with c/claim of being legal or eg. mortgagees.

30

App. raises about all questions dealt with in judgment.

If court against me so far, I vd. and court is sought cross appeal as notice of substantive appeal, as was done in (1900) 2 Ch. 280 284, Lindly Mr. R. Madame Knell's claim quite distinct from fact from main claim.

40

Object of claim & c/claim was to decide to what extent if any, pl. was secured. It is on this aspect of judgment that both appeal and cross appeal are directed.

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Desirable in w/u for speedy decision on question of security.

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10 Brice J. rule 65 does not envisage notice of service of cross appeal on Brice. His judgment in original suit was a penalty. No suggestion his interests distinct from bank. Represented by same setrs.

20 Rule 71 of court thinks it necessary for him the party to appeal then j. that amended notice can be secured on him. I have notice ready. Original notice was on setrs. on behalf of bank only. Brice not interceded in counter-claim.

If court still against one and all submissions so far, then I ask informally for leave to appeal, which was granted in Callenders Trust 16 Ch. 270, 272.

30 There has been literal compliance with r. 65 which does not require service on Brice.

Para 5(c) of cross appeal. If respots entitled to urge that they are unencumbered owners it to an additional ground on did they can uphold counterclaim.

Donaldson.

40 5(c) open to respots to included in notice of appeal to include to anything he likes. I think I should take it on appeal, and not by objection now.

Submit this is not and point has to give security to costs - 2.58 60 Liquidator may be lacking in means, and this may be case where increased

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security should be given. Respondents
should give security for costs given
against him in lower court. Costs
of counterclaim not yet taxed or even
put forward.

Use of rule 71 said be ultra vires
this ch & a way of awarding security
of costs.

The rule contemplates circumstances
following proper appeal not following 10
on cross appeal where these should
have been on appeal.

Brice not party to counterclaim and
he not involved in payment of costs,
but might received them if counterclaim
successful. My court to practice here
does not cover Brice, but can no doubt
be amended. I had not advise Brice
to require adjoinment. Submit he must
be put on terms, and should be covered 20
by secured costs.

A/u issues are intermingled, but
not some claims.

Eng. rule 5 wider than r. 65. O.58
r 6(4) Submit Eng. & Kenya rules
deal with same subject matter.

Security for costs of this appeal
and costs before if resp. allowed to
treat.

Extraordinary position of judgment 30
of lower court stands against Brice,
but this court reverses it against
bank.

If court says no appeal)
" " " shall appeal on terms)

O'Donovan.

Rule 69 - costs - no application
made.

Adjourned to 2.15 p.m.

18.6.63 On resumption: Bench and Bar as before.

2.15 p.m. Court: GOULD AG V.P. reads his ruling
CRAWSHAW J.A. agrees
NEWBOLD J.A. dissents.

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Donaldson

O'Donovan have no objection to my asking that my judgment on respts claim be raised on other points.

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Counterclaim.

10

Declaration that legal mtge. good
" that memo of deposit
may be demanded and order accordingly.

328 J. held "Highlands" law
presented.

7 88 legal mtge. and that any-
way no consents.

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Even if 328 had that effect s 2
of Bonds Title to Land Id. and
arbitrates it retrospectively to
13.5.58

20

Consent even land partial to have
land not regd. because bank is a
judicial person and consent only
reqd if for natural persons.

Continued.

30

E. judge J. held bank not entitled
to name because not deposited with
intention to create e.g. mtge but
legal. He held right to call for
memo mortgaged in legal mtg. Bank
rd.ep.ag. was to create an e.g. mtge.
which should operate until effective
legal mtge. then bank entitled to
have e.g. mtge. perpeted by Memo.

Cross Notice of Appeal: Says that
J. holding.

They say Deb inadvisable because
not reg.

48-53 Shows how this unfortunate
position arose.

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Continued.

- 51 Reg. sd consent not necessary. It is unsatisfactory letter, and refers to recls etc., inaccurate. The Bnk, took all normal steps, but unfortunately this not pursue question of consent.
- 63 - Deb -- dated 1st October 1951.
- 65 (1) as to future property (a) deposit deeds and (b) requires Co. to ex legal mtge. if reqd. The e.g. mtge is automatic. 10
- 68(6)(b)
69(7)(9)(11) - (12) gives express right to call for Memo.
- 73 Deb reg under Co.'s Act., but not under have hands hd. never done.
- I do not propose to agree here that fact of reg. is conclusive. 20
- 85 Cont. late 1st March.
- 86/21 Cont. held to ag. of 26th September
90 Para 6
- " 9 significant in attitude of Kentiles Island
- " 10 significant that N.B.I. paid off Barclays 5th or 6th October.
- 93/38 N.B.I. to pay cost and take over Barclay liabilities, leaving £30,000 for working capital. 30
- 98 Para 3 Mackie's end. I apprehend he was acting for Kenboard, Barclays as well as N.B.I.
- 99/13 "We" i.e. Mackie and Kenboard.
- 105 Bank s/ment - 400,390/- obviously the £20,000 payable

to Barclays against overdraft and referred to in Mins of mtge.

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10

When Machie held to adm. of Barclays at lob reversion was to Kenboard. Barclays letter not on record be 5th or 6th October. £20,000 add made available to Kenboard is repay Barclay, and under part of general agreements under Deb. Barclays not entitled to know where money came from but had to release deeds to Kenboard. In between Kentiles & Kenboard, latter entitled to deeds under financial agreements which included payment of Kenboard's obligation to Barclays which held deeds.

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20

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103 Comma for appointment of Brice.

Continued.

¹⁰⁷
(ref 110/19 not challenged that that is an accurate summing up of position. No agreed s'ment as such of facts.

Legal Mtge

30

328 Companies Act and absence of consent.
328 Cap 228 - similar to English sect.
Pt. II K. by birth.
Pt. 10
Pt. XI Foreign by birth but naturalised
Pt. XIII

40

1 - 33 s 15(2) - power to hold land similar to s.13/(2) s. 14 of ng. 29 Nov. Power to hold land "without being in Mortmain's"

Corp. of Court v Wyben (1895)
A.C. 89 Eng. necessary to give power to land in any part of U.K. because of application thereof - otherwise no such power necessary.

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Pt. X nothing on this
Pt. XIs. 304 - 19 Eng 321 - 36

Important first because judge said
necessary to reg. under this part of
to hold land in white highlands.
Submit impracticable - see s. 312 -
attached be done. s. 322 "is
incorporated" - not "reg" under the
ord. 313 - bn reg. under these sects.,
the C. becomes incorporated in K. 10
This cd. hardly be expected of Bank
such as B.B.I.

J. suggested possible for Co. to
have dual nationality but I have
never heard of it. Submit Co. can
only be incorporated in one country.

Sec. 326 - 74 U.K. s 343 - 53

U.K. 345: "shall have the same powers"
and this section is in effect a
Proviso to the Mortmain Acts, other- 20
wise not necessary.

Section 328: Submit this was overlooked
in drafting 328. Under U.K. Act
Company has power to hold land any-
where in world, although Kenya law
can of course make own provisions.

Section 328: - Proviso: Fact it is
Proviso shows it is cutting down the
power to hold land generally. Submit
a. would need the power in the Proviso, 30
as Company already had it, "unless
Company is registered" in the Proviso
to the Proviso. If Company has been
registered under P.T. XI it ceases
to be a foreign Company and P.T. XIII
has no application to it. On Judge's
interpretation not a single Bank in
Kenya was entitled to receive legal
mortgage of property in Highlands.
Control was racial and it did not 40
matter where Company incorporated -
question of shareholders. Anyway,
Ord 36/58 is retrospective - Bank
Title Ord. deemed to come into
operation 15th December 1945. Subject
to Proviso to Section 1. Proviso had

exception retrospective to 1945.

Judge held my counterclaim on original claim and subsequent to 13th May 1958.

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O.8. Section 2-12 Kenya.

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545,6: 547-8 Amon v. Bobbett
(1899) 22 K.B.543
255,6: 256 bills Chappel v. North
(1891) 2 K.B. 252
Stumore v. Campbell &
Co. (1892) 1 K.B. 314,
317, 18, 18 and 19,
Kenya.

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113/22
117/1-4 Judge not entitled to say this.

117/10 seq. The 1958 Ordinance was declared to "remove doubts".

18th June, 1963.

118/12 In fact did not found it necessary to consider later, but clear how he would have dealt with it.
123/8

Continued.

O.7. Cap. 150: Judge wrong. Submit "person" does not include juridical person.

Interpretation Ordinance - definition of "person".

Cap.155 - Section 90 The limitation here can only be to natural persons - Company cannot have race. Company can have two residences but not race. In multi-racial society impossible for one Company to have one race and another a different one - place of incorporation does not indicate race. Section 90 not inclusive so far as other sections concerned but indicative. The Ordinances suggest that legislation meant "individual" when he said so and Company when he said so.

Section 91: Imprisonment. No punishment of directors included in 99, 94, 95, 96 - control of shares in G.

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Continued.

Section 88: Contrast between
Company and person. Purpose
is to stop acquisition of land
by company using a nominal
person to cloak real position.

Section 7: - Cap. 150: Distinction
is clear, if not clearer 7 (1)
(a) words "to any other person"
would not be necessary if person
meant natural or company. 10

Control is only over natural
person (racial matter) and not
over juridical person.

Only if person means natural,
why have exception in 7 (4)?
Looked at either way the section
does not make sense. My
construction would be preferred
- merit of same plan - racial.

8(1) (b) Test is individual - 20
not shareholders.

118/13 22 - judgment.

120/3 - Wrong Ordinance, but
definition same in
both.

120/31 Submit Judge wrong.

121/25 What is required is
consent to individual.

Adjournment to 10 a.m.
tomorrow. 30

E.D.W. CRAWSHAW

18.6.63.

19.6.1963 (10 a.m.)

BENCH AND BAR AS BEFORE

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Equitable Mortgage:

No. 14.

FACTS: October 4th - 6th.

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10

93/30-48)
29 para.6.)
105.) Kenboard discloses
its obligation to
Barclays and to
Development Co. by
payment of £20,000
and delivery of
letter of guarantee
from N.B.I.

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100/69 Barclays and Develop-
ment Corporation
released deeds to
Kenboard by making
payments to Barclays
and guarantees to
Development Corpora-
tion. Kentiles
discharged its
obligation to Kenboard
in that respect under
sale agreement and
received title deeds.

Continued.

20

23/38-48)
100/15) Title deeds were
deposited with N.B.I.
by attornment with
authority of Kentiles
in pursuance of their
loan arrangements.

30

INTENT:

Looking at all surrounding
circumstances and imputing to
parties intention as matter of
law.

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Continued.

As between Dr. and Cr. the
mere fact of possession of
title deeds raises a strong
presumption that they were as
security.

Guarantee Dis. Co. v. Credit
Finance E.A. 64/62

p.2. of Sinclair's judgment

5. of Newbold's judgment.

The above has always been
the law.

10

Deposit with intent - and
then see Cap. 152 - Eng.
Judgment Ordinance as it was
at the relevant time.

English Law - 1909 relevant
period, but no
change since.

27 Halsbury 165
bottom.

20

P.2. of Sinclair's
judgment -
Guarantee Co.

1-9 bottom - Crabbe's
judgment.

19 middle - Crabbe's
judgment.

Deposit with intent binds
Mortgagor to do all that necessary
to vest in Mortgagee - i.e. to
deliver Memo and to satisfy
provision of Section 127

30

of Crown Lands - Cap. 155.

If Mortgagee liable to be defeated by inadmissibility of evidence then duty on Mortgagor to do what is necessary, i.e. Memo, then though section 127 does not go so far as to deposit, does not make equitable mortgage.

DEBENTURE:

10

65

Kentiles has contractually undertaken to deposit. This contract provides no exceptions, but gives right to Bank to call for legal judgment. Equitable Mortgage protects Bank prior to legal mortgage. In instant case can it protect them from Ordinance 4 and or 6, or alternatively from moment Kentiles became legal owners. Debenture itself does not create the equitable mortgage.

20

Section 127 has no effect to agreements to mortgage and section 129(e) - agreement to give document which will create.

30

Evidence can be given of inchoate mortgage of deposit, otherwise Proviso defeated. Evidence could be given of deposit, or otherwise, which entitle Bank to call for Memo. Nowhere in pleadings is it said that there was an equitable mortgage already executed by deposit, and which cannot be given in evidence.

40

Section 127 has nothing to do with an inchoate transaction. Equitable mortgage Ordinance "such delivery ..." condition of registration of Memo. Deposit operates as an agreement to give a Memo.

71-
Chap.12. Not only obligation to give Memo by virtue of deposit, there is also express obligation under this clause.

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328 Company's Ordinance: It refers only
to legal estates "acquire".

If held to include equitable
interest, then Section 7 (4) Land
Control Ord. which exempts Banks and
Section 882 of Crown Lands make
nonsense.

If Bank could obtain Memo then it
could register deposit and bring
action as Equitable Mortgagor and
compel legal mortgage says respondent. 10
That would not be so, because calling
for legal estate would be ultra vires
- Section 329.

No need for Equitable Mortgage to
obtain legal estates. Respondent
says Debenture created legal Mortgage
and required to be registered. It
purports to give legal charge on
existing property, and agreement to 20
give charge on future property. It
will be a charge when property comes
into possession of Company; it gave
a charge over the land in question when
Company acquired it, but also gave
right to Bank to call for legal charge
also.

It has to look to purpose for which
Debenture tendered in evidence. Maybe
I cannot give evidence of Debenture 30
as a charge because not registered,
but I used it for other purposes.

Denning v. Edwards (1961) A.C.pp.241

Even the Debenture did not create
charge on land, there is room for the
Equitable Mortgage (this presumably
because there is no evidence of there
being a legal charge).

Deb.Ch.12: Within Section 129(e) which
is exception to Section 127, one can 40
sever that part of Debenture which
creates a charge from the parts which
do not. Closer to Edwards v. Denning
is to say that the Court may look at
the Debenture according to the purpose
for which it is tendered.

CONSENT:

Judge says often impossible to get consent immediately so J. held sections did not apply to Debenture affecting after acquired property. Section 7 (4) Section 88/4 - I rely on "Nothing in this section shall be deemed to preclude".

10

If Debenture creates a legal charge, I rely on Edwards v. Denning: other guarantee clause p.20 of Crabbe's Judgment - bottom.

If legal mortgage created by Debenture cannot be proved then the ground is clear for equitable mortgage as it cannot recognise the legal. p.2. of Sinclair's Judgment. 4. Newbold.

20

127/44 - 128/33 Section 328 says land situate in Highlands - it is using land in sense of definition of "Highlands". Otherwise I agree with Judge's conclusions.

128/34 seq.

133/9 Not to create one Equitable Mortgage, but a security.

133/ 11-14 I disagree.

30

134/62 Not "create" but "secure". Must be moment of time between contract and mortgage.

Judge held legal mortgage void and it is impossible for anything to merge with it.

135/16 This is not correct. Title deeds were held as security.

P.19. Gould's judgment in Guarantee case.

Ghana Commercial Bank v. Chandiram (1960) A.C.

40

745 Can fall back on Equitable Mortgage if legal ineffective.

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Continued.

I claim I am entitled to a Memo:
I would then register it.

On counterclaim I say Bank are
legal mortgagees; if held no then
entitled to Memo of Equitable
Mortgage.

O'Donovan 328 Proviso- Companies Ordinance:

No escape from conclusion it
prohibits foreign Company holding
land in Highlands unless registered 10
under P.T.Xi. Co's Ord. I adopt
reasoning of J. on this issue. History
of leg. reinforces my submission.

In 1943 Land Control Ord. - and
Section 88 of Crown Lands enacted
23/44. Proviso to section 328 added in
1945. All that legislation concerned
with are topic - controlling legal
and equitable interests in Highlands.

Foreign Companies not have to 20
deliver annual returns - Section 108
Crown Ordinance - therefore if any
change of shareholders not known to
Kenya. Original shareholders anyway
would be known under PT.XI. - control
of transfers.

Bank says does not matter because
of retrospective effect of Bank Titles
Ordinance. I do not object to 30
counterclaim being treated as separate
action, but in present case if able
to take any advantage in counterclaim
of later legislation, then he must
take the disadvantage of a decision
in the suit proper which disposes
finally of matters arising in counter-
claim. Not possible for court to say
mortgage ultra vires Bank so far as
Company concerned but not so far as 40
Bank counterclaim concerned. When
once court has decided issue on claim
in favour of plaintiff that is res
judicata.

6. 7 of Civ. P. Ord. and O.8. Section 2. Finality not chaos.

123/35 J. admitted it was odd.

Donaldson I agree. O'Donovan agrees res
O'Donovan: judicata in lower court.

N.B.I. v. Official Receiver (1959)
E.A.P. 687 line - seq.

CONSENTS:

10

Natural or juridical. I agree defects in legislation or any argument or construction. Question of weighing up, which person should include Company even the same words then unnecessary.

121/21 Legal Mortgage ultra vires Mortgagee.

Equitable Mortgagees by deposit

20

Under Eq. Mortgage Ordinance the fact which creates the security is the deposit, provided intention to create. Effect of Section 12 - Cap. 155 is that end of that transaction is inadmissible because no reg. Memo.

In fact Deb. is the Memo. To see what terms were etc., but it is not in prescribed form and never registered.

30

Guarantee Discount case does not support argument that able to look at Debenture. In that case a further loan involved, otherwise suggest argument would have prevailed.

132. Judgment: SHAW V. FOSTER.

Even though legal judgment ineffective, it shows the intention of the parties and they cannot disregard it.

PAUL v. SAHA (1929) 2 A.C.C. E.R.737:

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If Memo sought is the operative document it requires reg. if not the operative document, it merely records it.

126/18 I agree with J. If he is right then at 130/25) he is wrong.
132/32)

132/32 is inconsistent with 126/12

Deposit creates the charge and the Memo records it. Memo no use to Bank unless there has been a deposit. They cannot lead evidence of security; they should have obtained a memo at the time. To now obtain registration of a Memo, 10 years later, would defeat the purpose of registration which is to show title.

10

Section 129 (e). The Memo sought is not the document here, but merely a record. The Deb. also does not create a right.

20

Bank must show there was a deposit with intent and I submit they are not entitled to do that. Anyway they must show that on 1st November there was some interval of time between contract and legal mortgage. Both documents executed same day - a virtual legal fiction. Even if Bank successful on that point, I say that capacity in which Bank held deeds is a distinguishing 30 factor.

At moment legal Mortgage executed, Bank held deeds by virtue thereof under rights real or supposed and not on deposit. Appeal would fail on this ground also.

My third ground for appeal failing is claim of specific performance which would put Bank in position to obtain legal estate - Eq. Mortg. ineffectual unless putting mortgagee into such a position.

40

Clear that on 1st November parties

decided on legal mortgage and regarded that as position for 10 years; the contract between them has taken that form. Therefore if on 2nd November Bank had asked for Eq. Mortg. the answer would have been "You do not need it". In fact, Bank still says he is a legal mortgagee.

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10

Ghana Bank case: A decision on the facts of that case, intention of parties. I do not argue the matter on merger of interest as J. did, but support his finding of fact.

Section 127 is perhaps my better argument.

Deb: June 12: Deb. is not such document as in 129 (e) as it purports to charge the property itself. Cannot now rely on Deb. to say it is a contract only, when it itself creates the int. The Deb. says it is a fixed security on future land.

20

Debenture: Purports to create an int. in land but is void because not reg. and no requisite consents. Where document purports to create int. whether it fails does not matter. Section 126 Cr. Lands Ord. "purporting" to confer - Section 127. Having relied on document for what it purports to do, cannot later rely on it for another purpose.

30

Cr. Lands Ord. had no application to Debs. at all said Donaldson. Section 7 Land Control and 88 Crown Lands speak of charges "created by any means whatsoever" - wide enough to cover creation of charge by Debenture, even floating Debenture which only attaches to land in certain areas; on certain circumstances strange result, but result of this land leg. is Deb. would have to be registered after acquiring land because it could not be registered before. Inconvenience and mechanics

40

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(e.g. consent within 4 months) cannot
alter the law.

Adjourned to 2.15.

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On resumption - Bench and Bar as before

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O'Donovan continues:-

"Deb. wholly void" is not quite
accurate. It could be valid for certain
purposes, such as movables, but I say
wholly void as to the creation of any
right title or interest in land. No
reply to say that because not regis-
tered it creates no int. and does not
require registration.

10

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Submit your transaction is caught
by Cr. Land Ord. etc., A limitation to
extent they can now remedy situation.
They cannot say "give us a memo, so as
to put ourselves in possession of
memo". If they could, the Proviso is
nugatory for any mortgagee by deposit
can get what he want by one remove.

20

Continued.

Similarly, "mortgagee" under un-
registered legal mortgage if met with
objection not registered he could say
he was relying only on deposit and
wanted memo.

Proviso to Section 328. It is part
of system of leg. to control right not
only legal estate but eq. interest of
any kind - e.g. possession. Necessary
therefore to read Proviso in conformity
with leg. which immediately preceded it
so as to arrive at a harmonious system
of leg.

30

Odd if foreign Co. disqualified
from owning land in Highlands because
shareholding not open to local
authorities, nor transfer of shares
controlled, and if it is limited to
legal estates because what was control-
led was who actually occupied the
Highlands.

40

It is said there is repugnancy between the Proviso on that construction on sections 7(4) and 88(4) which dispensed with nec. for attaining consent.

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128/33 }
128/4)

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128 - Final para. Contains the correct answer.

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10

Submit in constitution (?) Bank is not required to ask for consents (e.g. Mortgage) under Land Control Ordinance, nor under Cr. Lands Ord. Consent would be required to legal mortgage.

Submit argument against me as to Proviso S.328 is not a substantial one.

Continued.

CROSS APPEAL.

20

Deb. is put forward as defence to action for trespass because it is put forward as effective security or charge over suit land which has been enforced by Receiver in possession.

30

The Deb. having purported to create legal charge, it cannot be separated into that and eq. rights. The fallacy is that the appointment of receiver is the mode of enforcing security, and unless security good you cannot appoint receiver.

I ask Appeal be dismissed and Appeal be allowed against Bank. I ask nothing against Brice. I ask for everything I asked for in plaint against Bank but not against Brice. Sufficient to order possession against Bank.

40

I ask for declaration that security void, land unencumbered, mesne profits, and possession and enquiry.

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Continued.

Donaldson: The judgment of the lower court
being outstanding against Brice,
uncertain what position of Bank
would be.

136/8 True that declaration in suit will
28/23 not bind a person nor a party, but in
this case it is known that there is a
second Deb. held. It cannot in his
absence be said second Deb. holder
could not succeed. 10

Claim for possession operates in
reverse. Order cannot be made to
deliver to Liquidator land which is
known to be subject to second Deb.
holder.

135/29 Before J. I submitted suppose
Bank had no legal right to be in
possession but had right to eq. int.
this court administering equity would
not allow Bank to be dispossessed 20
whilst Memo being obtained when only
defect is lack of Memo.

Not a question of Bank sleeping on
rights. All equities are in favour
of Bank which continued to advance
money to Co. regarded Bank as secured
and intended it to be.

110. Hurst v. Picture Theatres (1915) 1.
K.R. 1. Tho' Earl cited therein. We
do not appeal from this preliminary
point. 30

124-127 J. saying (a) that Deb. does not
require registration under Cr. Lands
Ord., and (b) that anyway Deb. may be
looked at to rely on possession.
Mortgagee at least entitled to equiva-
lent of a lien on land as debenture -
a right to hold subject matter of Deb.

S.127 (2) Cap 155: Does mortgage apply to
antecedent agreements to create mort-
gate charge. An open question, but
absence of mention of ag. point to Ag.
not being included. 40

Edwards v. Denning: Sec. 88 is

concerned with completed transaction.
p. 251 of the App. cases - Edwards v.
Denning 252 last para.

P.C. decided that section 88 had
no concern with agreements. Submit
same approach should be adopted to notes
126 and 127. If O'Donovan is right
then it may explain why Deb. not reg.
It relates chiefly to further property.
In fact future property cannot be
charge, you can only agree to charge it
and Deb. does not therefore come with-
in Section 127.

An alternative way of treating the
matter is to rely on 129(e) which is
not distinctive of earlier argument.

On Co. subsequently acquiring land
after Deb. Deb. creates a charge, but
does he get his charge by virtue of
Deb.

You are charging property in
pursuance of eq. and not by Deb.
Anyway the charge arises - legal charge
subject to reg. etc.,

All I need do on mortgagee's claim
is to defeat claim for possession and
declaration of right to property free
from encumbrances.

Reply to my Appeal:

Banks Title Ord: Proviso - v.
additional proviso.

Mortgages created prior to 13th May
1958 may be subject to different laws
according to when suit commenced, in
spite of fact that the securities are
continuing ones - before and after
15th May. It does not affect "rights"
of persons before or after a certain
date; the test is only date of suit.
It is a more limited Proviso than one
which affects rights.

O'Donovan says my argument will

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Nairobi

No. 14.

Notes of The
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Justice
Crawshaw on
hearing of
Appeal and his
ruling on
preliminary
objection to
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cross Appeal.

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Continued.

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create inconsistencies, but we had
a lot of those already in other
Courts. No question of res judicata.

Claimant asked for possession etc.
at date of claim. Counterclaim asked
for declaration as to its position at
date of counterclaim.

In the way the Judge decided the
matter (with which I agree), the
position does not matter. All has
done is to say - Company not entitled
to its claims. 10

Bank could have urged that by time
of counterclaim position had changed
no res judicata because law changed
between suit and counterclaim. Cannot
plead res judicata on appeal in
respect of defences which failed.

Deb. does not identify the amount
loaned which charges. It does not
mention the future property. 20

PT XI Companies Ordinance. Leg.
would not contemplate that Banks etc.,
would reg. under PT.XI merely for
purposes of 7(4) 88(4).

O'Donovan: Land comes under Cr. Lands
Ordinance not required of Titles Ord.

28. 2nd Deb. unregistered (Donaldson
agrees).

Declaration of unencumbered.

7(4) 88(4) Parting with possession would
be a complete transaction.

Bank's Deb. void for lack of
consent.

Donaldson: Never before been suggested that
consent required to possession.

Judgment reserved.
E.D.W. CRAWSHAW.
Appeal Judge.
19.6.63.

157.

NO. 15.

NOTES OF THE HONOURABLE MR. JUSTICE
NEWBOLD ON HEARING OF APPEAL.

IN THE COURT OF APPEAL FOR EASTERN AFRICA
AT NAIROBI

CIVIL APPEAL NO. 21 OF 1962

BETWEEN

NATIONAL AND GRINDLAYS BANK LIMITED . . APPELLANT

AND

10 KENTILES LIMITED (In Liquidation)
and THE OFFICIAL RECEIVER as
Liquidator thereof . . RESPONDENTS

(Appeal from a Judgment and
Decree of the Supreme Court
of Kenya at Nairobi (Miles
J) dated 30th October 1961

in

Civil Case No. 658 of 1958

Between

20 Kentiles Limited (In
Liquidation and The
Official Receiver as
Liquidator thereof Plaintiff

and

Hubert Richard Brice 1st Defendant
National and Grindlays
Bank Limited 2nd Defendant).

Copy of Notes taken by the Hon.
Mr. Justice Newbold

30 18.6.1963 CORAM: GOULD, AG: V.P.
10.30 A.M. CRAWSHAW, J.A.
NEWBOLD, J.A.

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Donaldson, Q.C. & Harris for
Appellant
O'Donovan, Q.C. & Georgiadis
for Respondents

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Continued.

Donaldson Respondents gave notice of cross
appeal -

Sets out facts.

18/ 9/51 Respondents incorporated.
26/ 9/51 Sale to Respondents of
L.R. 57.

1/10/51 Agreement for loan on 10
security of debenture and
legal mortgage.

5/10/51 Barclays paid off with
money provided by Appellant.

1/11/51 Kenboard completed conveyance
of L.R. 57 and on same day
Respondents purported to
give legal mortgage to
Respondents.

7/11/56 Resolution for winding-up of 20
Respondents

20/11/56 Receiver appointed under
debenture

22/11/56 Brice took possession
11/1 /57 Order for winding-up
7/ 5/58 Action begun by Respondents
claiming injunction and
declaration and order for
possession and account,
damages etc. 30

16/ 3/59 Appellant filed counter-
claim for declaration that
legal mortgagee or that
Respondents deliver a
memorandum.

Judge dismissed claim for possession
on ground that under debenture
entitled to go into possession.

Judge dismissed counterclaim holding 40
that Appellant not legal mortgagee
or entitled to memo - appeal against
this.

Can Respondents under rule 65(1) cross

appeal against dismissal of claim
for possession ?

Submit notice under rule 65 in-
appropriate where appeal is different
cause of action and where party to
action not party to cross appeal.

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10

Rule 65 requires notice to be given
to Appellant - no provision for
serving notice on stranger - but
Brice has judgment in his favour and
now sought appeal this judgment.

Submit "decision" in Rule 65 means
decision which is subject matter of
appeal.

If causes of action different then
record filed by Appellant may be
defective - Brice's defence not on
record.

20

Under Rule 65 Appellant unable to
give notice seeking to uphold their
claim on grounds different from
those relied on by Judge.

Rule 65 based on O.58 Rule 6.

National Society for Distribution
of Electricity v. Gibbs (1900) 2 Ch.
D. 280, 286, 287 - when exparte
causes of action notice of cross
appeal not sufficient.

30

Here all parties are not before
Court - causes of action on claim
and counterclaim quite different.

Cross-appeal - rightly entitled with
no reference to Brice. Paras 1, 2, 3
relate to claim, 4 and 5 to counter-
claim - except that 5(c) also applies
to plaint.

40

Submit paras 1-3 and 5(c) be struck
out and Respondents left to apply for
leave to appeal out of time - on such
application Appellant will oppose
strongly - letters written.

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Appellant not concerned to stand on
technicality - only concerned to
assert substantive rights.

O'Donovan Appellants submits Respondents'
notice not suitable - Rule 65 differs
from Order 58, Rule 6.

Rule 65 deals in terms with cross-
appeals - in U.K. cross appeal quite
different from notice - that
distinction does not exist here. 10

Submit Rule 65 intended to deal with
both cross appeal and Respondents'
notice.

Submit not correct to say action and
counterclaim completely different -
common ground that object was to
challenge validity of a security
created by debenture and mortgage -
object of both to ascertain whether
Appellant a secured creditor. 20

This conceded in previous appeal 1959
E.A. 684, p.686 - issues in counter-
claim inextricably linked with issues
in defence to plaint.
See paras 1, 3, 4 and 7 of Memorandum
of Appeal - Memorandum of Appeal
raises all questions in both claim
and counterclaim.

If Court against me ask that notice
of cross appeal be accepted as sub-
stantive cross appeal as was done in
National Society case - see P. 284.
Object of litigation to ascertain
whether Appellant a secured creditor
- both sides seek to construe judg-
ment as in their favour on that point
- if appeal fails position of deben-
ture would still exist. 30

Argument that Brice not joined is a
formal one - agree Rule 65 does not
envisage service on Brice - his
joinder as defendant a formality -
never was it suggested that his
interest different from Bank's - Rule
71 - power to direct service - If 40

Court thinks that he should be joined party then I ask that Court make an order to that effect. Rule 71 envisages this position. Brice not essential as far as I am concerned.

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10

If Court entirely against me then I ask informally for leave to appeal - see Cavanders Trust, 16 Ch.D 270, 272.

To summarize :-

- 1) Rule 65 deals with cross appeals.
- 2) Claim and counterclaim inextricably linked.
- 3) Extent compliance with Rule 65 which does not envisage service on Brice but this can be done under Rule 71.
- 4) Ask that be given leave to give notice of appeal.

18th June, 1963

Continued.

20

Donaldson

Agree that open to Respondent to include anything he likes.

This not an arid point - an appellant has to give security under Rule 58 - or power under Rule 60 to order additional security and for past costs.

30

Here Respondent is lacking in means - on cross appeal Court should consider question of security.

If leave to be given it should be on basis that security for costs below given to Appellant and Brice.

Rule 71 - Submit this a manoeuvre to avoid position re security - submit ultra vires this Court - only enables Court to deal with person who party or ought to be party.

40

If Court allowed cross appeal my certificate only applies to appearing for Appellant.

Of course claim and counterclaim

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Continued.

O'Donovan

18.6.63
2.15 p.m.

Donaldson

Court

Donaldson

intermingled but nevertheless
question of costs and security.

Submit notice defective and Court
has no power under Rule 71 to put
matter right - in any event only
on terms of full costs.

Costs - Rule 69 allows of applica-
tion for security - in case of
cross appeal - but no application.

Adjourned for few minutes.

C.D. NEWBOLD
J.A.

On resumption: Bench and Bar as
before.

Gould V.P. - allow cross appeal to
be treated as notice
of appeal. Costs to
Appellant.

Crawshaw - Agree.
J.A.

Newbold
J.A. - Differ.

Can I raise other matters?

Yes.

Will deal with appeal.

Judge held Appellant not legal
mortgagee.

Appellant submits 328 of Companies
Ordinance does not prevent foreign
company holding land in Highlands.

If sec. 328 had this effect then
mortgage validated retrospectively
by sec. 2 of Ord. 36/58. Consent
under Cap 150 and 155 not required
as Appellant a juridical person and
consent only required if mortgagee
a natural person.

10

20

30

Judge held Appellant not entitled to memo of deposit as deeds not deposited with intention to create equitable mortgage - held right to call for memo merged in legal mortgage.

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10

Appellant submits agreement and intention of parties to create an equitable mortgage till effective legal mortgage created - if no effective legal mortgage created then Appellant entitled to have equitable mortgage effected by memo. Ground 5 of cross appeal.

Notes of The Honourable Mr. Justice Newbold on hearing of Appeal.

Appellant applied for consent to mortgage - stated not necessary.

18th June, 1963.

Damages not relevant to any appeal.

Continued.

Debenture dated 1/10/51

20

Clause 2 - obligation to deposit title deeds of any subsequently acquired property by way of equitable mortgage and secondly if required to execute by a mortgage.

Clause 7 - receiver.

Clauses 11 & 12 - powers of bank.

Debenture registered under Companies Ordinance but not under Cap. 155 - instructed debenture not registered under Cap. 153.

30

Do not pursue point that registration under Cap. 155 conclusive.

Conveyance from Kenboard to Respondents.

Evidence of Mackie-Robertson.

Mackie-Robertson held title deeds to order of Barclays - reversion in Kenboard - on 5/10/51 held deed for Appellant with reversion in Respondent.

P.107-110 of judgment summary of

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facts given on question of
intention no dispute on facts.

Legal mortgage - objection due
to sec. 328 and absence of consent.

Cap. 288, sec. 328 - submit 4
classes of companies

Part II - Kenyan after Ordinance.

Part X - Kenyan before "

Part XI - Kenyan by naturaliza-
tion.

Part XIII - Foreign.

10

Kenya Company - power to hold land
- sec. 15(2)
- parallel in 1929 U.K.
sec. 13(2) & 14

Mortmain Acts do not apply to lands
held outside U.K. - Wyburn's case.

Kenya Pre-Ordinance Company -
treated as post Ordinance.

Kenya by naturalization - U.K. 321-
336.

20

Judge said should register if
desire to hold land - could have
done so but not practical.

Foreign Company - U.K. 343-353 -
sec. 344 and 345 - this necessary
as Company could not hold land in
U.K. - in effect a proviso to
Mortmain Acts.

This fact overlooked by draftsmen
of Kenya Ordinance.

30

Sec. 328 surplusage - proviso
sets down power given by main body
of section - this merely says no
power to hold land in Highlands -
but already have power.

Proviso does not have the effect of
prohibiting holding land in High-
lands.

Amendment means particulars under

40

sec. 327 and not as Judge has held under Part XI.

This cannot be right as it then a Kenya Company and it is not so - it must thus be a reference to sec. 327.

Result is that Appellant entitled to legal mortgage in Highlands.

10

Amending Ord. is retrospective - amendment includes Appellant - Proviso to sec. 1 - submit Judge correct in saying counterclaim separate action Order 8 Rule 2 & 22.

Amon v. Bobbett, (1889) 22 Q.B.D. 543, 545/6, 547/8

Chappell v. North (1891) 2 Q.B.D. 252, 255/6, 256

Stumore v. Campbell & Co. (1892) 1 Q.B. 314, 317, 318 318/9

20

Judgment P. 113, 1.22 - submit P.117, 1.3. wrong. - P.118, 1-12 - Judge did not consider it later but at P.123, 1.8. clear he regarded it as applying to counterclaim.

This deals with sec. 328 in relation to legal estate in land.

30

Submit Judge wrong in holding consent of Governor and Land Board necessary under sec. 7 of Cap. 150 and sec.88 of Cap. 155.

Does word "person" include juridical person. Cap. 150, sec. 7 and Cap. 155, sec. 88.

Interpretation Ord - person includes juridical person unless context otherwise requires. Does context otherwise require?

40

Cap 155, sec. 90 - does it mean natural person.

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Cap 155, sec. 91 - by reason of
reference to
penalty - conform
with sec. 99
sec. 94-96 - code for Companies
holding land in
Highlands.

Sec. 88 - contract between person and
Company - see "person or any company.."

Cap. 150, sec. 7 - natural person may
sell to Company. 10

7(1)(b) - "person or of any company .."

But 7(4) is contrary to my submission.
No construction makes sense - submit
in circumstances my submissions should
be adopted.

Sec. 8(1)(b) - reference to shares.
Judgment P.118-122

Adjourned to 10 a.m. on 19/6

Sgd. C.D. NEWBOLD 20
J.A.
15/6

19th June,
1963.

19.6.1963 BENCH & BAR as before
10.00 A.M.

Donaldson Equitable mortgage.

What are facts.
Vital date 4 Oct.
Kenboard discharged obligation to
Barclays by payment of £20,000 and
delivery of letters of guarantee 30
signed by N.B.I. p.93,1.8.
p.99, para 6.
p.105

Barclays released title deeds to
Kenboard p.

By paying Barclays and delivering titles
Kentiles discharged obligation to
Kenboard and received title deeds to
property. P.93,1.38-48. P.100,1.9.5

Title deeds deposited with N.B.I. by
attornment with authority of Kentiles 40

pursuant to loan arrangements with N.B.I.

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10

What was intent with which deeds deposited? To be inferred from surrounding circumstances. As between debtor and creditor fact of deposit raises a presumption - CA. 64/62
Sinclair P - p.2, l.2.
Newbold J.A. - p.5, l.20

Cap. 152 sec. 2 - same position as U.K.

27 Hals. 165/6

Sinclair P - p.2) Deposit of
Gould VP - p.9/10 & 19) title deed

20

Submit deposit with interest creates an equitable mortgage and creates an obligation to do all necessary things - including a memorandum for sec. 127 of Cap. 155.

Duty to vest rights in mortgage carries a duty to do all things necessary to enable evidence of mortgage to be given.

Submit attack on debenture ill-founded but if good submit can rely on deposit and obligation to do all necessary things.

30

If Court does look at debenture their para 2 creates obligation to create an equitable mortgage which quite separate from legal mortgage.

Equitable mortgage protected Appellant from moment that Appellant became owner of land.

40

Submit sec. 127 no application to agreements for mortgage and also rely on sec. 129(e). In suit? to compel delivery of memo evidence tendered to make good obligation to deliver.

Debenture gives express obligation to deliver memo - clause 12.

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Does sec. 328 prevent equitable mortgage?
Submit it refers only to legal estates - submit "acquire" means legal ownership.
Also if it includes equitable interest then sec. 7(4) of Cap.150 and sec. 88(4) of Cap. 155 are nonsense.

It is said if Appellant can obtain equitable mortgage he could obtain also a legal mortgage - submit this does not follow.
Equitable mortgage only gives right of legal mortgage - does not make into one.

10

Submit debenture did not create mortgage. It was agreement to create legal mortgage and did not create a charge, when acquired the property was charged by debenture.

20

What is purpose for which debenture tendered in evidence?
Do not seek to use debenture to prove charge.
Denning v. Edwards (1961) A.C. 245, 251.

Use debenture to show intention of deposit of title deeds and also receives right to go into possession.

30

Clause 12 right within sec. 129(e).

Is debenture void as not registered under Cap.155?
Submit Cap. 155 does not apply to debenture.

Is it void for absence of consent?
Submit not- clear having regard to time factors that do not apply to debentures.

Submit Ord. does not prevent use of debenture for equitable mortgage - see secs. 7(4) and 88(4).

40

Gould - P. 20 bottom.

Newbold - P.2, 1.5.

Judgment, P.127,6.33 - P.128,1.20
- submit reasoning in error - sec.
328 refers to land situate in
Highlands - does not refer to land
defined in our Ordinance.

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P. 133,1.8 - intent must be to create
security.

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10

P. 135,1.9 - if legal mortgage void
then lower security could not merge
in it.

Gould V.P. - P.19, 1.15
Ghana Commercial Bank (1960) A.C.
732, 745.

19th June,
1963.

Submit Appellant intended rights as
equitable mortgagees to be presumed
until they obtained effective legal
mortgage.

Continued.

20

Submit entitled to order giving me
a memorandum.

Submit -

- 1) Appellant legal mortgages or
- 2) entitled to memo whereby can
become equitable mortgagees.

Thus entitled to succeed on counter-
claim.

O'Donovan

Proviso to sec. 328.
Submit no escape from conclusion it
prohibits foreign Co. from holding
land unless registered under Part XI.

30

Adopt reasoning of Judge.
Reinforced by history of legislation.
Land Control in 1943.
Sec. 88 of Cap. 155 in 1944.
Proviso to section 328 in 1945.

40

All this relates to restriction on
legal estate or equitable interest
in Highlands. Foreign Company does
not deliver annual return - thus
change of ownership of equity
capital not known.

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Position re amendment of 1958.
Agree counterclaim separate action for
many purposes but not for this
particular case.

If Appellant can take advantage of
amendment it must be on basis that it
is later case and a previous decision
has been given on this which disposes
of position for all time. Not
possible for Court to say mortgage
ultra vires for suit but not ultra
vires for counterclaim. 10

Question on suit is whether mortgage
ultra vires - decision on this makes
it res judicata for all purposes.
Sec. 6 and 7 of C.P.O. and Order 8
Rule 2.
Purpose of counterclaim is finality
not chaos.
Judgment P.123,1.31 - submit Judge
wrong. 20

Appeal in 1959 E.A. 687 A.

If Judge divides issues on suit he
cannot divide same issues differently
on counterclaim.

Are consents unnecessary for a non-
natural person?
Agree these are defects and that
impossible to put forward view which
removes all objections, but submit
that on balance it is clear that
person covers company. 30
Adopt Judge's reasoning - especially
P. 121,1.20.

Submit legal mortgage invalidated
because it ultra vires mortgage and
created without consents under caps.
150 and 155.

Are Appellant's equitable mortgages
by deposit or are they entitled to
Specific Performance of agreement to
deliver memo. 40

Under Cap. 152 fact which creates

security is deposit if made with interest to create security.

Effect of sec. 127 is that evidence of transaction is inadmissible as no registered memo.

Submit debenture is the memo as that sets out terms - but not in prescribed form and not registered.

10 Can he rely on bare deposit without debenture - submit no - Guarantee Case does not support it - further payment created right

Shaw v. Foster - Ed.Carrus?? - P.132

Paul v. Nath Saha (1939) 2 A.E.R.737

If memo they seek is operative document creating security then it required registration - if not operative document it does not create but merely records security.

20 If. P. 126,1.20 right then P.132,1.32 is wrong.

Under Cap. 152 it is deposit which creates charge and memo which records it.

30 Thus Appellant in difficulty that memo of no use unless there has been a deposit creating a security. But cannot lead evidence of deposit with intent as did not obtain a memo and register it.

Crown Lands Ordinance intended to ensure that all interests registered except equitable interest if memo registered.

If after 10 years could obtain memo it would defeat purpose of legislation which to enable outstanding interests to be obtained.

40 Sec. 129(c) - does not come in this as memo they seek merely a record.

Also must show a deposit with intent

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if can lead evidence (submit not)
Appellant has to show that on 1st
Nov. a period that Appellant legal
owner and by attornment document
deposited with intent with A. But
conveyance and mortgage executed
contemporaneously. At that moment
in what capacity did Appellant hold
deeds. Submit at moment when legal
mortgage executed Appellant held
deeds in pursuance of legal mortgage
and this not on deposit. Also what
Appellant seeks is equitable relief
of specific performance - if ultra
vires to own legal estate this good
reason to refuse equitable right
which would enable them to achieve
ultra vires result.

10

Whatever was originally agreed
parties could remit performance and
parties decided on 1 Nov. to get
legal mortgage and did get it.

20

Ghana Bank Case - decision on facts.

Sec. 129(e) - memo sought would
only record rights - as regards
debenture it is a document charging
- not possible to sever parts. -
debenture designed as security - word
"merely" in sec. 129(e).

Debenture purports to create contract
- void as not registered and made
without consents.

30

If document purports to create contract
then if it fails in that it does not
matter for sec. 126 & 127 of Cap.155.

Appellant submits Cap. 150 & Cap. 155
does not apply to debenture. Submit
sec. 7 or sec. 88 refer to charges
created by any means - this wide
enough to include debenture.

40

Debenture could be registered after
acquisition of land.

Adjourned to 2.15
(sgd) C.D. NEWBOLD.
19/6

On resumption: Bench and Bar as before.

O'Donovan continues :

Debenture wholly void in so far as it relates to an interest in land.

No reply to say that as it creates no interest it does not require registration.

10

The debenture, legal mortgage, deposit caught by Cap. 150 and 155 and they cannot remedy position by saying now give me memo so I can put myself in order. If they could proviso would be nugatory.

So also mortgagee under unregistered legal mortgage cannot say that he relies on it as entitling him to -- memo to qualify as equitable mortgagee.

20

Submit acquisition of equitable interest ultra vires Appellant. Proviso to sec. 328 - designed to control interests of any nature - should be read in conformity with sec. 7 and sec. 88 so as to arrive at harmonious system of legislation. Qd. if foreign company could be disqualified from owning legal estate but could have beneficial interest - which is real interest? Submit no repugnancy between section 328 and 7(4) and 88(4). See P. 128 and 129 - submit these sections give nothing. Submit answer at P. 128, 1.35 - 7(4) and 88(4) do not permit land holding - it only prevents necessity for consent.

30

Thus even equitable mortgage ultra vires.

40

Cross Appeal

Debenture put forward as defence to trespass and put forward as security over land which in force by receiver

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in possession.

Judge having held that debenture purported to create security erred in saying that empowering receiver was good. Appointment of receiver is mode of enforcing security and unless security good cannot appoint receiver.

Ask that appeal be dismissed and that cross appeal be allowed against bank - a declaration against bank that land unincumbered.

Declaration against bank that security void and that Respondents owners of unencumbered estate and that Bank deliver up property and that enquiry into mesne profits and an account.

10

Donaldson Submit in so far as ask for order for possession cannot have it as inconsistent with judgment giving Brice's rights.

20

P. 136, 1.10 - cross appeal must succeed on strength of our title.

True a declaration will not bind third party - but if Court knows that it is not unencumbered it should not make declaration.

Impossible for the Respondents to get declaration in terms asked for.

Claim for possession operates in reverse - Court is asked to deliver up premises over head of receiver properly in possession.

30

Hurst v. Picture Theatres (1915)
1 K.B. 1 - if equitable mortgage to be perfected it would not permit interim dispossession due to absence of perfected equitable mortgage.

Equities on side of bank and they lent money - Respondents would not have had money except on basis of being a secured creditor.

40

Fact that receiver and manager

appointed does not mean it a charge
- it is merely a lien.

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Does section 127 extend to antecedent
agreements which lead to mortgage,
etc.?

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Edwards v. Denning - evidence of
agreement to mortgage etc. as section
88 relates to completed transactions:
so also should sections 126 and 127.

Notes of The
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Mr. Justice
Newbold on
hearing of
Appeal.

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As at date of execution debenture
operates as agreement in relation
to after acquired property.

19th June,
1963.

Submit doubtful whether charge
created by or in pursuance of
debenture.

Continued.

On counterclaim I must go further
and show either legal or equitable
mortgage.

Proviso to section 328

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More limited than one related to
rights as it deals with actions.

Thus not matter of judgment
inconsistent on claim and counter-
claim - no question of res judicata

Submit no trespass and Respondents
not entitled to possession and that
no declaration and thus no conflict
if held that following amendment
Appellant was mortgagee.

30

Debenture cannot be the memorandum
- it does not contain any of neces-
sary particulars.

O'Donovan

On counterclaim.
Abstract of title at page 79
- unencumbered
Page 28 - 2nd debenture not
registered.

40

Section 88 - entry into possession of
receiver is a completed transaction
and would thus require assent.

176.

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Donaldson This first time that reference to
consent for possession.

C.A.V.

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(Sgd) C.D. Newbold.

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RULING OF THE HONOURABLE MR.
JUSTICE NEWBOLD ON PRELIMINARY
OBJECTION TO NOTICE OF CROSS
APPEAL DATED 18TH JUNE 1963

18th June,
1963.

IN THE COURT OF APPEAL FOR EASTERN AFRICA
AT NAIROBI

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CIVIL APPEAL NO. 21 OF 1963

BETWEEN

NATIONAL AND GRINDLAYS BANK LIMITED . . APPELLANT

AND

KENTILES LIMITED (In Liquidation)
and THE OFFICIAL RECEIVER as
Liquidator thereof

. . RESPONDENT

(Appeal from a judgment and
decree of the Supreme Court
of Kenya at Nairobi (Miles J)
dated 30th October, 1961

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in

Civil Case No. 658 of 1958

Between

Kembiles Limited (In
Liquidation) and The
Official Receiver as
Liquidator thereof

Plaintiff

and

Hubert Richard Brice First Defendant

and

National and Grindlays
Bank Limited Second Defendant)In the Court
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NairobiNo. 16.Ruling of The
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Notice of
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1963.

Continued.

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RULINGNEWBOLD J.A.

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I regret that I find myself differing from the other members of the court on this matter. This was a case in which a plaintiff brought an action against two defendants claiming as against each of them an injunction to restrain the two defendants from entering certain land; a declaration against the two defendants that the plaintiff was entitled to be regarded as the free and unincumbered owner of the land; an order for delivery of possession of the land against both defendants; an order for an account against both defendants; and mesne profits and damages against both defendants. One of the defendants filed, in addition to his defence, a counterclaim.

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The learned judge who tried these issues dismissed the plaint with costs to each of the defendants and dismissed the counterclaim with costs to the plaintiff. The second defendant, who had claimed by way of counterclaim, then gave notice of appeal and very shortly after that the plaintiff gave notice of cross appeal. The notice of cross appeal given by the plaintiff did not include the first defendant. The claim against both

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Continued.

defendants raised precisely the same issues in that the first defendant entered upon the land at the instance of the second defendant. It is to my mind quite impossible to draw any distinction on the facts between the positions of the first and second defendants. Mr. Donaldson has taken a preliminary objection that the cross appeal will not lie because, as the notice of appeal relates to the counterclaim, any question of raising an appeal the decision on the plaint itself should be done by a separate notice of appeal. He refers to the English position on that, but with respect to him it is not the English law we have to construe but the local law. As I see it, Rule 65 of the Rules of this Court clearly covers this case. His second argument against the validity of the notice of cross appeal is that it relates only to the second defendant and leaves in the air the position as regards the first defendant. To my mind that is a very good objection indeed. The decision of the learned judge has the result that the first defendant is entitled to remain in possession of the land and that, as regards the first defendant, the debenture and the various other documents whereby he entered into possession are perfectly good and valid. Should the plaintiff succeed on his cross appeal, we would then have the extraordinary position whereby judgment in the same action would, for the two defendants and the same plaintiff, have precisely opposite effect. To my mind that is a position which a court could not permit, so that it seems to me that it is absolutely essential to join the first defendant on the cross appeal. Was however, the plaintiff wrong having regard to rule 65 in giving a notice of cross appeal and not a notice of appeal. In my view he was not. Rule 65 entitled him to do precisely what he did do and it is unfortunate that as a result of doing so we may then have the position in which the judgment would have effect differently in relation to the parties to it. That, in my view, should be covered by an order under rule 71. Now, as I see it, if the notice of cross appeal is to be treated as a notice of appeal served on the

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10 first defendant the result of that must be to
 put the first defendant in jeopardy on this
 appeal in a number of respects; in jeopardy
 in relation to the order for costs made in his
 favour, in jeopardy in relation to the costs
 of the appeal, in jeopardy in relation to
 mesne profits and damages. The respondent by
 his notice of cross appeal has not as I see
 it, at any time intended to put the first
 defendant in jeopardy. I would, therefore,
 in order to remove the anomaly which I see
 as possible in the event of this court allowing
 the cross appeal, make an order under rule 71
 directing that the first defendant be made a
 party to this appeal and that the documents be
 served upon him. But on these terms: the
 terms being that in no circumstances would the
 order for costs in the court below in his
 favour be varied; that he would not be called
 20 upon, should he be unsuccessful, to be liable
 for any costs on the appeal; and that, should
 the respondent be successful on his cross
 appeal, no order by way of damages or mesne
 profits would be made against him. It would
 then be open to the first defendant who thus
 becomes a party to this appeal to decide
 whether or not to appear, as it would be open
 to him not to appear without prejudicing his
 position. At the same time we should by the
 30 decision of this court on appeal be able to
 vary the order of the court below in relation
 to both defendants and should the cross appeal
 be successful, thus avoid the anomalous
 position of the same judgment operating in
 different ways in respect of the two defendants.

Dated at Nairobi this 18 day of June, 1963

Sgd. C.D. NEWBOLD

JUSTICE OF APPEAL.

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40 JUDGMENTS OF THE COURT OF APPEAL
DATED 29TH AUGUST, 1963.

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CIVIL APPEAL NO: 21 OF 1962

BETWEEN

NATIONAL AND GRINDLAYS BANK
LIMITED . . . APPELLANT

No. 17.

AND

Judgment of
the Court of
Appeal

KENTILES LIMITED (In
Liquidation) }
AND }
THE OFFICIAL RECEIVER (as
Liquidator thereof) } . . . RESPONDENTS

29th August,
1963.

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The Honourable
Mr. Justice
Crawshaw.

(Appeal from a judgment and
decree of the Supreme Court
of Kenya at Nairobi (Miles J)
dated 30th October, 1961

Continued.

in

Civil Case No. 658 of 1958

Between

Kentiles Ltd. (In
Liquidation) }
and }
The Official Receiver (as
Liquidator thereof) } Plaintiff 20

and

Hubert Richard Brice 1st Defendant
National and Grindlays
Bank Limited 2nd Defendant).

JUDGMENT OF CRAWSHAW Ag. V-P

On the 7th May, 1958 the respondents
filed a suit against the appellant as second
defendant and H.R. Brice as first defendant 30
claiming inter-alia possession of certain
land with buildings and fixtures thereon
(hereinafter referred to as the "suit premises"),
which Mr. Brice had taken possession of as a

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receiver appointed by the appellant under
a debenture issued by Kentiles Ltd. (here-
inafter referred to as "Kentiles") in
favour of the appellant. The appellant
denied that the respondents were entitled
to any of the reliefs claimed, and in a
counterclaim asked for certain orders
against the respondents. Brice is not a
party to these appeal proceedings, and
pleadings relating to his defence did not
appear on the record. On the 30th October,
1961, judgment was given by the Supreme
Court dismissing the respondents' suit with
costs and dismissing the appellant's counter-
claim with costs. The appellant appealed
against the dismissal of his counterclaim.
The respondents gave "Notice of Cross
Appeal" asking that the dismissal of the
counterclaim be affirmed on grounds other
than those relied upon by the court, and
that the order dismissing the suit be set
aside. As I have indicated, Brice was not
made a party to the appeal or cross-appeal.
Objection was taken by Mr. Donaldson for
the appellant at the commencement of the
hearing of the appeal that the respondents'
complaint against the dismissal of their
suit would have formed the subject of a
separate appeal. With this we agree,
Newbold J.A. dissenting. As however, the
appeals could have been heard together,
and having regard to the close relation-
ship between the matters in question, we
thought it right (Newbold J.A. dissenting)
to order that the notice of cross-appeal
should, as regards paragraphs 1, 2 and 3
thereof, be treated as a separate appeal.
Mr. O'Donovan for the respondents said
that he would have no objection in the
circumstances to the appellant asking, if
it thought fit, during the hearing of the
appeal that the judgment dismissing the
respondents' claim be affirmed on other
grounds.

The facts, although agreed, are
important for the purposes of this appeal,
and are in the words of the learned judge:-

"The plaintiff company was
incorporated in Kenya on the 18th

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September, 1951 with a share capital
of £500,000 in £1 shares. The
certificate under section 95(3) of the
Companies Ordinance was issued on the
27th September, 1951.

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In September, 1951 the plaintiff
company entered into negotiations with
the second defendants who were then
known as the National Bank of India
Limited for a loan on security of
£90,000. On the 26th September it
was resolved at a meeting of directors
that subject to the issue of a
certificate under section 95(3) of
the Companies Ordinance, the offer of
the National Bank of India Limited be
accepted.

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Continued.

At a further meeting of directors
on the 1st October, 1951, a form of
debenture was considered as was also
an Indenture of Mortgage of the land
L.R. 57, Kasarini, hereinafter referred
to as 'the suit property', which the
plaintiff company proposed to purchase.
This was to be a collateral security to
the debenture. The debenture was duly
registered in the Companies Register
and particulars filed on the 4th October,
1951. A Certificate was issued under
section 82(2) of the Companies Ordinance
on the same day.

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On the 1st November, 1951 the
plaintiffs acquired the suit property
by conveyance. On the same date it
created a legal mortgage in favour of
the National Bank of India Limited. This
was registered in the Crown Lands
Registry under section 126 of the Crown
Lands Ordinance, but no consent thereto
was obtained from the Land Control
Board under section 7 of the Land Control
Ordinance nor was the consent of the
Governor obtained under section 88 of
the Crown Lands Ordinance. It is
conceded that the suit property is land
in the Highlands as described in the
Seventh Schedule to the Crown Lands
Ordinance.....

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Particulars of the mortgage were registered in the Companies Register on the 5th February, 1952 an extension of time having been granted under section 85 of the Companies Ordinance by the Court. On 20th October, 1951, Messrs. Kaplan and Stratton submitted an application for both consents to the Land Control Board. This was in accordance with the usual practice since the powers of the Governor under section 88 of the Crown Lands Ordinance had been delegated to the Commissioner of Lands. On 31st October, 1951, the secretary of the Land Control Board replied to Messrs. Kaplan and Stratton to the effect that the consent of the Land Control Board was not necessary to this transaction. (See letter No. 18. Volume A of correspondence). Notwithstanding the somewhat peculiar reasons given in the letter the application was not proceeded with and the present position is that neither of the consents have been obtained to the legal mortgage.

On 17th November, 1956 at a meeting of directors of the plaintiff company the board were informed by their legal advisers that the plaintiff company was insolvent and it was resolved that a petition be presented for winding up by the Court. The petition was presented on 19th November, 1956.

On 20th November, 1956, the second defendants appointed the first defendant receiver and manager of the plaintiff company's property, under the debenture of 1st October, 1951.

On 14th December, 1956, the Court appointed the Official Receiver provisional liquidator with powers restricted to the taking of possession of the reversion of the company's property in the hands of the debenture holders' receiver.

A winding up order was made by

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the Court on the 11th January, 1957,
the Official Receiver being appointed
provisional liquidator.

On 28th October, 1957 the
Official Receiver wrote to the manager
of the National Bank of India Limited
(letter p.282) suggesting that in view
of section 328 of the Companies
Ordinance the Bank had no title to
deal with suit property." 10

In the plaint it was alleged
that Kentiles were still the owners of the
freehold of the suit premises, and that the
appellant had wrongfully taken possession of
them. In its written statement of defence
the appellant denied these allegations and
said it was entitled to take possession
under and by virtue of the debenture. In
its counterclaim it alleged, inter alia,
(a) that on or about the 19th December,
1951 Kentiles "caused to be delivered" to
the appellant the title deeds of the suit
premises to be held by the appellant by way
of collateral security under the debenture
but failed to execute the memorandum of
deposit to give effect thereto and (b) that
by the legal mortgage the suit premises were
conveyed to the appellant in fee simple; in
its prayer the appellant asked, inter alia,
for a declaration that it was the legal
mortgagee, that it was entitled to a
memorandum of deposit of title deeds, and
asked also that the liquidator (hereinafter
referred to as the "Official Receiver") be
ordered to execute a memorandum thereof. In
their defence to the counterclaim the
respondents denied that the debenture
created any charge on the suit premises or
the right to appoint a receiver thereof,
and that it was void; that the legal
mortgage was also void; that although the
title deeds were delivered to the appellant
as described by the appellant, it was not
by way of equitable mortgage. 20
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The learned judge first dealt
with the validity of the legal mortgage
which he said was attacked by the
respondents on two grounds, (a) that the
appellant was debarred from holding ...

land in the Highlands of Kenya by virtue of section 328 of the Companies Ordinance (Cap. 288 of the Revised Laws of Kenya 1948) and (b) that anyway the consent of the Land Control Board to the mortgage had not been obtained as required by section 7(1) of the Land Control Ordinance (Cap. 150) which was in force at the relevant time, nor had the consent of the Governor been obtained as required by section 88(1) of the Crown Lands Ordinance (Cap.155). As to (a) the learned judge held that subject to the applicability of an amendment to the proviso to section 328, to which reference will be made later, the appellant was debarred from holding lands in the Highlands, and that as to (b) the consents were necessary before a legal mortgage could be created. Grounds 1 and 2 of the memorandum of appeal complain that the learned judge was wrong on both (a) and (b), and that he should have held that the appellant became the legal mortgagee on the 19th November, the date the mortgage was registered under the Crown Lands Ordinance.

Dealing first with (a), section 328 of the Companies Ordinance comes within part XIII thereof, headed "COMPANIES INCORPORATED OUTSIDE THE COLONY CARRYING ON BUSINESS WITHIN THE COLONY", which is the position of the appellant. Section 328 reads:-

"328. A company incorporated outside the colony which has delivered to the registrar the documents and particulars specified in paragraphs (a), (b), (c) and (d) of the last foregoing section shall have the same power to hold lands in the Colony as if it were a company incorporated under this Ordinance:

Provided that no company incorporated outside the Colony shall have power to acquire land situate in the Highlands (as described in the Seventh Schedule to the Crown Lands Ordinance) unless such company is registered in accordance with the provisions of this Ordinance or is one of the banks or bodies of persons with whom title deeds may be deposited by way of

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equitable mortgage or charge by reason
of paragraph (b) of sub-section (4)
of section 7 of the Land Control
Ordinance."

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The appellant had delivered to the Registrar
the documents required under section 327 and
so came within the provisions of section 328.

The first question is whether the
appellant was registered within the meaning
of the Proviso. Mr. Donaldson points out
that section 345 of the English Companies
Act 1929 (on which our Ordinance is modelled)
is similar in effect to our section 328
without the Proviso; in other words in both,
companies incorporated outside the respective
countries (hereinafter for convenience
referred to as "foreign companies") are
expressly given power to hold land. A
similar power is expressly given to companies
incorporated in Kenya by section 15(2), but
section 13 of the English Act which is other-
wise similar contains no such provision, a
matter which is dealt with in section 14.
Subsection (1) of section 14 commences,
"A company incorporated under this Act shall
have power to hold lands, and as regards
lands in any part of the United Kingdom
without Licence in mortmain:". Mr.
Donaldson says that the only reason power
was given in the English Act to hold land
was because of the Mortmain Acts, apart from
which the power would exist without statutory
authority; he suggests that in drafting the
Kenya Ordinance the English wording was
followed without thought being given to
this, the Mortmain Acts not applying to
Kenya. At common law power to hold land
does exist, but the fact remains that the
first part of section 14(1) is in general
terms, as in our section 15(2), and would
be unnecessary if all the section intended
to do was to exempt corporations from the
provisions of the Mortmain Acts. Whether
one regards the right to hold land as
inherent or provided by statute, or both,
is not, so far as I can see, material,
affecting only the drafting of the section
and perhaps section 328 in particular. The
substantive part of the Proviso to section
328 clearly cuts down that power so far as

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concerned land in the Highlands. The point I understand Mr. Donaldson is really making is that the word "registered" in the Proviso must refer to the delivery of documents and particulars under section 327, which also comes within Part XIII and which is required of foreign companies having a place of business in the Colony. Under Part XI a foreign company may adopt a different procedure. It may, after complying with the specified requirements, obtain a certificate from the Registrar (Section 312) that it is "incorporated as a company under the Ordinance ...". Section 316(3) provides that, "All the provisions of this Ordinance shall apply to the company ... in the same manner in all respects as if it had been formed under this Ordinance, subject ...", and then follow matters with which we need not concern ourselves.

The restrictions relating to the Highlands in the Proviso to section 328 do not of course apply to foreign companies registered under Part XI because such companies become incorporated in Kenya. Mr. Donaldson, as I understand him, argues that the reference in the Proviso to registration must therefore relate to the requirement of section 327; I do not think that this follows. The learned judge said, "Under section 327 it is not a company which is registered, but the documents and particulars specified therein". Mr. Donaldson points out that it would be quite impracticable for many foreign companies to become registered under Part XI, especially banks; I agree with him, but that does not to my mind affect the construction of the Proviso to section 328. A foreign company may be registered under Part XI "at any time" (section 304(1)) and so become incorporated in Kenya. All that the Proviso says, as I read it, is that unless and until it is so registered (and until then it remains a company "incorporated outside the Colony") it shall have no power to acquire land in the Highlands. The learned judge so held and in my opinion rightly.

The next question is whether the appellant comes within the provisions of the last part of the Proviso to section 328

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of the Companies Ordinance. It is not in dispute that the appellant is one of the banks referred to therein. The exception commencing with the words, "or is one of the banks ..." was added by section 2 of the Banks' Title to Land (Amendment of Laws) Ordinance 1958 (hereinafter referred to as the "1958 Ordinance"). Section 1 of the 1958 Ordinance declared that section 2 thereof shall be deemed to have come into operation on the 13th December, 1945 "Provided that nothing contained in the said sections" (including section 2) "shall affect any action, suit or proceedings commenced before 30th May, 1958". The present suit was filed, it will be remembered, on 7th May, 1958. The learned judge quite rightly observed that the appellant could not therefore take advantage of the amendment as a defence to the respondents' suit. The counterclaim had, however, been filed after the 30th May, 1958, and the learned judge said, "The effect of the amendment on the counterclaim is another matter and it may have to be construed later". He did construe it later. He considered the rules under Order (viii) of the Civil Procedure (Revised) Rules 1948, rule 2 of which says that a "counterclaim shall have the same effect as a cross-suit" (similar to Order 19, rule 3 of the Rules of the Supreme Court in England). He then considered certain English authorities in which it was stated when counterclaims could be treated as "independent" actions, and said:-

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"It would appear therefore that the law applicable to the counterclaim is the law after the passing of the Banks (Title to Land) Amendment of Laws Ordinance, 1958. It may seem odd that a Court must apply two different legal tests to the validity of the same instrument on the claim and counterclaim but I see no escape from this conclusion."

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Had the matter rested there, the learned judge would presumably have found on the counterclaim that the Proviso to section 50

328 was no bar to the appellant acquiring land in the Highlands, and that the legal mortgage was valid. He observed however that this conclusion was academic as he had earlier ruled that the legal mortgage was invalid for want of the necessary consents. Section 7(1) of the Land Control Ordinance (as substituted in section 2 of the Land Control (Amendment) Ordinance, 1949) provided in terms that no "person" shall, except with the consent in writing of the Land Control Board, alienate (by mortgage or otherwise) any land in the Highlands or "acquire any right title or interest in" any land "for or on behalf of any person or of any company registered under the Companies Ordinance". Similar provisions restricting alienation or acquisition by a "person" of land in the Highlands without the consent of the Governor appear in section 88(1) of the Crown Lands Ordinance.

Mr. Donaldson submits, however, that the appellant is not a "person" within the meaning of these sections, and that they did not apply, and that no consent was therefore necessary. The learned judge dealt with this matter at some length, and although he arrived, he said, at his conclusion with some hesitancy, he found that consents were necessary to validate the mortgage. No definition of "person" appears in either of the Ordinances, but in section 2 of the Interpretation and General Clauses Ordinance (Cap. 1) which was in force at the relevant time (the learned judge wrongly refers to the "Interpretation and General Provisions Ordinance 1956", but the definition in both is the same), "person" was defined as including "any company or association or body of persons incorporated or unincorporated". Under section 2 the definitions therein apply, "unless there is something in the subject or context inconsistent with such construction, or unless it is otherwise expressly provided in the ordinance under consideration". Mr. Donaldson submits that the definition of "person" is inconsistent in the context of sections 7(1) and 88(1) respectively of the Ordinances under consideration; he says

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that the purpose of the legislation is racial and that a person in those sub-sections does not include a juridical person. He points to section 90 of the Crown Lands Ordinance which requires that where land is sold, mortgaged, etc, to a "person" of a different race from the vendor or mortgagor, notice must be given to the Commissioner of Lands. He submits that "race" cannot pertain to a company, and that anyway in a multi-racial society there could not be one company of one race and a second company of another, and that the place of incorporation is not the test; he submits that what must be meant in that section is a "natural person". Natural person would also be intended in section 95 which does not apply to foreign companies, but where it is said no "person shall mortgage the assets of a company ...". Likewise in section 91 where a "person" may, for an offence under section 90, be imprisoned. Mr. Donaldson points also to section 7(1) of the Land Control Ordinance which provides that no "person" shall without the consent of the board mortgage, etc. land to "any other person", and says this would not be necessary if "person" was meant to include a company. I agree that the words would not be strictly necessary, but the fact that they are there does not to my mind mean that they are incapable of the wider meaning. Sub-section (4) of section 7 provides that nothing in the section shall be deemed to preclude any "person" from mortgaging "his" land without consent in certain circumstances. A distinction between "person" and "company" is on the face of it made in paragraph (b) of section 7(1) which requires consent before a "person" can acquire any right over land "for or on behalf of any person or of any company". Here, as elsewhere, it seems to me to be a matter of slovenly drafting only, for it could hardly have been intended that a company (if "person" has to be used in the restricted sense) could acquire a right in land on behalf of, say, a natural person, for that way the prohibition could be easily avoided by a "person" converting himself into a company.

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Also, as the learned judge points out, Mr. Donaldson's interpretation of "person" would result in the prohibition in section 7(1)(b) applying to companies registered in Kenya but not to foreign companies coming within Part XIII of the Companies Ordinance, which could not have been the intention of the legislature.

10 The learned judge also observed that on such a construction section 7(4) of the Land Control Ordinance and section 88(4) of the Crown Lands Ordinance would be unnecessary, but I do not see that it would be so. He thought that looking at the legislation as a whole the intention was to give certainly no greater latitude to companies than to natural persons in acquiring land in the Highlands, and that the statutory definition should be given to the word "person" in so far as consent was required to the acquisition of land.

20 MAXWELL ON INTERPRETATION OF STATUTES, 11th Edn. at page 313 points to the danger of assigning different meanings to the same words on the ground of a supposed general intention of the legislature, but I see nothing wrong in construing "person" in the wider statutory sense in one part of the Ordinance and in the narrower sense in another part, if

30 the context so demands.

MAXWELL at page 311 says:-

40 "It is ... reasonable to presume that the same meaning is implied by the use of the same expression in every part of an Act. Accordingly, in ascertaining the meaning to be attached to a particular word in a section of an Act, though the proper course would seem to be to ascertain that meaning if possible from a consideration of the section itself, yet, if the meaning cannot be so ascertained, other sections may be looked at to fix the sense in which the word is there used.

 But the presumption is not of much weight. The same word may be used in different senses in the same

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statute and even in the same section,
.....".

It is to be observed that neither in section 7 nor in section 88 is there any express prohibition (as there is on disposition in sections 7(1)(a) and 88(1)) on a person acquiring land for himself or itself. Section 88(3), however, makes void "Any instrument in so far as it purports to effect any of the transactions " in section 88(1), and section 7(3) makes void every "agreement" or disposition under section 7(1). The general effect is therefore to make void the disposition and acquisition of an interest in land without consent. I agree with the learned judge that the context of the Ordinances in this respect does not preclude the statutory definition of a "person" so purporting to dispose of such interest. This being so, the legal mortgage was void, and it is not necessary to decide whether the counterclaim could bring in in favour of the appellant the amendment to the Proviso to section 328 of the Companies Ordinance.

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20

Dealing now with the debenture, the appellant in ground 3 of the appeal complained that the learned judge erred in not holding that it created "an effective floating charge over all lands which from time to time became and for the time being remained the property of the said Company", and in ground 4 that the learned judge failed to hold that the debenture created "an effective charge over the suit premises immediately upon the passing on the 17th November, 1956 of the resolution for the winding up of the said Company". The relevant clauses of the debenture read as follows:-

30

40

"1. The Company hereby charges with the payment and discharge of all moneys and liabilities intended to be hereby secured (including any expenses and charges arising out of or in connection with the acts authorised by Clauses 5, 8 and 9 hereof) ALL its undertaking good-will assets and property whatsoever

50

and wheresoever both present and future including its uncalled capital for the time being.

10 2. The charge created by this Debenture shall rank as a first charge on all the property hereby charged and as regards all immovable property of the Company (to be mortgaged as hereinafter provided) shall constitute a fixed charge and as regards all other property hereby charged shall constitute a floating security but so that the Company is not to be at liberty to create any mortgage or charge upon any of the property comprised in this security to rank either in priority to or pari passu with the charge hereby created. The Company shall forth-
20 with upon the execution of this Debenture deposit with the Bank the title Deeds of all immovable properties now vested in the Company and shall from time to time likewise deposit with the Bank the title deeds of any immovable property which may hereafter be acquired by the Company (all such deposits of title deeds being by way of equitable
30 mortgage as collateral security for the repayment of the principal moneys and interest hereby secured) and shall at its own expense whenever called upon by the Bank so to do execute legal mortgages or charges as the case may require in favour of the Bank over any such immovable properties.

40 3. The security hereby given to the Bank shall be without prejudice and in addition to any other security whether by way of pledge legal or equitable mortgage or charge or otherwise howsoever which the Bank may now or at any time hereafter hold on any other property for or in respect of all or any part of the indebtedness of the Company to the Bank or any interest thereon.

6. The principal moneys and interest

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hereby secured shall immediately become
payable without demand:

.....

(b) if an order is made or an
effective resolution is passed for
the winding up of the Company; or

.....

7. At any time after the principal
moneys hereby secured become payable
either as a result of lawful demand
being made by the Bank or under the
provisions of Clause 6 hereof the Bank
may appoint by writing any person
whether an Officer of the Bank or not
to be a receiver and manager of the
property hereby charged or any part
thereof and may in like manner from
time to time remove any receiver and
manager so appointed and appoint another
in his stead. 10

8. A receiver and manager so appointed
shall be the agent of the Company and
the Company shall alone be liable for
his acts defaults and remuneration and
he shall have authority and be entitled
to exercise the powers hereinafter set
forth in addition to and without
limiting any general powers conferred
upon him by law: 20

(a) to take possession of collect
and get in all or any part of
the property hereby charged
and for that purpose to take
proceedings in the name of
the Company or otherwise as
may seem expedient; 30

.....

12. After the security hereby constituted
has become enforceable the Company shall
from time to time and at all times exe-
cute and do all such assurances acts and
things as the Bank may reasonably require
for facilitating the realisation of the
assets and for exercising all the powers
authorities and discretions hereby con- 40

ferred on the Bank."

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10 The respondents maintain that the debenture
purported to create a legal charge, or any-
way an interest in land, and was void for
want of registration under section 126 of
the Crown Lands Ordinance; that it is also
void for want of the consents to which
reference has been made in relation to the
mortgage deed; and void because of the
restrictions against holding land in the
Highlands under section 328 of the Companies
Ordinance.

20 As I understand Mr. Donaldson's
submission on the nature of the debenture
so far as it related to a legal charge on
future immovable property, it was that it
automatically acted as a legal charge on
land so soon as land was acquired by
Kentiles, and that it acted also as an
agreement giving to the appellant a right
to require Kentiles to execute a legal
mortgage in favour of the appellant immedia-
tely upon such acquisition.

The learned judge said:-

30 "The question arises therefore
whether the debenture is to be regarded
as an instrument effecting a charge;
I think there can be no doubt that it
is. I would observe in the first
instance that this is not, so far
as immovable property is concerned
a floating charge so as to be
entitled to the protection of section
7(5) of the Land Control Ordinance and
88(5) of the Crown Lands Ordinance. So
far as immovable property is concerned
it creates a fixed charge thereon as
soon as it is acquired by the Company.
40 There is no other document apart from
the debenture which is necessary for
that purpose."

Section 7(5) reads:-

"This section shall not operate to
prevent any floating charge contained
in a debenture in favour of any of
the banks or bodies of persons with

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whom title deeds may be deposited by way of equitable mortgage or charge by reason of paragraph (b) of subsection (4) of this section from charging any land without the consent of the Board."

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Section 88(5) is in similar terms. Both subsections were introduced by the 1958 Ordinance and for the reasons I have given when considering section 2 of that Ordinance they are not available to the appellant as a defence to the respondents' suit; whether they could be invoked by the appellant on his counterclaim would depend on the same considerations as those I have mentioned in respect of the amendment to the Proviso to section 328 of the Companies Ordinance. The intention of clause 1 of the debenture standing alone would be to create a floating charge on Kentiles' assets, present and future, including immovable property, but it was qualified by the words in clause 2, "all immovable property of the Company (to be mortgaged as hereinafter provided) shall constitute a fixed charge and as regards all other property hereby charged shall constitute a floating security..".

10

20

As to registration, section 126 of the Crown Lands Ordinance reads:-

"All transactions entered into, affecting, or conferring or purporting to confer, declare, limit or extinguish any right, title, or interest, whether vested or contingent, to, in or over, land registered under this Part (other than a letting for one year only or for any term not exceeding one year) and all mutations of title by succession or otherwise shall be registered under this part."

30

It is not in dispute that the suit premises comprise land "registered under this Part". The learned judge said he could find nothing in sections 7, 88 or 126 of the respective Ordinances which affect instruments creating a charge over future or unascertained land, and that as the debenture contained "no reference to any land which is the subject of the two Ordinances" there would be nothing to

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10 register; he said he was unaware of it ever having been previously suggested that a debenture as such required consent or registration. As to consent to legal charges (no consent was required to a charge by way of deposit with the appellant, by virtue of section 7(4)(b) of the Land Control Ordinance and section 88(4)(b) of the Crown Lands Ordinance), it is to be observed that sections 7(1)(a) and 88(1) relate to the charging etc. of land "by any means whatsoever", which I should have thought would have included debentures, even if practical difficulties might result. In fact at the date of the debenture there was no immovable property over which a legal mortgage could operate, although there was an agreement dated the 26th September, 1951 for the sale of the suit premises to Kentiles. If the 20 purported effect of the debenture was, on conveyance of the suit premises, automatically and without further instrument to create a legal charge over them, I would agree with Mr. O'Donovan that it would then require the consents and registration which it did not receive.

30 For the reasons given, I am of the opinion there was no valid legal charge over the suit premises either by virtue of the debenture or deed of mortgage, and it now becomes necessary to consider whether there was an equitable charge and a provable right in the appellant to call for a memorandum of deposit. Before doing so, however, I shall deal with the respondents' submission (contained in paragraph 5(a) of the cross-appeal) that the substantive part of the Proviso to section 328 of the 40 Companies Ordinance was a prohibition against a foreign company acquiring not only a legal estate in land in the Highlands, but an equitable interest also. The learned judge held that it related to a legal estate only. The definition of "land" in section 2 of the Land Control Ordinance includes "any right over or in respect" thereof, and section 7(1)(b) of that Ordinance and section 88(1) of the Crown Lands Ordinance prohibit the acquisition of any "right 50 title or interest" in the land without consent. Mr. O'Donovan submits that the

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Proviso to section 328 is part of the legislative system to control legal and equitable interests in land in the Highlands, and that it should be read with the provisions of the Land Control and Crown Lands Ordinances; he points out that the Proviso was introduced about one year after sections 7 and 88. There can be no doubt that in the amendments to the three Ordinances there was a common purpose. MAXWELL at page 319 says, "... generally, statutes in pari materia ought to receive a uniform construction, notwithstanding any slight variations of phrase, the object and intention being the same". This principle, however, would not be followed on Mr. O'Donovan's construction of the Proviso, for sections 7(4)(b) and 88(4)(b) exempt from the necessity of obtaining consent the deposit of title deeds with specified banks, including the appellant. If "acquire" in the Proviso to section 328 was to include an equitable interest in land then one would have expected on the ground of consistency to find a similar exemption added at the time the Proviso was drafted, but if "acquire land" is construed as meaning the acquisition of a legal interest in land (which would seem to me to be the normal meaning) no such exemption was necessary. In support of his construction Mr. O'Donovan submits that if equitable interests are excluded, then the bank could, on the basis of having obtained an equitable mortgage, demand that it be perfected by the execution of a legal mortgage. The same argument would, however, apply to sections 7(4)(b) and 88(4)(b). I do not think it follows, for before the legal mortgage could become effective the necessary consents would be required, and, until the amendment of the Proviso to section 328, a bank which was a foreign company was anyway prohibited from acquiring a legal estate in land.

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It has not been suggested I think that the mere deposit of title deeds with intent to create an equitable mortgage is a "transaction" requiring registration under section 126 of the Crown Lands Ordinance or a "dealing" to be recorded under section 124. FISHER & LIGHTWOOD ON THE LAWS OF

50

MORTGAGE, 7th Edn. at page 15 says, "An equitable mortgage is a contract operating as a security, which, for want of being accompanied by a legal estate, can only be enforced under the equitable jurisdiction of the court". The nature of a deposit of title deeds is described in HALSBURY'S LAWS OF ENGLAND, 1912 Edn., Vol.21, page 78 as follows:-

10 "A deposit of title deeds is regarded as an imperfect mortgage which the mortgagee is entitled to have perfected; or as a contract for a legal mortgage which gives to the party entitled all such rights as he would have had if the contract had been completed. By the deposit the mortgagor contracts that his interest in the property comprised in the deeds shall be liable to the debt and binds himself to do all that is necessary to effect the vesting in the mortgagee of such interest as he has.

20

The deposit may be of the deeds alone, or may be accompanied by a memorandum of the terms of the deposit or by an agreement to give a mortgage."

30 Were it not for the exemptions in section 7(4)(b) and 88(4)(b) the implied contract would be one which came within the provisions of section 7(3) and 88(1) for the purpose of consent.

The difficulty which the appellant was up against, however, was to prove a deposit of deeds with intent to create a security, a fact which the respondents denied. The relevant part of section 127 of the Crown Lands Ordinance reads:-

40 "127. No evidence shall be receivable in any Civil Court:-

.....

(2) Of a lien, mortgage or charge of or upon such land unless the mortgage or charge is created by an instrument in writing, and the instrument has been

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registered under this Part.

.....

Provided, however, that nothing hereinbefore contained shall apply to an equitable mortgage by deposit of documents of title provided that a memorandum of such equitable mortgage shall have been registered in the register. On the discharge of such equitable mortgage a memorandum of such discharge shall be registered in the register. Every memorandum shall be transmitted to the registry in duplicate and shall be in such form and there shall be paid on the registration thereof such fee as may be prescribed."

10

Mr. Donaldson's submission is that even though the debenture could not be received as evidence of any interest in land which might be held to have been created thereby, it could be evidence of a right to obtain another document which would itself create an interest in land, and in support of this he referred to section 129(e) of the Crown Lands Ordinance which reads:-

20

"129. Nothing in the last two preceding sections shall apply to:-

.....

30

(e) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest to or in land registered under this Part, but merely creating a right to obtain another document, which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest;"

40

Mr. Donaldson submits that one can sever that part of the debenture which creates or purports to create a charge from the part which does not. He refers to Edwards v. Denning [1958] E.A. 628 in support of

his proposition that an instrument can be accepted as evidence for one purpose, when it is inadmissible for another. Mr. O'Donovan goes so far as to admit that the debenture is not wholly void in that it can be looked at for certain purposes, such as its effect on movables, but that section 129(e) cannot be invoked because the debenture purports to create a charge, and the fact that it fails to do so is immaterial to the provisions of that section; that having relied on the debenture for what it purported to do, it could not later be relied on for another purpose, such as proving a contract relating to land.

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The learned judge held that the debenture was admissible so far as it affected movables. He held further that it could be relied upon to give the appellant a right to appoint a receiver and to enter into possession of the suit premises under clauses 7 and 8, saying "On this ground, therefore, they have a valid defence to the respondents' claim"; I will deal with this later. As to its admissibility in evidence to prove a contractual right in the appellant to call on the respondents for a memorandum of deposit, the learned judge posed a question whether the debenture itself created an equitable mortgage and so required registration or whether it merely created a right to call for a memorandum of deposit which could itself be registered and thus come within the exemption of section 129(e) of the Crown Lands Ordinance. His conclusions were in the following terms:-

"In the present case the debenture contains no reference in clause 2 or 3 to any specific property; it, therefore, could not be registered under the Crown Lands Ordinance. The registrar would not accept it for registration since it does not confer any interest in land registered under part XII of the Crown Lands Ordinance. The only document which could be registered would be the memorandum of deposit,

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whenever that is executed because it is that document alone which specifies the property in question. In the context of the present case I cannot see that there is any other document which could create an equitable mortgage except the memorandum of deposit which would be the document specifying the property which is the subject of the equitable mortgage. This is consistent with the proviso to section 127 which, in the case of an equitable mortgage by deposit of documents of title does not require anything to be registered other than the memorandum. In my view, therefore, the debenture at most is a document which comes within section 129(e) of the Crown Lands Ordinance and it is not inadmissible in evidence merely by reason of the fact that it constitutes an agreement for an equitable mortgage of future acquired land."

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20

In paragraph 5(d) of the cross-appeal the respondents maintain that the debenture itself purported to create an equitable mortgage and therefore required to be registered. I am not sure that Mr. O'Donovan's argument was quite consistent therewith, because he said it is the deposit which creates the charge if there is the intention, and the memorandum records it. He maintained, however, that section 129(e) did not apply as the debenture was itself a memorandum of the terms of the security, but being un-registered it could not be produced as evidence. He says that if it is not the operative document then it merely records the security by deposit and it does not give a right to another document. A memorandum without deposit can effectively create an equitable charge. In HALSBURY, at page 79, it is said:-

30

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"A memorandum or agreement in

writing showing an intention to deposit title deeds by way of mortgage or to charge the property comprised in the deeds is sufficient although no deeds are in fact deposited, and even though some of the deeds are not executed: so is a written direction or consent that the deeds may be retained as a security."

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10 Unfortunately, the cases cited in support of
this statement are not available to me. In
considering whether the debenture was a docu-
ment effecting the equitable mortgage, the
learned judge referred to a Privy Council case
cited by Mr. O'Donovan, Paul v Nath Saha (1939)
2 A.E.R. 737. The facts there were different
in that the deposit of deeds preceded the
memorandum. Lord Macmillan said at page 742
F "Having purported to create a mortgage by
20 delivery of title deeds, the parties proceeded
to create it over again in writing. The
memorandum does not merely evidence a tran-
saction already completed. Its language is
operative". He observed that whether a docu-
ment required registration depended on its
nature or character and cited another Privy
Council case, Obla Sundarachariar v. Narayanna
Ayyar (1931) 58 Ind.App.68, in which considera-
30 tion was given to whether a certain memorandum
of deposit required registration under section
17 of the Indian Registration Act, 1908, as,
if unregistered, it could not be used as
evidence of the mortgage. The facts again
were very different from those in the instant
case, but Lord Tomlin, referring to section 17
said at page 74, "Their Lordships are of
opinion that no such memorandum can be within
the section unless on its face it embodies such
terms and is signed and delivered at such time
40 and place and in such circumstances that so far
as the deposit is concerned it constitutes the
agreement between the parties". The case of
Guaranty Discount Ltd. v. Credit Finance
Corporation & Anor., Civil Appeal No. 64 of
1962 (Tanganyika), was also cited to us, but
the circumstances there were such that it is
of no great value to us, I think.

50 Although the debenture which we are
considering undoubtedly contains an agreement
to deposit, it is not in my opinion worded so

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as to create an immediate equitable mortgage. For one thing it does not relate to any specified deeds or land and therefore, as the learned judge said, would make registration impossible. As has been said, the charge created by the debenture was clearly intended to be a legal charge - "The Company hereby charges ..."; "The charge created by this debenture ...". The material words relating to deposit are "and shall from time to time likewise deposit with the Bank the title deeds of any immovable property which may hereafter be acquired by the Company (all such deposits of title deeds being by way of equitable mortgage as collateral security for the repayment of the principal moneys and interest hereby secured)...". The intention appears to have been that it was "all such deposits of title deeds" which were to create the equitable mortgages and not the debenture itself.

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The question then arises whether the debenture, inadmissible to prove a legal charge, can be looked at to show the intention of the parties to create an equitable mortgage by deposit. In Edwards v. Denning (supra) an agreement for the purchase of land was tendered in evidence but rejected by the lower court on the ground that it created a charge for the purchase money and therefore should have been registered under section 126 of the Crown Lands Ordinance and, not having been so registered, it was inadmissible in evidence under section 127(2). This court held that for want of consent and registration it was void to create a charge, but the President said:-

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"What is rejected by s. 127 is not the unregistered instrument per se in so far as it is to be received as evidence of any transaction affecting immovable property, but evidence of certain specified transactions, and of those only, such, for instance as a sale, lease mortgage or charge. An instrument may effect a transaction which is required to be registered by s.126; but might, nevertheless, not itself be excluded from evidence by s.127, though not registered."

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10 With this view the Privy Council agreed.
Admittedly, in that case the agreement had
not been tendered to prove the charge, but
for other purposes not requiring registra-
tion. In the instant case the debenture
was tendered to prove a legal charge, but
it was also tendered in support of the agree-
ment contained therein relating to future
equitable mortgages by deposit. That agree-
ment was pleaded in the counterclaim. If it
is sought by a single document to prove two
matters, merely because it cannot be received
as evidence of the one I can see no reason
why it should not be accepted as evidence
of the other which, had it been in a
separate document, would have been admissible.
On the second leg of the argument in
Edwards v. Denning it was held by this
20 court at page 638 H that as the agreement
was void to create a charge, it therefore
fell within section 129(e) and was excluded
from the operation of section 127, assuming
that section would otherwise apply to it.
The Privy Council did not find it necessary
to consider that decision, but it would
appear to be applicable to the debenture
in the instant case. In my opinion the
learned judge was right in holding the
debenture admissible to prove the agree-
30 ment for future deposits of title deeds.

Having arrived so far, the learned
judge said:-

40 "A further question now arises as to
whether in the circumstances of the
present case there was a deposit of
title deeds by the plaintiff company
with intent to create an equitable
mortgage and it is here that it seems
to me the case for the defendant bank
breaks down on the facts. It may be
pointed out that the claim that there
was an equitable mortgage by deposit
of title deeds is itself inconsistent
with the assertion of a legal mortgage."

He then referred to the facts. Without
going into them in detail, it would seem
from an affidavit of Mr. Mackie-Robertson,
a partner in the firm of Messrs. Kaplan &
Stratton, lawyers, that the latter were at

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the material time acting for Kentiles (and may be for all the other interested parties also) and that at the relevant time they were in possession of the title deeds of the suit premises. This covered the period when the vendors, Kenboard Ltd., were still the owners and the suit premises were charged to Barclays Overseas Development Corporation (hereinafter referred to as "Barclays") and a Mr. Block, the deeds being held by Kaplan & Stratton to Barclays' order. The arrangement was that the appellant should accommodate Kentiles by, inter alia, paying off the debt of Kenboard Ltd. to Barclays so that Kenboard Ltd. could give a clean title to Kentiles. In the words of Mr. Kackie-Robertson:-

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"I had been instructed generally by Kentiles Limited, embracing the whole matter, and necessarily entailing steps to have the titles released from the then encumbrances in favour of Barclays and Mr. Block, to make them available to the National Bank.

20

In my view I was never at any time holding these title deeds to the order of either Kenboard Limited or Kentiles Limited. It was always on behalf of one Bank or the other."

The appellant duly gave a letter of guarantee to Barclays on 5th October, 1951, and Barclays then passed out of the picture and so far as we know so did Mr. Block. As to the guarantee, Mr. Mackie-Robertson said :-

30

"That letter I obtained from the National Bank on the condition and understanding that the letter would release the title deeds from Barclays lien and immediately render them subject to a lien in favour of the National Bank. Therefore as soon as the letter of guarantee was passed to Barclays i.e. from about 5 October, 1951 I regarded myself as holding these deeds to the order of the National Bank."

40

Barclays purported to release the deeds to

Kenboard Ltd., who passed a receipt for them to Kaplan & Stratton, who in fact retained them on, so Mr. Mackie-Robertson says, the appellant's behalf. As has been said, on the 1st November the suit premises were conveyed to Kentiles, and on the same date Kentiles purported to execute a legal mortgage of them to the appellant.

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10 The learned judge said:-

 "The position, therefore, was that on the 1st October, 1951, which was the date of the debenture, the plaintiffs did not own the suit property; they did not acquire this until the 1st November. Prior to the 1st November Mr. Mackie-Robertson could not have held the title deeds by way of deposit with intent to create an equitable mortgage because the deeds were not then the property of the plaintiff company. The plaintiff company contemporaneously, at the request of the defendant bank, executed what they thought was valid legal mortgage. The defendant bank could not have called on the 2nd November, 1951, for memorandum of deposit of title deeds because a legal mortgage had been executed and the lower security would merge in the higher. The legal mortgage having been executed and registered the bank would be entitled to the title deeds as legal mortgagees. At no time during the last ten years has the defendant bank ever called upon the plaintiff company to execute a memorandum or taken up the attitude that it had an equitable mortgage. It is clear that the intention of the parties in November, 1951, was to create a legal mortgage and nothing else. The fact that the legal mortgage now turns out to have been invalid is irrelevant. The mistake was a mistake of law as to its efficacy. Insofar as there was a contract for an equitable mortgage it was superseded by the legal mortgage. This would be the effect

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under section 62 and 63 of the Indian Contract Act. It is impossible upon the admitted facts of this case to draw the inference that there was a deposit with intent to create a security at the material time, namely in November, 1951, and unless the defendant bank can establish this, their counterclaim and, consequently, their defence, must fail, and I hold that they do."

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Paragraphs 5 to 8 inclusive of the grounds of appeal maintain respectively that the judge should have held that the title deeds of the suit premises were deposited with the appellant or its agent with the intention of creating an equitable mortgage (ground 5); that the deposit was effective in creating a collateral security (ground 6); that if the legal mortgage was invalid the judge should not have held that the right of the appellant to call for a memorandum of deposit "merged as a lower security in the higher security purported to be created" by the legal mortgage (ground 7); and that the judge should have made a declaration that the appellant was entitled to demand such memorandum from the respondents (ground 8).

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Mr. Donaldson submitted that there was an effective mortgage by deposit until a valid legal mortgage was created; that clause (12) of the debenture gave an express right to call for a memorandum in the circumstances which arose; that the appellant by obtaining the release of the deeds of the suit premises from Barclays became entitled to hold them and to call on Kentiles to do all that was necessary to make the deposit effective, that is to say to execute a memorandum. In their defence to the counterclaim the respondents admitted that the deeds were delivered to the appellant on or about 19th December, 1951, but denied that the delivery constituted or was intended to constitute a deposit by way of equitable mortgage. Mr. O'Donovan maintains that the appellant cannot now anyway call on the respondents to supply the evidence, in the form of a memorandum, on which it could rely

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to prove the alleged intention of the parties to create an equitable mortgage.

Admittedly the debenture does not make specific provisions for a memorandum, but nor does the Equitable Mortgages Ordinance or section 88(4)(b) of the Crown Lands Ordinance or section 7(4)(b) of the Land Control Ordinance. If, on deposit, the intention of the parties could not be proved it is clear that there would be no effective security and the depositor would presumably be able to reclaim the deeds as soon as they had been deposited and he had had the benefit of the loan. This to my mind cannot have been the intention of the parties. The debenture makes it perfectly clear that the intention was that the deposit was to be by way of security, and because of the provisions of section 127 effective security could only be obtained if the deposit was accompanied by a memorandum, as is quite a normal practice. The fact that many years passed after the deposit and before a memorandum was asked for is, I think, immaterial, especially as both Kentiles and the appellant were under the impression during that period that the legal mortgage of the 1st November, 1951, was valid. Clause (12) of the debenture empowered the appellant to call upon Kentiles to do certain acts, "After the security hereby constituted has become enforceable". I am in some doubt whether future mortgages by deposit can be said to come within the meaning of the words "hereby constituted", but, I am of opinion that the appellant can call for a memorandum irrespective of clause (12), subject to consideration of a further matter with which I will now deal.

The learned judge said that to claim an equitable mortgage was inconsistent with the claim that there was a legal mortgage, and that following the legal mortgage on the 1st November, 1951 the appellant could not have called for a memorandum of deposit for as a lower security it had become merged in the legal mortgage. That may have been the position had the legal mortgage been valid, but it was not, it

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was void. There being no legal mortgage, the fact that it was claimed that there was is, I think, immaterial; the right to an equitable charge was in the nature of an alternative claim. There being nothing with which the equitable mortgage could merge, the obligation in the debenture to create an equitable charge still stood, and if there was already an existing charge by way of deposit, such charge remained unaffected. Some support for this view is to be found in the case of Ghana Commercial Bank v. D.T. Chandiram & Anor (1960) A.C. 732. I do not therefore think it matters whether the deposit with the appellant or its agent can be said to have occurred before the conveyance of the suit premises to Kentiles, or between the time of the conveyance and the legal mortgage, or after the legal mortgage. Incidentally, there must have been a moment of time between the conveyance and the legal mortgage, even though they were executed the same day, when the appellant became entitled to regard the title deeds as retained by him by way of equitable mortgage in pursuance of the agreement in the debenture. Had the learned judge taken the above view he would, it seems, and I think rightly, have found for the appellant on the counterclaim to the extent of holding that he had a right to call for a memorandum.

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The crux of this matter is, as I see it, not whether possession of the deeds created an equitable charge (proof of which is restricted by section 127) but whether the debenture contains a provable agreement to call for an equitable mortgage by deposit with a memorandum. In my opinion it does. If the deeds were with the respondents, the appellant could call on them to deposit them and supply a memorandum therewith. It is not in dispute that the deeds are already in the possession of the appellant (in whatever capacity that might be), and so all it has now to do is to demand the memorandum to which, in my view, it is entitled. As I read the counterclaim, it is sufficient to support a declaration as to this. Paragraph 6 first recites the agreement to deposit contained in the debenture; it then

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alleges delivery of the deeds, without specifying the capacity in which they were received, although it is common ground that at that time the parties regarded them as held under a legal mortgage; on the validity of the legal mortgage being questioned by the respondents, it seems that the appellants asked for a memorandum of deposit, to give effect to the agreement, and the counterclaim recites the refusal of the respondents so to implement such possession, which implementation would have amounted to specific performance of the agreement. I do not see that in the circumstances the appellant is any more affected by the incidence of being in possession of the deeds than if they were in the possession of the respondents; the only difference is that instead of having to call for specific performance by delivery of deeds and memorandum, it has only to call for the latter, by virtue of the agreement in the debenture and not by virtue of being in possession of the deeds. This, as I read it, is consistent with the framing of the counterclaim, and I do not think it has been argued otherwise; Mr. O'Donovan himself referred to the claim for specific performance objecting that it would give a right to require a legal mortgage. It is also consistent with that part of Mr. Donaldson's argument that the appellant, when obtaining possession of the deeds, became entitled to call for a memorandum, although he dated this right back to the time when the appellant obtained the release of the deeds from Barclays.

I would observe in passing that the form of memorandum of deposit prescribed at page 2371 of Volume VI of the 1958 Laws merely declares that documents of title have been deposited, and, having in mind the Proviso to section 127 and registration under section 126, would not itself appear to "affect" etc. any right, title or interest in the land except in a purely evidential way. In so far as a memorandum itself created any interest in land, it would be admissible as evidence of an equitable mortgage anyway, without the assistance of the Proviso. It seems to me that it might have been argued that whereas the registration of a memorandum for the purposes of the Proviso to section 127 provided one way of avoiding the restrictions imposed by paragraphs (1) and (2) of Section 127, a mortgagor would anyway be estopped

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from pleading that section. I think I am right in saying that in England a depositor would be estopped from pleading the Statute of Frauds, as delivery of the deeds would be sufficient part performance without an instrument in writing. This argument has not, however, been advanced and I come to no conclusion as to its merits.

This leaves the question whether, the debenture being invalid itself to create a charge, it could still have been relied on to justify the appointment by the appellant of a receiver and the taking of possession of the suit premises. Under clause (6) of the debenture, "The principal moneys and interest hereby secured" immediately became payable on demand on the passing of the resolution for the winding up of Kentiles, and under clause (7) at any time thereafter the appellant could appoint a receiver with power, inter alia, to take possession. Mr. O'Donovan's argument is that the appointment of a receiver is a method of enforcing the security and if the debenture is not valid as a security a receiver cannot be appointed. Mr. Donaldson submits that even if the appellant had no legal right to possession but had a right to delivery of a memorandum of deposit by way of equitable mortgage, a court administering equity would not allow the appellant to be dispossessed whilst an order for delivery of such memorandum was being carried out. I agree.

In my opinion the appellant's appeal should succeed to the extent of setting aside the order of the court below that the counterclaim be dismissed with costs, and substituting therefor a declaration that the appellant is entitled to receive a memorandum of deposit of the title deeds to the suit premises sufficient for registration and to satisfy the Proviso to section 127 of the Crown Lands Ordinance, together with an order that the Official Receiver as liquidator of Kentiles forthwith prepares, executes and delivers to the appellant such memorandum at the expense of Kentiles. I would award to the appellant the costs of this appeal and the costs in the court below. I would dismiss the respondents' appeal and cross-appeal with costs. The appellant in his pleadings asked that "if necessary" an order be made that accounts be taken of the moneys due by Kentiles to the appellant. We have not been informed that such an order is necessary, and I would accordingly make no such order but would give liberty to apply as to that and generally. I would certify for two counsel.

Dated at Nairobi this 29th day of
August, 1963.

E. D. W. CRAWSHAW
ACTING VICE-PRESIDENT.

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IN THE COURT OF APPEAL FOR EASTERN AFRICA
AT NAIROBI

In the Court
of Appeal for
Eastern Africa
at Nairobi

CIVIL APPEAL NO: 21 OF 1962

No.17

NATIONAL AND GRINDLAYS BANK LIMITED APPELLANT

and

Judgment of the
Court of Appeal

KENTILES LIMITED (In Liquidation) }
AND }
THE OFFICIAL RECEIVER (as Liquidator }
thereof) }

29th August 1963

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RESPONDENTS

The Honourable
Sir Trevor Gould

(Appeal from a judgment and decree of the
Supreme Court of Kenya at Nairobi (Miles J)
dated 30th October, 1961.

in

Civil Case No. 658 of 1958

Between

Kentiles Ltd. (In Liquidation)
and)
The Official Receiver (as)
Liquidator thereof) }

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Plaintiff

and

Hubert Richard Brice 1st Defendant

National and Grindlays Bank Ltd 2nd Defendant)

JUDGMENT OF GOULD Ag. P.

The facts in this appeal are fully stated in
the judgment of the learned Acting Vice-President
and there is no need for me to repeat them.

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There are certain issues with which I can
deal quite shortly. The first is whether the
appellant bank (hereinafter called "the bank") was
capable of holding land in the Highlands of Kenya

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in view of section 328 of the Companies Ordinance (Cap. 288 of the Laws of Kenya, 1948) which was applicable at the relevant time, and without regard to the amendment to the proviso to that section contained in section 2 of the Banks' Title to Land (Amendment of Laws) Ordinance, 1958. All I need say on this question is that for the reasons given by the learned judge in the Supreme Court and by the learned Vice-President I agree that the bank was not capable of holding such land.

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The next two issues are in the nature of alternatives in that if either is resolved against the bank it is fatal to the bank's case so far as the legal mortgage is concerned, but I think it right to give my opinion on both. The first of them is whether, assuming that the bank could hold a legal mortgage of the land in question, it was void for lack of the consents of the Land Control Board and the Governor respectively as required by section 7(1) of the Land Control Ordinance (Cap.150) and section 88(1) of the Crown Lands Ordinance (Cap.155). It was argued in this court and below that such consents were not required in the case of a limited company and whichever way this issue is resolved inconsistencies in the relevant legislation are discernable. For the reasons given by the learned judge in the Supreme Court I am in agreement with his view of the matter and would hold that the consents above mentioned to the legal mortgage were essential and that their absence rendered it void if it was otherwise valid.

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The second of the alternative issues is whether the amendment to the proviso to section 328 of the Companies Ordinance enacted by section 2 of the Banks' Title to Land (Amendment of Laws) Ordinance, 1958, can be relied upon by the bank in any way. The learned judge in the Supreme Court held that the amendment could not be relied upon as matter of defence but inclined to the view that the bank could rely on it on the counterclaim. Section 2 reads:-

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"2. The proviso to section 328 of the Companies Ordinance is amended by adding at the end thereof the words 'or is one of the banks or bodies of persons with whom title deeds may be deposited by way of equitable mortgage or charge by reason of paragraph (b) of sub-section (4) of section 7 of the Land Control Ordinance'".

The bank is one of the banks referred to in that section.

Section 1 of the same Ordinance reads:-

"1. This Ordinance may be cited as the Banks' Title to Land (Amendment of Laws) Ordinance, 1958, and shall be deemed to have come into operation, as to section 2 on the 13th December 1945, as to section 3 on the 19th October 1943, and as to section 4 on the 14th December 1944:

Provided that nothing contained in the said sections shall affect any action, suit or proceedings commenced before the 13th day of May 1958".

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In the present case the action by Kentiles Limited (in liquidation) and the Liquidator (hereinafter together referred to as "Kentiles") was commenced before the 13th May 1958, and the bank's counterclaim was lodged on a day subsequent to the relevant date. For my part I am satisfied that the intention of the legislature is that the bank cannot avail itself of the benefit of the amendment in any way (be it by way of defence counterclaim, cross action or subsequent action) which would affect the action brought by Kentiles. Further, in my opinion, an action is affected if the judgment given in that action is detracted from, negatived or varied in any way, which is what is sought to be done, whether by way of anticipation or otherwise, by the present counterclaim. I do not consider, therefore, that the amendment can be relied upon by the bank in any way in any of these proceedings.

I come now to the question of the debenture. I do not read the counterclaim as alleging a claim that the delivery of title deeds constituted an equitable mortgage per se or that the debenture created an equitable mortgage. The counterclaim alleges the delivery to and retention by the bank of the title deeds and continues: "but the Plaintiffs have refused to implement the said delivery, by the execution of an appropriate memorandum of deposit by way of equitable mortgage to enable this Defendant to complete and give effect

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to the said delivery as a deposit of the title deeds by way of equitable mortgage....". Whatever may be intended by that pleading it is clear, I think, that the bank cannot put forward either the debenture itself or the deposit of deeds as an equitable mortgage or charge. Section 127 of the Crown Lands Ordinance (to which Ordinance section 2 of the Equitable Mortgage Ordinance (Cap.152) is made subject) provides that no evidence shall be receivable in any court of a lien mortgage or charge unless created by an instrument in writing which has been registered under the Ordinance. The proviso to the section creates an exception in the case of an equitable mortgage by deposit of documents of title, "provided that a memorandum of such equitable mortgage shall have been registered in the register". The proviso, I think, makes it clear that the substantive part of the section applies to equitable as well as to legal mortgages. Section 88(4) of the same Ordinance, which deals with consents, provides that nothing in that section shall be deemed to preclude any person, without the consent of the Governor, from (*inter alia*) depositing title deeds by way of equitable mortgage or charge with specified banks, including the appellant bank. I am of opinion, however, and the contrary has not been argued, that section 88(4) does not relieve the specified banks from the necessity of complying with section 127. In the present case no instrument in writing or memorandum of deposit having been registered the bank cannot give evidence of any equitable mortgage or charge.

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The next question is whether the debenture is receivable in evidence either as a contract entitling the bank to go into possession by putting in a Receiver, or as a contract to give or create an equitable mortgage in the future. As I read his judgment the learned judge in the Supreme Court answered both aspects of that question in the affirmative, held that the first aspect provided a good defence to the action, but that the second aspect did not avail the bank because, on his view of the facts, it was impossible to draw the inference that there was a deposit with intent to create a security at the material time.

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The effect of section 127 of the Crown Lands Ordinance upon questions of admissibility was considered by the Privy Council in Denning v Edwards(1960) E.A.755. A distinction was there drawn between the

Kenya legislation and section 49 of the Indian Registration Act, which prohibited any document required to be registered from being received as evidence of any transaction affecting immovable property unless it had been registered. The action with which the Kenya courts had been concerned was one for specific performance of an agreement for sale of land and it was sought to exclude it from evidence because it was said that under the document, a charge on the land arose in respect of a deposit paid by the purchaser. The distinction between the Kenya and Indian legislation was drawn by the President of this court in the following passage which was approved by the Privy Council at page 757 of the report above quoted:-

"Section 49 of the Indian Registration Act makes 'documents' required by s.17 to be registered not receivable as evidence of any transaction affecting immovable property unless registered. This disqualifies the instrument per se in so far as it is to be received as evidence of any transaction affecting immovable property. On the other hand, s.127 of the Kenya Crown Lands Ordinance says: 'No evidence shall be receivable in any Civil Court.....of a sale, lease.....charges etc'. What is rejected by s.127 is not the unregistered instrument per se in so far as it is to be received as evidence of any transaction affecting immovable property, but evidence of certain specified transactions, and of those only".

Earlier in the Privy Council judgment, at pp. 756-7, occurs the following passage:-

"Dealing with the point the President of the Court of Appeal (who wrote the principal judgment) said of s.127:-

'what is rejected in Kenya is evidence of specified transactions - of the sale, lease, transfer or charge etc., of registered land. The Agreement in this case was not tendered as evidence of a charge. No charge was sought to be proved, and the

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existence or otherwise of a charge was irrelevant to any issue in the suit. I am of opinion that the Agreement was not excluded by s.127(2) from being received as evidence in this suit'.

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Their lordships are of the same opinion. The section says 'no evidence shall be receivable' 'of a charge' unless 'the instrument is registered'. When the sole object of using the instrument has nothing whatever to do with a charge the court is not receiving evidence of a charge within the meaning of the section. To be 'evidence' within that meaning it must be evidence for the purposes of the case".

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The wording of their Lordships in that passage is framed, I think, in relation to the case before them. The essence of the decision is that no evidence, except by registered instrument, shall be receivable of a charge over land. It follows that anything in an unregistered instrument which is not intended to create and does not purport to create a charge over land, (or, of course, a lien or mortgage) and is properly severable, can be admitted in evidence. The debenture now under consideration is a comprehensive document undoubtedly intended to be a security but embracing many things as well as a charge on land. Under clause 1 the charge extends to all Kentiles' undertaking goodwill assets and property whatsoever, present and future, including its uncalled capital. The right to appoint a manager and receiver is not an essential incident of an equitable mortgage, which is normally enforced by mortgage suit and sale. It is common ground that the debenture can be relied upon to prove a charge over movables and I see no reason why the same would not apply to all other assets mentioned in the debenture except immovables e.g., business, book debts, goodwill and uncalled capital. The debenture may, as I see it, be received as evidence of all those matters, but nevertheless, unless for those purposes the debenture gave a right to enter upon or take possession of the land in question, I cannot see that it can provide a defence to an action for trespass on that land. There is no such provision in the debenture. Clause 8(a) provides that the receiver and manager shall have power to take possession of all or any part of the property "hereby charged", but, so far as the court is concerned the land has not been charged, for

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it is not open to the bank to prove the charge by reason of the provisions of the Crown Lands Ordinance above discussed. It might be argued that a right of entry from time to time was necessarily incidental to those powers of the receiver and manager which are provable, but the action is based not on that ground but on the wider ground of wrongfully taking possession and continuing in occupation. For these reasons, with respect, I am unable to agree with the learned judge that the right to appoint a receiver extends to and justifies the entry of the bank into possession of the suit property.

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The next matter for consideration is the submission that the debenture includes an agreement to give an equitable mortgage over future acquired land entitling the bank to a memorandum of deposit registerable under the Crown Lands Ordinance in respect of the title deeds which it now holds. By virtue of section 129(e) of the Crown Lands Ordinance section 127 does not apply to:-

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"any document not itself creating, declaring assigning, limiting or extinguishing any right, title or interest to or in land registered under this Part, but merely creating a right to obtain another document, which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest";

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Is it possible to have an agreement to provide an equitable mortgage falling within this sub-paragraph so as to be admissible in evidence without registration? I think that the answer is in the affirmative provided the agreement itself does not amount to an equitable mortgage. Whether such an agreement is enforceable is a separate question but I see no reason why it should not be. Putting the proposition in as simple terms as I may, I think it is this. A lends to B a sum of money on security or even without it. The agreement recites that B expects to acquire land in three months time and B undertakes that upon such acquisition he will give A a valid equitable mortgage thereover by deposit of title deeds as security or collateral security. B acquires the land. I think that undertaking, supported by

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by consideration, would be enforceable by action and the agreement between A and B would be admissible in evidence. At that stage it would perhaps be a question of the construction of the agreement whether B was obliged to provide also a memorandum, but it is hard to envisage a case in which the law would not imply a term that the equitable mortgage was to be a legally enforceable one, and for that purpose a memorandum would be essential. The form of a memorandum is contained in the Schedule to the Crown Lands (Registration Offices) Rules (Laws of Kenya 1948 Vol. VI p.2371) and is, by rule 3 directed to be used in all cases under Part XII. It is:-

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"SCHEDULE

THE CROWN LANDS ORDINANCE

Memorandum of Equitable Mortgage by Deposit of Documents (Section 127, Proviso) To The Registrar of Crown Lands,

I, , hereby declare that Document(s) No. relating to holding No. in the District of was/were deposited by me with by way of Equitable Mortgage on the day of 19 .

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Dated this day of 19 .

(Signature of Mortgagor)

(Signed in the presence of)

Received the above-quoted document(s)

(Signature of Mortgagee)

(Signed in the presence of)

N.B. This form is subject to stamp duty as prescribed by the Stamp Ordinance".

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I think in the present case that Kentiles was bound by the debenture to deposit title deeds to future acquired immovable property with the bank and to provide a memorandum to enable the deposit to be proved and effective. That deposit was intended to be by

way of collateral security with the charge which the debenture would itself have effected over such land on its acquisition, but which could not be given in evidence by reason of section 127 of the Crown Lands Ordinance. Counsel for the bank also relied on Clause 12 of the debenture as conferring a like right but I do not think it is applicable if I am not right in thinking that the earlier part of the debenture confers such a right - if I am correct clause 12 is not material.

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From this point, however, the difficulties in the way of the bank are formidable. To provide a defence to the action in trespass (on the basis I am now discussing) it must claim the ancillary right of entry provided by the debenture on the basis that it was at the material time an equitable mortgagee. Section 127 of the Crown Lands Ordinance prevents from being tendered in evidence for that purpose not only the debenture but any evidence at all. In Kenya it is not only a question of documents. Hence, though all the evidence which surrounds the giving of the legal mortgage is admissible (consequent upon its registration) and that evidence includes the fact that the documents of title were held as well as the legal mortgage, it is admissible only for the decision of the question before the court as to the validity of the legal mortgage. It cannot be looked at to arrive at the determination (which otherwise in my opinion was a possibility) that the legal mortgage having been found to be a nullity the deposit of the documents of title took effect in equity as an equitable mortgage. Nor can any evidence of the intention of the parties to deposit the documents of title prior to the execution of the legal mortgage (as has been argued) as equitable security, be received by way of the debenture or otherwise.

The position is therefore, that the bank has not sued for enforcement of a right to a deposit of documents of title and a memorandum at the time of action. It has sued for a memorandum in respect of a past deposit, to which it is entitled only if the deposit was made with intent to create an equitable mortgage or otherwise took effect as such. The law prevents the bank from proving a deposit with any such intent or effect. I think that the argument advanced for the bank on these lines must fail.

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For these reasons I would allow the appeal of Kentiles with costs and dismiss the appeal of the bank with costs, certifying for two counsel. I would add that I am not in agreement with my brother Newbold J.A. (who, except for the matter I am now dealing with, would have arrived at a similar result) that the outcome must be different because Kentiles are estopped from challenging the bank on appeal. Though Mr. Donaldson in argument on a preliminary point said that a necessary party (the Receiver) had not been joined, he did so on a collateral issue and never submitted or suggested that the court on appeal could not decide the issues as between the bank and Kentiles. The resulting order naturally would have to be limited so as not to affect the Receiver. I have no views on whether estoppel might successfully have been argued - it was not, and Mr. O'Donovan had no opportunity of dealing with such a submission. In the result, particularly as either party could, by taking the necessary steps in proper time, have secured the joinder of the Receiver, they must be taken to be content with such order as the court could properly make without affecting the Receiver's rights.

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I have read the judgments of the learned Acting Vice President and Justice of Appeal. My brother Newbold J.A. and I are agreed that the appeal by the bank must be dismissed with costs (which costs shall include the costs of the cross appeal) and it is so ordered (with a certificate for two counsel). As to the appeal by Kentiles my own opinion is that it should be allowed (subject to modification of the relief which can be granted) and the view of my brother Newbold J.A. as to estoppel does not, as I understand him, prevent such relief being given on the plaint as follows naturally upon the dismissal of the bank's appeal for the reasons given by the learned Justice of Appeal and myself. The court is not assisted by the fact that it has been left by counsel lamentably in ignorance of what the de facto position is and has been during this protracted litigation. The result of our joint views is that Kentiles' appeal should be and is allowed in part and that paragraph 1 of the decree in the Supreme Court be set aside and replaced by:-

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- (a) A declaration that the bank is not a secured creditor in relation to the

immovable property either by way of legal or equitable mortgage or charge and is not entitled to possession of the immovable property.

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10 (b) An order that Kentiles be at liberty to apply to this court within fourteen days for such order directing the bank to terminate the appointment of the Receiver in relation to the immovable property as is necessary to give full effect to the declaration set out above.

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(c) An order in relation to the costs of the plaintiffs' suit that the costs of the first defendant Mr. H. R. Bryce be paid by the plaintiff and that the bank pay one half of plaintiffs' costs.

The Honourable
Sir Trevor Gould
continued

20 The costs of Kentiles' appeal in this court will be paid as to one-quarter by the bank - there will be a certificate for two counsel.

Dated at NAIROBI this 29TH day of AUGUST 1963.

T.J. GOULD

Acting President.

In the Court
of Appeal
for Eastern
Africa at
Nairobi

IN THE COURT OF APPEAL FOR EASTERN AFRICA
AT NAIROBI

CIVIL APPEAL NO. 21 OF 1962

BETWEEN

No. 17 NATIONAL AND GRINDLAYS BANK LTD APPELLANT

Judgment of
the Court of
Appeal

AND

29th August
1963

KENTILES LIMITED (In Liquidation))
and THE OFFICIAL RECEIVER (as)
Liquidator thereof)) RESPONDENTS

The
Honourable
Mr. Justice
Newbold

(Appeal from a judgment and decree
of the Supreme Court of Kenya at
Nairobi (Miles J.) dated 30th
October, 1961

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in

Civil Case No. 658 of 1958

Between

Kentiles Limited (In Liquidation))
and The Official Receiver (as)
Liquidator thereof)) Plaintiff

and

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Hubert Richard Brice 1st Defendant

and

National and Grindlays Bank Ltd. 2nd Defendant)

JUDGMENT OF NEWBOLD, J.A

On the 1st October, 1951, Kentiles Limited, a
company incorporated in Kenya, (hereinafter referred
to as "Kentiles") gave to the predecessor of National
and Grindlays Bank Limited, a company incorporated
outside Kenya, (hereinafter referred to as "the Bank")
a debenture in consideration of overdraft facilities

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10 which were not to exceed at any one time Shs. 1,800,000/-, the amount owing at any time being repayable on demand. By clause 1 of the debenture Kentiles charged with the repayment of any monies due all its assets both present and future. By clause 2 it was provided that the charge should, as respects immovable property, constitute a fixed charge and that Kentiles should, on the acquisition of any immovable property, deposit the title deeds thereof with the Bank by way of equitable mortgage as collateral security for the repayment of the monies owed and that Kentiles should, when called upon by the Bank so to do, execute a legal mortgage of such immovable property. By clauses 7, 8 and 9, power was given to the Bank to appoint a receiver and manager after the monies secured by the debenture became payable and the powers of any such appointee and his duties in relation to monies received by him were also set out. On the 1st

20 November, 1951, Kentiles acquired immovable property in the Highlands (which property is hereinafter referred to as "the land") and prior to that date the title deeds of the land were, with the knowledge and consent of Kentiles and in anticipation of such acquisition, held to the order of the Bank. On the same date Kentiles executed a legal mortgage of the land in favour of the Bank. On the 19th November, 1956, a petition for the winding-up of Kentiles was presented and on the

30 20th November, 1956, the Bank appointed a receiver and manager (hereinafter referred to as "the Receiver") under the powers contained in the debenture and the Receiver subsequently took possession of the land. On the 11th January 1957, a winding-up order was made and the official Receiver was appointed liquidator. On the 7th May 1958, Kentiles and the official Receiver as liquidator (both of whom in so far as any reference is made to the litigation are referred to as

40 Kentiles) filed a plaint claiming as against both the Bank and the Receiver, inter alia, a declaration that Kentiles was the unincumbered owner of the land, an order for delivery of possession of the land, and orders for accounts, mesne profits and damages. On the 16th March, 1959, the Bank filed a defence and counterclaim which, as amended, claimed, inter alia, a declaration that the Bank was the legal mortgagee of the land, a declaration that it was entitled to the delivery of a duly

In the Court of Appeal for Eastern Africa at Nairobi

No.17

Judgment of the Court of Appeal

29th August 1963

The Honourable Mr. Justice Newbold -
continued

In the Court
of Appeal
for Eastern
Africa at
Nairobi

executed memorandum of deposit of title deeds by way of equitable mortgage, and an order for the execution and delivery of such memorandum. Apparently the Receiver filed a defence to the plaint but this is not included in the record.

No. 17

Judgment of
the Court
of Appeal

29th August
1963

The
Honourable
Mr. Justice
Newbold -
continued

When the plaint and counterclaim came before the Supreme Court the learned trial judge dismissed both holding, inter alia, first, that the legal mortgage was invalid; secondly, that there had been no equitable mortgage of the land by deposit of title deeds; and, thirdly, that the Bank and the Receiver were entitled to rely on the debenture to justify the entry upon and possession of the land. From the decision dismissing the counterclaim the Bank appealed on the broad grounds that the judge had erred in failing to hold that the legal mortgage was valid or, alternatively, that the debenture gave a right to call for a memorandum of deposit and that the title deeds had been deposited with intent to create an equitable mortgage. The only parties to the appeal were the Bank and Kentiles. Kentiles gave notice of cross appeal, and the first three grounds thereof related to the decision on the plaint and were, broadly, that the judge erred in holding that the debenture gave to the Bank a right to appoint a receiver and in failing to hold that the debenture was void and that the appointment of a receiver was a means of enforcing a void security. The other grounds of the notice claimed that the trial judge's decision on the counterclaim should be upheld for reasons other than those which he gave.

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When the appeal and cross appeal came before this court Mr. Donaldson, who appeared for the Bank, raised a preliminary objection to the notice of cross appeal on the grounds first, that the appeal was against the decision on the Bank's counterclaim but the first three grounds of the notice related to the decision on the plaint; and secondly, that the decision on the plaint affected both the Bank and the Receiver and that, as the Receiver was a party neither to the appeal nor to the cross appeal, Kentiles were not entitled to seek to upset the judgment on the plaint as to either the Bank or the Receiver. Mr. O'Donovan, who appeared for Kentiles, stated that the Receiver was not, so far as Kentiles were concerned, a necessary party to the proceedings, but that if the court thought that he should be joined he

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asked that this be done; he also submitted that the procedure was in accordance with the Rules and asked, if the court was against him, that the first three grounds of the cross appeal be treated as a separate appeal. This court by a majority decided to treat the first three grounds of the notice of cross appeal as a separate appeal but did not order the Receiver to be joined. There is thus before this court an appeal by the Bank against the decision on the counterclaim and a cross appeal by Kentiles asking that the decision be affirmed on grounds other than those on which the trial judge relied. There is also an appeal by Kentiles against the decision on the plaint in so far as it relates to the Bank only.

Dealing first with the appeal of the Bank, it cannot succeed unless the Bank is either a legal or equitable mortgagee of the land. The Bank asserts that the mortgage executed on 1st November, 1951, is a valid legal mortgage of the land and that the proviso to section 328 of the Companies Ordinance at no time precluded the Bank from acquiring a legal interest in the land or, if it did, that the amendment to the proviso effected subsequent to the filing of the plaint but prior to the filing of the counterclaim had the result of validating the mortgage. The trial judge held that the proviso as it existed prior to the amendment barred the Bank from acquiring the legal estate in the land and I agree with him. The proviso as it existed originally specifically prohibited a company such as the Bank from acquiring the land unless it was registered under the Companies Ordinance and, for the reasons given by the judge, in my view the Bank was not registered under the Ordinance. The trial judge held accordingly that for the purposes of the defence the Bank was not the holder of a valid mortgage; but, if I understand his judgment correctly, he would have held that, by reason of the amendment to the proviso, the Bank held a valid legal mortgage for the purposes of the counterclaim if he had not held that the mortgage was invalid for other reasons. The trial judge arrived at this conclusion, which, I think with justice, he described as "odd", on the ground that the amendment applied to actions commenced on or after 13th May, 1958, but not to

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.17

Judgment of the
Court of Appeal

29th August 1963

The Honourable
Mr. Justice
Newbold -

continued

In the Court
of Appeal
for Eastern
Africa at
Nairobi

No. 17

Judgment of
the Court
of Appeal

29th August
1963

The
Honourable
Mr. Justice
Newbold -
continued

those commenced earlier, and the counterclaim, which must be treated as an independent action, was filed subsequent to that date. I accept that a counterclaim is for many, probably for most, purposes to be treated as an independent action; but, with respect to the learned judge, I know of no authority or statutory provision which would require it to be so treated for all purposes and in any circumstances. It would be complete nonsense if the law were such that in an action between the same parties arising out of the same acts the mortgage were held invalid for the purpose of the defence but valid for the purposes of the counterclaim, both of which pleadings are contained in the same document filed on the same day, and I refuse to accept, if such would be the result of treating the counterclaim as an independent action, that it should be so treated. In any event, were the counterclaim to be treated as an independent and subsequent action, the validity of the mortgage would be res judicata for the purposes of the counterclaim by reason of the notionally earlier judgment on the plaint. For these reasons I consider that the Bank was prohibited by the proviso to section 328 of the Companies Ordinance from acquiring a legal interest in the land, and, consequently, that the mortgage is invalid. It is thus unnecessary to consider whether the mortgage is void by reason of the provisions of the Land Control Ordinance or the Crown Lands Ordinance, but as the matter was fully argued I think I shall say that I see no reason to differ from the conclusion reached by the trial judge.

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Turning now to the submissions on the appeal of the Bank that it is an equitable mortgagee of the land, the counterclaim alleges that the Bank is an equitable mortgagee by reason of the title deeds having been deposited with the Bank on the 19th December, 1951, which deposit, having regard to the terms of the debenture, was by way of equitable mortgage. The judge found that the title deeds had been deposited with the Bank by attornment though on a date different from that mentioned in the counterclaim but he held that they had not been deposited by way of equitable mortgage. The legislation on this subject is most confused and there are many different aspects which arise for consideration under the Companies Ordinance, the Land Control Ordinance, the Equitable Mortgages Ordinance, the Crown Lands Ordinance and the Ordinance amending those Ordinances.

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I have, however, come to the conclusion that there is one essential point in so far as the counterclaim is concerned and I shall go straight to it and not discuss the many other aspects which arise. The counterclaim is based on the existence of an equitable mortgage arising by deposit of title deeds; unless it exists the Bank is not entitled to either the declaration or the memorandum. Under section 127 of the Crown Lands Ordinance no evidence shall be receivable in any court of a mortgage unless it is created by an instrument in writing which is registered under the Ordinance; the proviso to that section, however, states that an exception applies in the case of an equitable mortgage by deposit of documents if a memorandum of such equitable mortgage has been registered. No memorandum of this equitable mortgage has been registered and thus it is not, in my view, open to the Bank to give any evidence that the land is subject to an equitable mortgage. The result is that the Bank is unable to prove that it is an equitable mortgagee.

As I stated earlier, this appeal cannot succeed unless the Bank is either the legal or equitable mortgagee of the land. For the reasons I have given the Bank is neither a legal nor an equitable mortgagee of the land and, therefore, the appeal of the Bank must fail.

I turn now to the appeal of Kentiles. The defence to the plaint rests upon the entry of the Receiver being lawful; this, in turn, rests upon the debenture being admissible in evidence. There are many aspects of the debenture which fall for consideration but I find it necessary to examine one only. Quite clearly the debenture creates a charge on the land; indeed, that is one of its objects. Equally clearly the appointment of a Receiver is inextricably linked with this charge as it is a means of enforcing it. But the debenture has not been registered under the Crown Lands Ordinance and thus, under section 127 of that Ordinance, is not receivable in evidence. There is nothing in section 129 of that Ordinance which would result in section 127 not applying to this debenture, nor is Denning v Edwardes (1960) E.A. 755 of assistance to the Bank as this is not

In the Court
of Appeal for
Eastern Africa
at Nairobi

No. 17

Judgment of the
Court of Appeal

29th August 1963

The Honourable
Mr. Justice
Newbold -

continued

In the Court
of Appeal
for Eastern
Africa at
Nairobi

No.17

Judgment of
the Court
of Appeal

29th August
1963

The
Honourable
Mr. Justice
Newbold -
continued

a case where the sole object of using the debenture had nothing to do with the charge - indeed it is the very reverse. It would appear therefore that Kentiles are entitled to succeed on their appeal, but with reluctance and some hesitancy I do not think that this follows. The plaintiff is against both the Bank and the Receiver, the allegations therein of wrongful acts are made against "the Defendants" without distinction and the prayers therein ask for the same relief against each. The decree of the Supreme Court, which is founded upon the decision that the debenture entitles the Bank to appoint the Receiver and the Receiver to enter into possession with the powers and duties as set out in the debenture, draws no distinction between the Bank and the Receiver. The only parties on this appeal are Kentiles and the Bank with the result that the decision of the judge and the decree of the Supreme Court in respect of the Receiver cannot be altered. Kentiles have chosen to appeal against the Bank only. It would in my view be nonsense for the Courts, on the same plaintiff setting out the same cause of action between the same parties arising out of the same acts claimed to be lawful under the same instrument, to hold that the Bank could not appoint the Receiver to enter into possession of the land and exercise the powers set out in the debenture and at the same time to hold that the Receiver was validly appointed under the debenture and had properly entered into possession of the land and exercised the powers set out in the debenture. By choosing to sue both the Bank and the Receiver in the manner in which Kentiles did, and by accepting the decision of the Supreme Court in respect of the Receiver, Kentiles, are in my opinion, estopped from challenging on appeal in relation to the Bank any action of the Bank the validity of which must have been accepted by reason of accepting the decision in relation to the Receiver.

For these reasons I would dismiss the appeal of the Bank with costs, which costs should include the costs of the cross appeal. As regards the appeal of Kentiles, while the estoppel which in my view has arisen precludes Kentiles from succeeding in toto, nevertheless the Bank is not a secured creditor in relation to the land and Kentiles are thus entitled to a declaration to that effect.

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I agree with the order proposed by the Acting President in his judgment and also with his order as to the costs in the Supreme Court and on the appeal. I would in respect of each appeal give a certificate for two counsel.

Dated at Nairobi this 29TH day of AUGUST, 1963.

C.D. NEWBOLD
JUSTICE OF APPEAL

10 I certify that this is a true copy of the original

Sgd. ?

AG. ASSOCIATE REGISTRAR.

SEAL

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.17

Judgment of the
Court of Appeal

29th August 1963

The Honourable
Mr. Justice
Newbold -

continued

In the Court
of Appeal
for Eastern
Africa at
Nairobi

NO.18

ORDER OF COURT OF APPEAL DATED 29th
AUGUST, 1963

IN THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

No. 18

CIVIL APPEAL NO. 21 OF 1962

Order of the
Court of
Appeal

Between

NATIONAL & GRINDLAYS BANK LIMITED APPELLANT

29th August
1963

and

KENTILES LIMITED (In Liquidation))

and

THE OFFICIAL RECEIVER (as
Liquidator thereof)

RESPONDENT

10

(Appeal by the Appellant together with
an Appeal and cross-Appeal by the
Respondent from and judgment and decree
of the Supreme Court of Kenya at Nairobi
(Miles J) dated 30th October, 1961

in

Civil Case No. 658 of 1958

Between

20

Kentiles Ltd (In Liquidation))

and

The Official Receiver (as
Liquidator thereof)

Plaintiff

and

Hubert Richard Brice

1st Defendant

National & Grindlays Bank Limited

2nd Defendant)

In Courtthis 29th day of August 1963In the Court
of Appeal for
Eastern Africa
at Nairobi

Before The Honourable the Acting President
(Sir Trevor Gould)
The Honourable the Acting Vice President
(Mr. Justice Crawshaw)
and The Honourable Mr. Justice Newbold, a
Justice of Appeal

No. 18

Order of the
Court of Appeal

29th August 1963

continued

O R D E R

10 THIS APPEAL by the Appellant and CROSS
APPEAL by the Respondent, coming on the 18th and
 19th June 1963 for hearing in the presence of Mr.
 John Donaldson, one of Her Majesty's Counsel and
 Mr. Gerald Harris of Counsel for the Appellant
 and Mr. Bryan O'Donovan one of Her Majesty's
 Counsel and Mr. Byron Georgiadis of Counsel for
 the Respondent when, on Counsel for the Appellant
 taking a preliminary objection to the said Notice
 of Cross-Appeal it was directed that the Notice
 20 of Cross-Appeal should, as to paragraphs 1, 2 and
 3 thereof be treated as a separate Appeal by the
 Respondent and that the said respective Appeals
 and Cross-Appeal should stand over for judgment
 and the same coming on this day for judgment in
 the presence of Counsel for the Appellant and
 Counsel for the Respondent.

IT IS ORDERED

- 30 (1) That the Appeal by the Appellant herein
 be and the same is hereby dismissed and
 that the costs thereof when taxed shall
 be paid by the Appellant to the
 Respondent.
- 40 (2) That the Appeal by the Respondent com-
 prised in the said Notice of Cross-
 Appeal (which as to paragraphs 1, 2 and
 3 thereof was deemed to be a separate
 Appeal by the Respondent against that
 portion of the decree of the Supreme
 Court dated the 30th October, 1961
 which dismisses the Respondent's Suit
 against the Appellant) be and is hereby
 allowed in part and that the costs
 thereof (other than the costs of the

In the Court
of Appeal
for Eastern
Africa at
Nairobi

No. 18

Order of the
Court of
Appeal

29th August
1963

continued

preliminary objection taken by the Appellant to the said Notice of Cross Appeal) shall as to one-quarter be paid by the Appellant to the Respondent.

- (3) That the costs of the Appellant of and in relation to its preliminary objection to the said Notice of Cross Appeal be paid when taxed by the Respondent to the Appellant. 10
- (4) That the first paragraph of the decretal portion of the said decree of the Supreme Court be set aside and replaced by a paragraph in the following terms:
- "1. (a) That the Plaintiff's suit against the First Defendant be and the same is hereby dismissed;
- " (b) That the Court doth declare that the Second Defendant is not a secured creditor in the liquidation of Kentiles Limited in relation to the immovable property the subject of the suit either by way of legal or equitable mortgage or charge and is not entitled to possession of such property; 20
- " (c) That the Plaintiff is at liberty to apply to this Court within fourteen days from the 29th day of August 1963 for such order directing the Second Defendant to terminate the appointment of the First Defendant as Receiver in relation to the said immovable property as is necessary to give full effect to the declaration at (b) above; 30
- " (d) That the First Defendant be declared entitled to his costs of the suit to be paid to him by the Plaintiff when taxed and that the Plaintiff be declared entitled to 40

one-half of its costs of the suit as against the Second Defendant to be paid to it by the Second Defendant when taxed".

In the Court of Appeal for Eastern Africa at Nairobi

(5) The Court doth certify that the employment of two Counsel at the hearing before this Court was reasonable.

No. 18

Order of the Court of Appeal

10 GIVEN under my hand and the Seal of the Court at Nairobi this 29th day of August 1963.

29th August 1963
continued

F. HARLAND

REGISTRAR
COURT OF APPEAL FOR EASTERN AFRICA
NAIROBI.

ISSUED this 8TH day of JANUARY, 1964.

I certify that this is a true copy of the Original.

?

For REGISTRAR

9. 1. 64.

In the Court
of Appeal
for Eastern
Africa
at Nairobi

NO.19

ORDER GRANTING FINAL LEAVE TO APPEAL TO THE
JUDICIAL COMMITTEE - DATED 14TH FEBRUARY 1964

IN THE COURT OF APPEAL FOR EASTERN AFRICA AT
NAIROBI

No. 19

CIVIL APPLICATION NO.9 OF 1963 (P.C)

Order
granting
final leave
to appeal
to the
Judicial
Committee

(In the matter of an Intended Appeal to the Judicial
Committee of the Privy Council)

B E T W E E N

NATIONAL & GRINDLAYS BANK LIMITED APPLICANT

10

14th February
1964

A N D

KENTILES LIMITED (In Liquidation))
and
THE OFFICIAL RECEIVER (as
Liquidator)

}
} RESPONDENT

(An application for final leave to appeal to
the Judicial Committee of the Privy Council and for
a stay of execution of the final Judgment and formal
Order of the Court of Appeal for Eastern Africa holden
at Nairobi dated 29th August 1963 in Civil Appeal No.
21 of 1962

20

B E T W E E N

NATIONAL & GRINDLAYS BANK LIMITED APPELLANT

A N D

KENTILES LIMITED (In Liquidation))
and
THE OFFICIAL RECEIVER (as
Liquidator)

}
} RESPONDENT)

In Chambers:

this Fourteenth day of February
1964

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Before the Honourable the Vice President (Sir Trevor
Gould)

O R D E R

In the Court
of Appeal for
Eastern Africa
at Nairobi

No.19

Order granting
final leave to
appeal to the
Judicial
Committee

14th February
1964 -

continued

10 Upon the Application presented to this
Court on the 11th day of February 1964 by Counsel
for the above named Applicant for final leave to
appeal to the Judicial Committee of the Privy
Council and for a further stay of execution of the
final Judgment and formal Order of this Court
dated the 29th day of August 1963 AND UPON
20 READING the Affidavit of Jayant Nichhabhai Desai
of Nairobi Advocate in support thereof and upon
hearing Counsel for the Applicant and for the
Respondent and Counsel for the Respondent so
consenting THIS COURT DOTH ORDER that the
Application for final leave to appeal to the
Judicial Committee of the Privy Council be and
is hereby granted AND DOTH DIRECT that the
Record including this Order be despatched to
London within ten days from the date of this
Order AND DOTH FURTHER ORDER that the execution
30 of the Judgment and Order of this Court dated 29th
day of August 1963 shall be suspended pending the
determination of the said appeal AND DOTH FURTHER
ORDER that the costs of and incidental to this
Application do abide the result of the appeal.

GIVEN under my hand and the Seal of the
Court at Nairobi this 14TH day of FEBRUARY, 1964.

Sgd. F. HARLAND

REGISTRAR,
COURT OF APPEAL FOR EASTERN AFRICA

30 ISSUED this 17TH day of FEBRUARY, 1964.

I certify that this is a true copy
of the Original

?

For REGISTRAR
17. 2. 64.

Exhibits

EXHIBITS

5

5 - COPY ABSTRACT OF REGISTER OBTAINED
FROM LAND OFFICECopy Abstract File 1131274

of Register
obtained from 1. Conveyance dated 5th October 1906 Provincial No.
Land Office 653

Crown To Henry Herbert Tarlton
of 557 acres Kasarini River (L.O.No.57)

Consideration Rs.557/- Regd. No.343/AIII/1906

2. Further Assurance dated 26th September 1914 10

Crown to H.H. Tarlton. In connection with the
conveyance dated 5th October 1906.

Regd. No. 533/A XIII/1914.

3. Memo of Deposit of Title deed No.343/AIII/1906

By way of Equitable Mortgage dated 30th August
1915 in favour of and presented by Standard
Bank of South Africa.

D.B. No. 218/1915.

4. Memorandum of Discharge of Equitable Mortgage
dated 4th December 1925 By the Standard Bank
of South Africa Limited, Nairobi. 20

D.B. No. 957/25 dt. 7/12/25.

Sgd. G.J. Robbins
REGISTRAR OF CROWN LANDS.

5. Mortgage dated 2nd December 1925.

H.H.Tarlton to Thomas Alfred Wood; George
Alexander Hume Hamilton & George Russell

557 Acres L.O. NO.57 Kasarini River near
Nairobi to secure the sum of Shs. 360,000/-
(with other lands) 30

D.B. No. 1004/25 dt. 11/12/25.

Sgd. G.J. Robbins
REGISTRAR OF CROWN LANDS

6. Second Mortgage dated 14th May 1932

Exhibits

H.H.Tarlton to Sir Henry John Delves
Broughton & William Tyson trading as
"Tyson Brothers"

5

557 acres L.R. No. (L.R.No.57) Kasarini
River near Nairobi (with other lands)

Copy Abstract of
Register obtained
from Land Office

To secure the sum of Shs. 240,000/- Subject
to Mortgage No. 5 above

continued

No. 1834 dt. 13/6/32

10

Sgd. R.A. Hawkins

REGISTRAR OF CROWN LANDS.

7. Probate of Will dated 26th March 1934
of Henry Herbert Tarlton - decd - To Mrs.
Annie Elizabeth Catherine Tarlton.

No. 1219 dt. 2.6.36

Sgd. R.A.Hawkins

REGISTRAR OF CROWN LANDS.

8. Wayleave Agreement dated 30th May 1936

20

To The East African Power & Lighting Company
Limited, Granting Easement to lay and main-
tain the electric line across the above land.

No. 1218 dt. 2.6.36.

Sgd. R.A. Hawkins

REGISTRAR OF CROWN LANDS

9. Transfer of Mortgage dated 6th August 1937
of No. 6 above (with other lands)

To Sir Henry John Delves Broughton

No. 2193 dt. 16.9.37

Sgd. G.J. Robbins

REGISTRAR OF CROWN LANDS

30

Exhibits

5

Copy Abstract
of Register
obtained from
Land Office
continued

10. Certificate of Death dated 2nd July 1937
of George Alexander Hume Hamilton

No. 2954 dt. 21.10.38

Sgd. G.J. Robbins

REGISTRAR OF CROWN LANDS

File 1131

11. Probate of Will dated 4th December 1930
of George Russell Mayers - deceased.

To Rupert William Barrett & George Alexander
Hume Hamilton

10

No. 3008 dt. 25.10.38

Sgd. G.J. Robbins

REGISTRAR OF CROWN LANDS

12. Transfer of Mortgage dated 5th October 1938

To Thomas Alfred Wood. Rupert William Barrett
and Humphrey Slade of No. 5 above (with other
lands)

No. 2976 dt. 21.10.38

Sgd. G.J. Robbins

REGISTRAR OF CROWN LANDS

20

13. Probate of Will dated 26th March 1934
of Henry Herbert Tarlton - decd - To Annie
Elizabeth Catherine Tarlton

No. 3243 dt. 21.11.38

Sgd. G.J. Robbins

REGISTRAR OF CROWN LANDS

14. Conveyance dated 1st November 1938

To Thomas Alfred Wood, Humphrey Slade and
Rupert William Barrett.

as trustees of B.J.Allen "decd" & G.R.Mayers
"decd" Respectively as tenants in common in
equal shares.

Exhibits

5

For Shs. 110,000/- Freed & Discharged from
Nos. 5 and 6 above (with other lands)

No. 3244 dt. 21.11.38

Sgd. G.J. Robbins

Copy Abstract
of Register
obtained from
Land Office -
continued

REGISTRAR OF CROWN LANDS

(I.R.1281)

- 10 15. Certificate of Death dated 13th September
1944 of Thomas Alfred Wood - decd -

No. 3647 dt. 9.11.46

Sgd. E.B.Lloyd

REGISTRAR OF CROWN LANDS

(I.R.1281)

16. Appointment of new Trustee dated 10th July
1944

Appointing James Frederick Hume Hamilton in
place of Thomas Alfred Wood - decd.

20 No. 3048 dt. 9.11.46

Sgd. E.B.Lloyd

REGISTRAR OF CROWN LANDS

17. Conveyance dated 2nd November 1946.

To Kenboard Limited for Shs. 139,250/-.

No. 3649 dt. 9.11.46

Sgd. E.B.Lloyd

REGISTRAR OF CROWN LANDS

Exhibits

18. Mortgage dated 2nd November 1946

To A & S. Block Investment Trust Ltd.
For Shs. 139,250/-.

5

Copy Abstract
of Register
obtained from
Land Office

No. 3651 dt. 9.11.46

Sgd. E.B. Lloyd

REGISTRAR OF CROWN LANDS

continued

19. Wayleave Agreement dated 24th February 1948

With the East African Power & Lighting Co.Ltd.

No. 3554 dt. 11.8.48

Sgd. A.P. Manning

10

REGISTRAR OF CROWN LANDS

20. Variation of Mortgage dated 3rd September 1948

Varying terms in No. 18 above.

No. 3989 dt. 8.9.48

Sgd. A.P. Manning

REGISTRAR OF CROWN LANDS

21. Mortgage dated 10th March 1949

To A & S. Block Investment Trust Limited

For Shs. 50,000/- Supplemental to Nos. 18
and 20 above

No. 1245 dt. 15.3.49

Sgd. R.H.Mills-Owen

20

REGISTRAR OF CROWN LANDS

- | | | Exhibits |
|-----|--|--|
| 22. | Wayleave Agreement dated 15th April 1949
Between Kenboard Limited and The East
African Power & Lighting Co. Limited

No. 1875 dt. 25.4.49

Sgd. E.B. Lloyd
REGISTRAR OF CROWN LANDS | 5

Copy Abstract
of Register
obtained from
Land Office

continued |
| 23. | Reconveyance of Mortgage dated 9th August
1949 of Nos. 18, 20 and 21 above

No. 3654 dt. 12.8.49

Sgd. E.B. Lloyd
REGISTRAR OF CROWN LANDS | |
| 10 | | |
| 24. | Mortgage dated 9th August 1949

To Barclays Overseas Development Corpora-
tion Limited

For Shs. 900,000/- (with other lands)

No. 3706 dt. 16.8.49

Sgd. E.B. Lloyd
REGISTRAR OF CROWN LANDS | |
| 25. | Mortgage dated 22nd February 1950

Kenboard Limited - "Debtor" with Concrete
Utilities Limited "Surety" to Abraham
Iazarus Block "Guarantor"

To an amount not exceeding Shs. 400,000/-
(with other lands)

No. 1898 Dt. 2.5.50

Sgd. J.E. Jardin
REGISTRAR OF CROWN LANDS | |
| 20 | | |

Exhibits

5

Copy Abstract
of Register
obtained from
Land Office
continued

26. Reconveyance of Mortgage dated 1st October 1951 of No. 24 above.
- No. 6631 dt. 19.11.1951
- Sgd. T.R. Penny
- REGISTRAR OF CROWN LANDS
27. Reconveyance of Mortgage dated 1st October 1951 of No. 25 above
- No. 6632 dt. 19.11.1951
- Sgd. T.R. Penny
- REGISTRAR OF CROWN LANDS
28. Conveyance dated 1st November 1951
- To Kentiles Limited
- No. 6634 dt. 19.11.1951
- Sgd. T.R. Penny
- REGISTRAR OF CROWN LANDS
29. Mortgage dated 1st November 1951
- To The National Bank of India Limited by way of Collateral Security
- No. 6635 dt. 19.11.1951
- Sgd. T.R. Penny
- REGISTRAR OF CROWN LANDS
30. Conveyance dated 1st November 1951 Transferred to Volume N 37 Folio 20/1 20.8 acres I.R. No. 57/16
- To Michael Notkin. Freed and Discharged from No. 29 above
- No. 6636 dt. 19.11.1951
- Sgd. T.R. Penny
- REGISTRAR OF CROWN LANDS

10

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31. Memo of Equitable Mortgage dated 1st November 1951 with The East Africa Industries Limited in respect of L.R. No. 57/R. Subject to No. 29 above

Exhibits

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No. 6637

dt. 19.11.1951

Sgd. T.R. Penny

REGISTRAR OF CROWN LANDS

Copy Abstract
of Register
obtained from
Land Office

continued

32. Memo of Discharge of Equitable Mortgage dated 5th April 1952 of No. 31 above

10

No. 2026

dt. 5.4.1952

Sgd. T.L. Condron

REGISTRAR OF CROWN LANDS

33. Wayleave Agreement dated 1st May 1957 with The Kenya Power Company Limited

No. 5533

dt. 30.5.1957

Sgd. A. Collins

REGISTRAR OF CROWN LANDS

File 1131

34. Caveat dated 20th December 1960

20

By East African Power & Lighting Company Limited

No. 11620

dt. 22.12.60

Sgd. I.N. Leach

REGISTRAR OF CROWN LANDS

35. Withdrawal of Caveat dated 8th March 1961 of No. 34 above

No. 460

dt. 20.3.1961

Sgd. A. Khalil

REGISTRAR OF CROWN LANDS

Exhibits

36. Caveat dated 8th March 1961

By East African Power & Lighting Co. Ltd.

5

No. 174

dt. 11.4.1961

Copy Abstract
of Register
obtained from
Land Office

Sgd. A. Khalil

REGISTRAR OF CROWN LANDS

continued

7 (part)

7 (part) MINUTES OF MEETING OF DIRECTORS
OF KENTILES LIMITED DATED 26th SEPTEMBER
1951

Minutes of
Meeting of
Directors of
Kentiles Ltd

(COPY)

26th September
1951

MINUTES of First Meeting of the Board of Directors
of Kentiles Limited held at the Offices of
Messrs. Kaplan & Stratton, Advocates,
Queensway House, Nairobi on 26th September
1951.

10

PRESENT

Mr. L. Zuckerman

Sir Charles Mortimer, C.B.E., M.L.C.

Mr. A.G.Clough

APOLOGIES FOR ABSENCE
WERE RECEIVED FROM

Lt.Col. the Hon. Stanley Ghersie,
O.B.E., M.L.C.

20

Mr. J. Avinadav

IN ATTENDANCE

Mr. J.A. Mackie-Robertson

1. Mr. Zuckerman was invited to and consented to act as Chairman of the Meeting.

Exhibits

2. Mr. Zuckerman laid on the table a copy of the Memorandum and Articles of Association of Kentiles Limited together with the Certificate of Incorporation of the Company dated 18th September, 1951.

7 (part)

RESOLVED that the Certificate of Incorporation be suitably framed and hung in the Registered Office of the Company.

Minutes of Meeting of Directors of Kentiles Ltd.

26th September 1951 -

10 3. Mr. Zuckerman referred to Article 73 of the Company's Articles of Association and laid on the table appointment in writing by the subscribers to the Memorandum and Articles of Association nominating the following gentlemen to be the first Directors of the Company:

continued

Mr. Leon Zuckerman
 Lt. Col. The Hon. Stanley Chersie, O.B.E.,
 M.L.C.
 Sir Charles Mortimer, Kt. C.B.E., M.L.C.,
 20 Mr. Albert George Clough
 Mr. Joseph Avinadav

Mr. Mackie-Robertson reported that all the Directors present had given their consent in writing to act as such and that the requisite returns had been filed with the Registrar of Companies.

30 RESOLVED that in pursuance of Article 89 of the Articles of Association that Mr. Leon Zuckerman be and is hereby elected Chairman of the Board of Directors for so long as he shall hold the Office of a Director of the Company.

4. In pursuance of Article 95 of the Articles of Association, general notice was given as under of the present interests of Directors in other companies:-

40 Mr. Zuckerman Director of Kenboard Ltd
 Papain Limited
 Concrete Utili-
 ties Limited
 E.A. Marketing
 Co. Limited

Exhibits ----- 7 (part)	Mr. Clough Director of Kenboard Ltd Industrial Minerals Limited	
Minutes of Meeting of Directors of Kentiles Ltd	Mr. Avinadav Director of Kenboard Ltd Concrete Utilities Limited Papain Limited	
26th September 1951 - continued	RESOLVED that the interests of Directors in other companies as noted above be recorded as a general notice of such interests in terms of Article 95 of the Articles of Association and a sufficient disclosure thereunder in regard to any subsequent transaction that might be entered into between the Company and any of such other Companies.	10
	5. RESOLVED that the Seal now produced to the Meeting and an impression whereof if now made in the margin of this minute be and is hereby adopted as the Common Seal of the Company.	
	6. Mr. Zuckerman laid before the meeting Agreement for sale between Kenboard Limited and the Company whereby the Company would in pursuance of Clause 3 (1) of the Memorandum of Association acquire the whole undertaking freehold and leasehold premises, goodwill, plant, machinery and stock-in-trade of or connected with the business of brick and tile manufacturers established by Kenboard Limited on L.R. 57 Kasarini (including L.R.57 itself with the factory, offices and buildings thereon) as at the 1st day of October 1951. The Directors having approved the terms of the Agreement and the provisions as to consideration which it is noted are based on valuations <u>RESOLVED</u> that subject to ratification by the Company in General Meeting, the agreement between Kenboard Limited and the company laid before this meeting be and is hereby approved and that the same be sealed with the Common Seal of the company and signed on behalf of the Board by Mr. Zuckerman and Mr. Clough.	20 30
	7. In pursuance of the Agreement between Kenboard Limited and the Company as recorded in the immediately preceding Minute, the company will take over as from 1st October 1951 the service agreement dated 1st September 1951, existing between Kenboard	40

Limited and Mr. Clough as manager of the brick and tile business.

Exhibits

RESOLVED that the terms of the service agreement dated 1st September 1951 between Kenboard Limited and Mr. A. G. Clough, a copy whereof is annexed to the Agreement concluded between this company and Kenboard Limited, be and are approved and that the said service agreement be and is hereby adopted by the Company in all its terms.

7 (part)

Minutes of Meeting of Directors of Kentiles Ltd.

26th September 1951 -

continued

- 10 FURTHER RESOLVED that Mr. A.G. Clough be and is hereby appointed Managing Director of the Company for so long as he shall continue to serve the company under the said service agreement dated 1st September, 1951.

8. Mr. Clough reported that he had secured the services of Mr. A.D.Addison, A.C.I.S. as Secretary of the Company at a salary of £900 per annum and that Mr. Addison would be available to take up full time duties as from 1st November 1951.

- 20 RESOLVED that Mr. A.D.Addison be and is hereby appointed Secretary of the Company to commence full time duties as from 1st November 1951.

9. In view of the acquisition by the company of L.R.57 with the factory, offices and buildings thereon as recorded in minute No. 6 RESOLVED that the principal place of business of the company should be Land Reference No.57 Kasarini, Thika Road, Nairobi and that such address be registered as the Registered Office of the Company.

- 30 10. Mr. Zuckerman reported that he had been in negotiation with the Manager of the National Bank of India Limited as to the company's financial requirements and that the Bank had signified their preparedness to advance to the company the sum of £90,000 at 1% over Bank of England rates of interest with a minimum of 5% to be secured by a floating charge on all the company's assets and a fixed charge over L.R.57. The said sum of £90,000 would provide the figure of approximately 40 £60,000 required to discharge the liabilities of Kenboard Limited to Barclays Overseas Development Corporation and to Barclays Bank (D.C & O) which liabilities the company is responsible to pay and

Exhibits	discharge in terms of the Agreement between the company and Kenboard Limited recorded in minute No. 6 and would leave the company with a sum of approximately £30,000 available as initial working capital.	
7 (part)		
Minutes of Meeting of Directors of Kentiles Ltd	RESOLVED that the National Bank of India Limited be and is hereby appointed the company's Bankers and that all cheques, bills, etc., be signed by Mr. Zuckerman and Mr. Clough or by either of them and one other Director or the Secretary.	10
26th September 1951 -		
continued	FURTHER RESOLVED that subject to the issue of the Registrar's Certificate entitling the company to commence business, the company do accept the offer of an advance of £90,000 made by the Bank on the terms reported by Mr. Zuckerman and Mr. Clough be and are hereby authorised to conclude the arrangements.	
	The Secretary was instructed to give notice of the resolutions to the Bank to obtain the Bank's standard forms for completion and to send them specimens of the Directors signatures and of his own signature.	20
	11. Mr. Zuckerman laid before the meeting a copy of a notice issued by him for the calling of a General Meeting of the company on 1st October 1951 in order to obtain the ratifications of the members of the company to the agreement to be concluded with Kenboard Limited and the classification of the shares in the capital of the company required to be issued in implementation thereof. The action taken by Mr. Zuckerman was approved.	30
	RESOLVED that the Board does and hereby approves the text of the Special Resolutions to be submitted to the company in general meeting on 1st October 1951, as specified in the notice thereof already issued.	
	12. Mr. Clough was instructed to make preparatory arrangements for the take over of the brick and tile business from Kenboard Limited on 1st October, 1951.	40

13. RESOLVED that subject to the approval of the company in General Meeting Messrs. Cooper Bros., Leslie Seex & Company, Chartered Accountants Nairobi be and are hereby appointed Auditors of the company.

Exhibits

7 (part)

14. RESOLVED that the Board meet again on 1st October 1951 immediately on the conclusion of the General Meeting of the Company.

Minutes of Meeting of Directors of Kentiles Ltd.

Confirmed.

26th September 1951 -

10

Sgd. L. Zuckerman
CHAIRMAN

continued

1st October, 1951.

7 (part) MINUTES OF MEETING OF DIRECTORS OF KENTILES LIMITED DATED 1st OCTOBER 1951

1st October 1951

MINUTES of Second Meeting of the Board of Directors of Kentiles Limited held at the offices of Messrs. Kaplan & Stratton Queensway House, Nairobi on 1st October 1951.

20 PRESENT Mr. L. Zuckerman (Chairman)
Sir Charles Mortimer, C.B.E., M.L.C.
Lt.Col. the Hon. Stanley Ghersie,
O.B.E., M.L.C.
Mr. A.G. Clough
Mr. J. Avinadav
Mr. A.D. Addison, A.C.I.S. Secretary

IN ATTENDANCE

Mr. J.A. Mackie-Robertson

30 15. The Minutes of the First Meeting were read, approved and signed by the Chairman.

16. Mr. Zuckerman referred to the unfortunate absence from Nairobi of Lt. Col. Ghersie and Mr. Avinadav at the time of the First Meeting as a result of which they had been unable to take up their nomination as Directors by the subscribers to the Memorandum of Association. Mr. Zuckerman then drew the attention of the Board to the

Exhibits	provisions of Article 77 of the Articles of Association and moved that thereunder the Board should now appoint Lt. Col. Ghersie and Mr. Avinadav as additional Directors.	
7 (part)		
Minutes of Meeting of Directors of Kentiles Ltd	<u>RESOLVED</u> that Lt. Col. the Hon. Stanley G. Ghersie, O.B.E., M.L.C. and Mr. Joseph Avinadav be and are hereby appointed additional Directors of the Company as at this date under the provisions of Article 77 of the Articles of Association. Lt. Col. Ghersie and Mr. Avinadav having accepted the appointment, took their seats as Directors.	10
1st October 1951 - continued		
	17. Mr. Mackie-Robertson produced and laid before the Meeting the Registrar's Certificate entitling the company to commence business.	
	18. The Company in General Meeting having approved and ratified the Agreement between Kenboard Limited and the Company dated Twenty sixth September 1951 and authorised the Directors to proceed with the implementation thereof AND Kenboard Limited having intimated its election to receive £10,000 of the initial consideration in case as and when required.	20
	<u>RESOLVED</u> that in satisfaction of the initial consideration as provided by the Agreement dated Twenty sixth September 1951 between Kenboard Limited and the Company (a) there be allotted to Kenboard Limited and issued credited as fully paid up 40,000 Ordinary Shares of Shillings Twenty each and 150,000 6% Cumulative Participating Preference Shares of Shillings Twenty each in the capital of the company (out of the 125,000 Ordinary Shares of Shillings Twenty each and 375,000 6% Cumulative Participating Preference Shares created by the Company in General Meeting on 1st October 1951) and that the definitive Certificates in respect thereof be sealed with the Common Seal and signed on behalf of the Board by Mr. Zuckerman and Mr. Clough as Directors and by the Secretary and (b) there be paid to Kenboard Limited in cash the sum of £10,000 as and when Kenboard Limited may request payment thereof or instalments on account thereof.	30
		40

19. Mr. Mackie-Robertson produced and laid before the Meeting Conveyance of Land Reference No. 57 Kasarini by Kenboard Limited in favour of the Company.

Exhibits

7 (part)

10 RESOLVED that the terms of the Conveyance of Land Reference No. 57 Kasarini by Kenboard Limited in favour of the Company be and are hereby approved and that the Conveyance be sealed with the Common Seal and signed on behalf of the Board by Mr. Zuckerman and Mr. Clough.

Minutes of Meeting of Directors of Kentiles Ltd.

1st October 1951 -

continued

20 Mr. Zuckerman reported that the arrangements with the National Bank of India Limited referred to in Minute No. 9 of the First Meeting had now been finalised. Mr. Mackie-Robertson produced and laid before the Meeting (a) Debenture for £90,000 by the Company in favour of the National Bank of India Limited creating a floating charge on all the assets of the Company and (b) Indenture of Mortgage by the Company in favour of the National Bank of India Limited creating a fixed charge over L.R. 57 Kasarini as collateral security to the Debenture.

30 RESOLVED that under the powers conferred by Clause 16 of the Memorandum of Association and Article 85 (g) of the Articles of Association the Company do borrow from the National Bank of India Limited up to a maximum of £90,000 and that the same be secured by Debenture of the Company for that amount creating a floating charge on all the assets of the Company and by a legal Mortgage over Land Reference No. 57 Kasarini as collateral security.

40 FURTHER RESOLVED that the terms of the Debenture for £90,000 in favour of the National Bank of India Limited and the Indenture of Mortgage over Land Reference No. 57 in favour of the National Bank of India Limited be and are hereby approved and that such Debenture and Mortgage be respectively sealed with the Common Seal and signed on behalf of the Board by Mr. Zuckerman and Mr. Clough. The Secretary was instructed to register the Debenture as a charge with the Registrar of Companies and to make the necessary entry in the Company's Register of Charges.

Exhibits	The arrangements for the advance of £90,000 from the Bank having been concluded.	
<hr/>		
7 (part)	<u>RESOLVED</u> that the company should forthwith effect payment to Barclays Bank (D.C & O) of the same owing by Kenboard Limited (approximately £20,000) and for the payment of which the company is liable in terms of the Agreement dated 26th September, 1951.	
Minutes of Meeting of Directors of Kentiles Ltd		
1st October 1951 - continued	<u>FURTHER RESOLVED</u> that the Bank be requested to guarantee to Barclays Overseas Development Corporation the due payment of the capital instalments (£40,000) and interest due under a Mortgage by Kenboard Limited dated 9th August 1949 and for the payment of which the company is liable in terms of the Agreement dated 26th September, 1951.	10

3 - DEBENTURE BETWEEN KENTILES LIMITED
AND THE NATIONAL BANK OF INDIA LIMITED
DATED 1st OCTOBER, 1951

Exhibits

3

KENTILES LIMITED

THIS DEBENTURE is issued under Clause (16) of the Company's Memorandum of Association and Clause 85 (g) of the Company's Articles of Association and in pursuance of a Resolution of the Directors of the Company dated the first day of October 1951.

Debenture
between Kentiles
Limited and the
National Bank
of India Limited

1st October 1951

DEBENTURE Shillings 1,800,000/--
(maximum)

THIS First day of October One thousand nine hundred and fifty one KENTILES LIMITED a Limited Liability Company having its registered office at L.R.57 Kasarini, Thika Road, Nairobi in the Colony of Kenya (hereinafter called "the Company" which expression shall include its successors and assigns) in consideration of an agreement made between THE NATIONAL BANK OF INDIA LIMITED a Limited Liability Company having its registered office at 26 Bishopsgate in the City of London in England (hereinafter called "the Bank" which expression shall include its successors and assigns) of the one part and the Company of the other part whereby the Bank has agreed to make advances to the Company by way of loan by permitting the Company to overdraw its current account with the Bank or granting to the Company other financial accommodation from time to time to an aggregate amount not exceeding Shillings One Million and Eight hundred Thousand or such lower limit as may for the time being be fixed by the Bank HEREBY UNDERTAKES that it will ON DEMAND in writing made to it by the Bank pay to the Bank or to one of the cashiers for the time being of the Bank the balance which on account current of the Company with the Bank shall be for the time being owing whether in respect of moneys advanced or paid to or for the use of the Company or

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Exhibits

<p>3</p> <p>Debenture between Kentiles Ltd and the National Bank of India Ltd</p> <p>1st October 1951 -</p> <p>continued</p>	<p>charges incurred on its account or for any moneys whatsoever which may become due and owing by the Company to the Bank either as principal or surety and either solely or jointly with any other company society corporation person or persons in partnership or otherwise or upon loans or bills of exchange or promissory notes drafts orders for payment or delivery of money bills of lading or other negotiable or mercantile instruments drawn accepted or endorsed by or on behalf of the Company and discounted or paid or held by the Bank either at the request of the Company or in the course of business or otherwise or in respect of bills of exchange accepted by the Bank on the instructions of the Company or its authorised agents or in respect of moneys which the Company shall become liable to pay to the Bank either under guarantee given by the Company to the Bank or for money or any other facility guaranteed by the Bank for and on behalf of and at the request of the Company or in any other manner whatsoever and whether any such moneys shall be paid to or incurred on behalf of the Company or any other Company society corporation person or persons in partnership or otherwise at the request of the Company or for any other account whatsoever or otherwise howsoever or for an actual or contingent liability together with the current rate of interest from time to time charged by the Bank subject to a minimum of Five per cent per annum such interest to be calculated on daily balances and debited half yearly and together with commission and other usual bank charges and if and when the said sum or sums so owing by the Company to the Bank shall have been demanded to pay to the Bank or to one of the cashiers for the time being of the Bank interest from the time of such demand until the actual payment thereof on the sum or sums for the time being owing as aforesaid at the rate aforesaid computed with half yearly rests the interest owing at the end of each half year being added to the amount owing so as to form one aggregate sum carrying interest at the rate aforesaid <u>PROVIDED ALWAYS</u> that in the case of any such moneys being also secured to the Bank under an agreement or instrument reserving a higher rate of interest than as aforesaid nothing herein contained shall affect the right of the Bank to recover such higher rate of interest or (as the case may be) the difference between such higher rate and the rate payable hereunder <u>PROVIDED ALSO</u> that the total</p>	<p>10</p> <p>20</p> <p>30</p> <p>40</p> <p>50</p>
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moneys for which this Debenture constitutes a security shall not at any one time exceed the sum of Shillings One Million and eight hundred thousand together with interest at the rate aforesaid from the time of such moneys becoming payable until actual payment thereof.

Exhibits

3

Debenture
between Kentiles
Limited and the
National Bank
of India Limited

1st October 1951
continued

10 (1) The Company hereby charges with the payment and discharge of all moneys and liabilities intended to be hereby secured (including expenses and charges arising out of or in connection with the acts authorised by Clauses 5, 8 and 9 hereof) ALL its undertaking goodwill assets and property whatsoever and wheresoever both present and future including its uncalled capital for the time being.

20 (2) The charge created by this Debenture shall rank as a first charge on all the property hereby charged and as regards all immovable property of the Company (to be mortgaged as hereinafter provided) shall constitute a fixed charge and as regards all other property hereby charged shall constitute a floating security but so that the Company is not to be at liberty to create any mortgage or charge upon any of the property comprised in this security to rank either in priority to or pari passu with the charge hereby created. The Company shall forthwith upon the execution of this Debenture deposit with the Bank the title

30 Deeds of all immovable properties now vested in the Company and shall from time to time likewise deposit with the Bank the title deeds of any immovable property which may hereafter be acquired by the Company (all such deposits of title deeds being by way of equitable mortgage as collateral security for the repayment of the principal moneys and interest hereby secured) and shall at its own expense whenever called upon by the Bank so to do execute legal mortgages or charges as the case may

40 require in favour of the Bank over any such immovable properties.

(3) The security hereby given to the Bank shall be without prejudice and in addition to any other security whether by way of pledge legal or equitable mortgage or charge or otherwise howsoever which the Bank may now or at any time hereafter

Exhibits

3

Debenture
between
Kentiles Ltd
and the
National
Bank of
India Ltd.

1st October
1951 -

continued

hold on any other property for or in respect of all or any part of the indebtedness of the Company to the Bank or any interest thereon.

(4) It is hereby agreed and declared that during the continuance of this security the Bank shall be appointed and act as the sole bankers of the Company and all sums received by the Company in the course of its business or otherwise howsoever shall be paid by the Company to the Bank for the credit of the Company in an account or accounts opened or to be opened in the name of the Company and the Company shall make all payments by cheques drafts promissory notes or bills of exchange drawn on the Bank and all costs and expenses incurred by the Bank in acting as such bankers of the Company as aforesaid shall be debited to the Company and constitute a charge upon all the property and assets hereby charged.

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(5) The Company hereby covenants with the Bank:

(a) to carry on and conduct the business of the Company in a proper and efficient manner;

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(b) to keep proper books of account and therein make true and perfect entries of all dealings and transactions of and in relation to the said business and keep the said books of account and all other documents relating to the affairs of the Company at its registered office or other place or places where the said books of account and documents of a similar nature would properly be kept and procure that the same shall at all reasonable times be open for the inspection of the Bank and such person or persons as the Bank shall from time to time appoint;

30

(c) to furnish to the Bank annually or oftener if required a balance sheet profit and loss account and trading accounts showing the true position of the Company's affairs at a date

40

not more than one month previous certified by the Auditors for the time being of the Company and also from time to time to give to the Bank or to such other person or persons as aforesaid such information as it he or they or any of them shall require as to all matters relating to the business or any existing or after acquired property of the Company or otherwise relating to the affairs thereof;

Debenture
between Kentiles
Limited and the
National Bank
of India Ltd.

1st October
1951 -

continued

(d) to keep all machinery works fixtures fittings implements utensils and other effects in or upon the Company's property in a good state of repair and in proper working order and condition;

(e) to permit the Bank and such person or persons as the Bank shall from time to time for that purpose appoint to enter into and upon the Company's property to view the state and condition of all the said machinery works fixtures fittings implements utensils and other effects;

(f) to insure and keep insured with an insurance company approved by the Bank and if required by the Bank in the name of the Bank such of the premises hereby charged as are of an insurable nature against loss or damage by fire to the extent of their full value and duly pay the premia and other moneys payable for that purpose and immediately after every such payment (if required) deliver to the Bank the receipts for the same and if default shall be made in keeping the said premises to insured as aforesaid or in delivering any such receipt as aforesaid the Bank may (but without being legally obliged so to do) insure and keep insured the same and the Company will

Exhibits

3

Debenture
between
Kentiles Ltd
and the
National
Bank of
India Ltd

on demand repay to the Bank every sum of money expended by it for the above purposes with interest at the rate aforesaid from the time of the same respectively having been expended and until such repayment the same shall be a first charge upon the premises hereby charged.

(6) The principal moneys and interest hereby secured shall immediately become payable without demand:

10

1st October
1951 -
continued

(a) if a distress or execution either by writ or by appointment of a Receiver is levied upon any part of the property or assets hereby charged and the debt for which such levy is made or Receiver appointed is not paid off within seven days; or

(b) if an order is made or an effective resolution is passed for the winding up of the Company; or

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(c) if the Company without the consent of the Bank ceases to carry on its business or threatens to cease to carry on the same; or

(d) if the Company commits or attempts or purports to commit any breach of any of the covenants contained in Clause 4 or Clause 5 hereof.

(7) At any time after the principal moneys hereby secured become payable either as a result of lawful demand being made by the Bank or under the provisions of Clause 6 hereof the Bank may appoint by writing any person whether an Officer of the Bank or not to be a receiver and manager of the property hereby charged or any part thereof and may in like manner from time to time remove any receiver and manager so appointed and appoint another in his stead.

30

(8) A receiver and manager so appointed shall be the agent of the Company and the Company shall alone be liable for his acts defaults and remuneration and he shall have authority and be entitled to

40

exercise the powers hereinafter set forth in addition to and without limiting any general powers conferred upon him by law;

Exhibits

3

- (a) to take possession of collect and get in all or any part of the property hereby charged and for that purpose to take proceedings in the name of the Company or otherwise as may seem expedient;
- 10 (b) to sell or concur in selling any property hereby charged or to be hereafter charged in such manner and generally on such terms and conditions as he shall think fit and to carry any such sale into effect by conveying in the name and on behalf of the Company or otherwise;
- 20 (c) to carry on or concur in carrying on the business of the Company and for that purpose to raise money from the Bank or from others with the consent of the Bank on the security of any property now or hereafter charged in favour of the Bank in priority to this Debenture or otherwise;
- (d) to make any arrangement or compromise which the Bank or the receiver shall think expedient;
- 30 (e) to appoint dismiss and remove managers accountants servants and agents for the aforesaid purposes upon such terms as to remuneration or otherwise as the receiver may determine;
- (f) to do all such other acts and things as may be considered to be incidental or conducive to any of the matters and powers aforesaid and which the receiver can or may lawfully do as agent for the Company.
- 40 (9) All moneys received by any such receiver shall after providing for all costs and expenses incurred in carrying on the business of the

Debenture
between Kentiles
Limited and the
National Bank
of India Limited

1st October 1951
continued

Exhibits <hr/>	Company or the sale or disposal of the Company's property hereby charged be applied:	
3	First in payment of all rents rates taxes and outgoings whatsoever affecting the said property:	
Debenture between Kentiles Ltd and the National Bank of India Ltd	Secondly in payment of all costs charges and expenses of and incidental to the appointment of the receiver and manager and the exercise by him of all or any of the powers aforesaid including the reasonable remuneration of the receiver and manager;	10
1st October 1951 -		
continued	Thirdly in or towards payment to the Bank of all moneys owing on any account in respect of this Debenture and remaining unpaid and charges due hereunder;	
	Fourthly any surplus shall be paid to the Company.	
	(10) No purchaser mortgagor mortgagee or other person or company dealing with the Bank or any receiver or receivers appointed by it or with its or his or their attorneys or agents shall be concerned to enquire whether the powers exercised or purported to be exercised have become exerciseable or whether any money remains due on the security of these presents or as to the necessity or expediency of the stipulations and conditions subject to which any sale shall have been made or otherwise as to the propriety or regularity of such sale calling in collection or conversion or to see to the application of any money paid to the Bank or such receiver or receivers and in the absence of mala fides on the part of such purchaser mortgagor mortgagee or other person or company such dealing shall be deemed so far as regards such purchaser mortgagor mortgagee person or company to be within the powers hereby conferred and to be valid and effectual accordingly.	20 30
	(11) The Bank shall not nor shall any receiver or receivers appointed by it by reason of the Bank or such receiver or receivers entering into possession of the premises hereby charged or any part thereof be liable to account as mortgagee or mortgagees in possession or for anything except	40

actual receipts or be liable for any loss upon realisation or for any default or omission for which a mortgagee in possession might be liable.

Exhibits

3

10 (12) After the security hereby constituted has become enforceable the Company shall from time to time and at all times execute and do all such assurances acts and things as the Bank may reasonably require for facilitating the realisation of the assets and for exercising all the powers authorities and discretions hereby conferred on the Bank.

Debenture
between Kentiles
Limited and the
National Bank
of India Limited

1st October 1951
continued

20 (13) The Company hereby irrevocably appoints the Bank to be the Attorney of the Company and in the name and on behalf of the Company to execute and do any assurances acts and things which the Company ought to execute and do under the covenants herein contained and generally to use the name of the Company in the exercise of all or any of the powers hereby conferred on the Bank or any receiver appointed by the Bank.

(14) Upon the final balance of the principal moneys hereby secured having been paid off and satisfied together with all interest due thereon and upon payment of all costs charges and expenses incurred by the Bank in relation to this Debenture the Bank shall as requested and at the cost of the Company execute a discharge of this Debenture.

30 (15) It is hereby agreed and declared that this Debenture shall be a continuing security notwithstanding any settlement of account or other matter or thing whatsoever and shall not prejudice or affect any agreement which may have been made with the Bank prior to the execution hereof relating to any security which the Bank may now or at any time hereafter hold in respect of the moneys hereby secured or any part thereof.

40 (16) The principal moneys and interest hereby secured will be paid at the Nairobi Branch of the Bank.

(17) Any notice served by post shall be deemed to have been duly served when the same would in the ordinary course have reached its

Exhibits

3

destination and in proving such service it shall be sufficient to prove that the letter containing the notice was properly addressed and put into the Post Office.

Debenture between Kentiles Ltd and the National Bank of India Ltd.

(18) Upon demand being made by the Bank for payment of the moneys hereby secured or upon such moneys for any other reason becoming immediately payable the Bank shall be under no obligation to make any further advances or to grant any further accommodation to the Company.

10

1st October 1951 - continued

IN WITNESS whereof the Company has hereunto affixed its Common Seal the day and year first above Written.

THE COMMON SEAL of KENTILES LIMITED was hereunto affixed pursuant to a resolution of the Board in the presence of:-

(Sgd) Leon Zuckerman Director

(Sgd) A.H.Clough Director

(Sgd) Secretary

20

REGISTRY OF COMPANIES

Presented 4/10/1951

Date of Registration 4/10/1951

(Sgd)

REGISTRAR

30

1 (part) (i) LETTER KAPLAN & STRATTON
TO THE SECRETARY LAND CONTROL BOARD DATED
20th OCTOBER, 1951

Exhibits

1

KAPLAN & STRATTON

1 (part)

JAMR/5615

20th October, 1951

(i) Letter
Kaplan & Stratton
to The Secretary
Land Control
Board

Secretary,
Land Control Board,
Land Office,
NAIROBI.

20th October
1951

10 Dear Sir,

L.R. 57 Kasarini Nairobi. Sale Ken-
board Limited to Kentiles Limited
Mortgage Kentiles Limited to National
Bank of India Limited

We refer to our letter to you of 27th
ultimo with which we submitted Application Forms
in respect of the sale of L.R. 57 by Kenboard
Limited to the new public Company Kentiles Ltd.

20 We now enclose Application Form in dupli-
cate in respect of a Mortgage to be granted over
the property by Kentiles Limited in favour of
the National Bank of India Limited, to secure
overdraft facilities up to a maximum of £90,000.

We shall be glad if this might receive ap-
proval at the same time as the Sale transaction.

Yours faithfully,

(Sgd) KAPLAN & STRATTON

Exhibits

1 (part) (ii) APPLICATION TO LAND CONTROL BOARD DATED 20th OCTOBER, 1951

1 (part)

To be submitted in DUPLICATE in respect of each portion of land

(ii)

Application
to Land
Control
Board

COLONY AND PROTECTORATE OF KENYA

LAND CONTROL AND CROWN LANDS (AMENDMENT) ORDINANCE 1944

20th October
1951

To the Land Control Board, c/o the Hon. Commissioner
for Lands,
P.O.Box 89, Nairobi.

10

c/o Kaplan & Stratton,
Box 111 Nairobi.

Date 20/10/51

Application is hereby made for consent to be
given to the transaction described below.

1. (a) Present registered holder of interest (full
name in BLOCK letters)

KENTILES LIMITED

- (b) Nationality (if British subject, state whether
by birth or naturalization, and if the latter,
date of naturalization) BRITISH

20

- (c) Race -

- (d) Address BOX 1219 NAIROBI

2. Nature of holder's interest (state whether free-
hold, leasehold or what other interest)

FREEHOLD

3. (a) Proposed purchaser, transferee, mortgagee etc.
(full name in BLOCK letters)(if a limited
liability company state names of Directors,
nationality etc).

30

THE NATIONAL BANK OF INDIA LIMITED

- | | | | |
|--|---|---------|--|
| | (b) Nationality | BRITISH | Exhibits |
| | (c) Race | - | _____ |
| | (d) Address | NAIROBI | 1 (part) |
| | (e) Number of children (if any), state ages and sex | - | (ii) Application to Land Control Board |
4. Nature of transaction (i.e. sale, gift, lease, mortgage, equitable mortgage etc). 20th October 1951 - continued
- MORTGAGE (as collateral security to a Debenture)
- 10 5. Term (i.e. length of time for which the land affected is to be transferred or leased)
-
6. Description of land: L.R. No. 57
- | | | |
|--|-------------------------------|--------------------|
| | Area (acres) | 557 |
| | Locality | KASARINI |
| | Distance from Railway Station | 8 miles to Nairobi |
| | District Council | Nairobi |
- 20 If subdivision quote Land Office approval thereof: -
- Particulars of permanent water (including dams, boreholes, wells etc) -
- Description and area of permanent crops grown in preceding two years and arable land under cultivation: FACTORY HAS BEEN ERECTED FOR THE PRODUCTION OF BRICKS AND TILES FROM THE CLAY DEPOSIT ON L.R.57
- 30 7. Special covenants or conditions affecting the use and occupation of the land: -
8. (a) Purchase price (if a sale or option): Sh. or Estimated value of the land (if a gift): Sh. -
or Amount of loan and rate of interest (if a mortgage): Sh. 1,800,000/- (MAXIMUM) with interest at 1% over Bank of England rates.

Exhibits

1 (part)

(ii)

Application
to Land
Control
Board

20th October
1951 -

continued

and any other information affecting the amount of the consideration, particularly regarding the description and area of crops with estimated yields and value thereof INCLUDED in the purchase price

- (b) Full description and approximate value of improvements on land included in consideration:

BRICK AND TILE FACTORY WITH ALL RE-
QUISITE PLANT AND MACHINERY.
OFFICE BUILDINGS.
OUTHOUSES GARAGES LABOUR LINES &c.

10

- (c) What other consideration (if any) is passing between the parties -

9. If a transfer or lease of the land, then state:

- (a) Present holder's reasons for disposal of interest
- (b) Purchaser, lessee, mortgagee etc., reason for acquisition
- (c) Proposed development programme of purchaser - with approximate dates
- (d) Number of Europeans at present employed on the land
- (e) Number of Europeans likely to be employed on the land by the purchaser
- (f) Does purchaser intend to reside on the land?

20

- 10 (a) Other land registered in the name of or held under contract for sale by the proposed purchaser, transferee or lessee, or any members of his immediate family, OR ANY COMPANY HOLDING LAND IN THE HIGHLANDS FOR AGRICULTURAL PURPOSES in which he has an interest (the nature of any interest in such company should be stated):-

30

L.R. Nos.

Areas

Nature of interest

Exhibits

If contiguous to land being purchased

1 (part)

(b) Particulars of land held and disposed of by purchaser or lessee in last three years:-

(ii) Application to Land Control Board

L.R. No. District Acres

20th October 1951 -

L.R. No. District Acres

continued

Reasons for disposal

10

11. General remarks (including farming experience of transferee, whether a serving or ex-soldier etc).

12. Consent (if any) of Land Control Board for acquisition of this land by present holder (quote date and reference)

13. What conditions imposed (if any) under previous consent have not been fulfilled and reasons

We hereby declare that the above information is true to the best of our knowledge and belief.

20

KAPLAN & STRATTON
Advocates for Kentiles Ltd.

KAPLAN & STRATTON
Advocates for the
National Bank of
India Limited

Signature of Owner, Lessee,
Mortgagor etc.

Signature of Purchaser
Lessee, Mortgagee etc.

NOTE:- If spaces allowed under any particular item are insufficient for the information a separate sheet with item number and duly signed by all parties should be attached.

G.P.K.1596 - 3000 - 7/55

Exhibits

(iii) 1 (part) LETTER: SECRETARY LAND
CONTROL BOARD TO KAPLAN & STRATTON DATED
31st OCTOBER, 1951

1 (part)

(iii)
Letter:
Secretary
Land Control
Board to
Kaplan &
Stratton

Department of Lands,
Nairobi.

Ref. 5698/35.

31st October, 1951

31st October
1951

Messrs. Kaplan & Stratton,
Advocates,
P.O. Box 111,
NAIROBI.

Gentlemen,

LAND CONTROL ORDINANCE

L.R. No. 57 - Kasarini - Mortgage
Kentiles Limited to National Bank
of India Limited

I have the honour to refer to your letter
Ref: JAMR/5615 dated 20th October, 1951, and to
inform you that it is not necessary to obtain the
consent of the Land Control Board to this trans-
action.

In this connection I would draw your attention
to paragraph 3 (b) Part 2 of the Land Control Ordin-
ance (Cap. 155) of the Laws of Kenya.

I have the honour to be,
Gentlemen,
Your obedient servant,

(Sgd) P.R. OMMANEY

SECRETARY, LAND CONTROL BOARD

10

20

6 (part) CONVEYANCE KENBOARD LIMITED TO
KENTILES LIMITED DATED 1st NOVEMBER, 1951

Exhibits

6 (part)

Conveyance
Kenboard Ltd.
to Kentiles Ltd

1st November
1951

10 THIS INDENTURE made the First day of November One
thousand nine hundred and fifty one BETWEEN
KENBOARD LIMITED a limited liability Company having
its Registered Office at Nairobi in the Colony of
Kenya (hereinafter called "the Vendor" which ex-
pression where the context so admits shall include
its successors and assigns) of the one part and
20 KENTILES LIMITED a limited liability Company having
its registered Office at Kasarini, Thika Road,
Nairobi aforesaid (hereinafter called "the Pur-
chaser" which expression where the context so ad-
mits shall include its successors and assigns) of
the other part WHEREAS by an Indenture dated the
Fifth day of October One thousand nine hundred and
six (registered in the Crown Lands Registry at
Nairobi in Volume N.6 Folio 274/1) and made be-
tween Lieutenant Colonel James Hayes Sadler C.B.
30 His then Majesty's Commissioner for the East
Africa Protectorate of the one part and Henry
Herbert Tarlton (therein described) of the other
part ALL THAT piece or parcel of land situate on
the Kasarini River near Nairobi in the said Pro-
tectorate (now the said Colony) comprising five
hundred and fifty-seven (557) acres or thereabouts
which said piece or parcel of land is more parti-
cularly delineated and described on the plan
annexed to the said Indenture and thereon bordered
red was conveyed unto and to the use of the said
Henry Herbert Tarlton subject to the provisions
of the Crown Lands Ordinance 1902 and to the rules
for the time being in force thereunder AND WHEREAS
40 by an Indenture dated the twenty-sixth day of
September One thousand nine hundred and fourteen
(endorsed on the hereinbefore recited Indenture)
and made between His Late Most Gracious Majesty
King George the Fifth of the one part and the said
Henry Herbert Tarlton of the other part after re-
citing (inter alia) that the proper words of
limitation to convey an estate in fee simple had
by mistake been omitted from the habendum of the
hereinbefore recited Indenture the premises com-
prised in the said Indenture were conveyed unto
and to the use of the said Henry Herbert Tarlton
in fee simple subject as in the hereinbefore re-
cited Indenture AND WHEREAS by divers mesne
assurances acts in the law and events and

Exhibits

 6 (part)
 Conveyance
 Kenboard Ltd
 to Kentiles
 Limited
 1st November
 1951 -
 continued

ultimately by an Indenture dated the Second day of November One thousand nine hundred and forty six and made between Humphrey Slade, James Frederick Hume Hamilton and Rupert William Barrett (all therein described) of the first part Abraham Lazarus Block (therein described) of the second part and the Vendor of the third part the Vendor became and is now seized and possessed for an estate in fee simple of the premises comprised in and conveyed by the hereinbefore recited Indentures of the Fifth day of October One thousand nine hundred and six and the Twenty sixth day of September One thousand nine hundred and fourteen AND WHEREAS the Vendor has contracted with the Purchaser by an Agreement made the Twenty sixth day of September One thousand nine hundred and fifty one for the sale to the Purchaser of the whole undertaking of the Vendor in the business of brick and tile manufacturers and assets immovable and moveable, real and personal of what nature soever and wheresoever situated belonging to the Vendor in connection with the said business including inter alia the premises comprised in the hereinbefore recited Indenture of the Fifth day of October One thousand nine hundred and six and the Twenty sixth day of September One thousand nine hundred and fourteen together with the factory and all other buildings being and erected thereon in consideration of the issue and allotment by the Purchaser to the Vendor of the Shares in the capital of the Purchaser as the said Agreement of the Twenty sixth day of September One thousand nine hundred and fifty one in itself more fully bears

10
20
30

NOW THIS INDENTURE WITNESSETH that in pursuance of the said Agreement of the Twenty sixth day of September One thousand nine hundred and fifty one and in respect of the consideration therein set forth but without any other price or consideration the Vendor does hereby grant and convey unto the Purchaser ALL THAT piece or parcel of land situate on the Kasarini River near Nairobi comprised in the hereinbefore recited Indentures of the Fifth day of October One thousand nine hundred and six and the Twenty sixth day of September One thousand nine hundred and fourteen together with the factory and all other buildings being and erected thereon to the Vendor TO HOLD the same unto and to the use of the Purchaser for an estate in fee simple

40

SUBJECT to the provisions of the Crown Lands Ordinance One thousand nine hundred and two and to the rules for the time being in force thereunder

Exhibits

6 (part)

IN WITNESS whereof the Common Seals of the Vendor and the Purchaser respectively have been hereunto affixed the day and year first herein WRITTEN

Conveyance
Kenboard Ltd
to Kentiles
Limited

1st November
1951 -
continued

10

THE COMMON SEAL of KENBOARD
LIMITED was affixed hereto)
by resolution of the Board)
in the presence of:-)

(Sgd) Leon Zuckerman)
Director)

(sgd) A.H. Clough)
Director)

20

THE COMMON SEAL OF KENTILES
LIMITED was affixed hereto)
by resolution of the Board)
in the presence of:-)

(Sgd) Leon Zuckerman)
Director)

(Sgd) A.H. Clough)
Director)



Exhibits

4 - MORTGAGE BETWEEN KENTILES LIMITED
AND THE NATIONAL BANK OF INDIA LIMITED
DATED 1st NOVEMBER 1951

4

Mortgage
between
Kentiles Ltd
and the
National
Bank of
India Ltd.

1st November
1951

THIS INDENTURE OF MORTGAGE is made the First day of November One thousand nine hundred and fifty one B E T W E E N KENTILES LIMITED a limited liability Company having its registered office at L.R. 57 Kasarini, Thika Road Nairobi (hereinafter called "the Company" which expression shall include its successors and assigns) of the one part and THE NATIONAL BANK OF INDIA LIMITED a limited liability Company having its registered office at 26 Bishopsgate in the City of London in England (hereinafter called "the Bank" which expression shall include its successors and assigns) of the other part WHEREAS the Company has created and issued to the Bank a Debenture of the Company containing a floating charge to secure the sum of Shillings One million eight hundred thousand and interest thereon at the current rate of interest charged by the Bank subject to a minimum of Five per cent per annum AND WHEREAS the Bank has requested and the Company has agreed that the freehold premises described in the Schedule hereto shall stand as collateral security for all principal moneys and interest secured by the said Debenture

10

20

NOW THIS DEED WITNESSETH:-

The Company as beneficial owner hereby conveys unto the Bank ALL AND SINGULAR the freehold premises described in the Schedule hereto with the factory, offices and buildings being and erected thereon TO HOLD the same unto and to the use of the Bank in fee simple SUBJECT to the proviso for redemption hereinafter contained PROVIDED ALWAYS and it is hereby agreed and declared that if the Company shall on the First day of October next pay to the Bank all principal moneys and interest secured by the said Debenture the Bank shall at any time thereafter upon the request and at the cost of the Company reconvey the premises described in the Schedule hereto unto and to the use of the Company or as it shall direct AND the Company shall not without the consent in writing of the Bank previously had and obtained exercise any power of leasing allowed by law to mortgagors in possession.

30

40

SCHEDULE

Exhibits

4

10 ALL THAT piece or parcel of land situate on the Kasarini River near Nairobi comprising five hundred and fifty seven acres or thereabouts known as Land Reference Number 57 being the premises comprised in and conveyed by an Indenture dated the Fifth day of October One thousand nine hundred and six made between Lieutenant Colonel James Hayes Sadler C.B. then Commissioner for the East African Protectorate of the one part and Henry Herbert Tarlton (therein described) of the other part as the same is more particularly delineated and described on the plan annexed thereto and thereon bordered red AND which said piece or parcel of land was conveyed unto and to the use of the Company in fee simple by an Indenture dated the first day of November One thousand nine hundred and fifty one (registered in the Crown Lands Registry at Nairobi in Volume No.6 Folio 276) and

20 made between Kenboard Limited of the one part and the Company of the other part

Mortgage between Kentiles Limited and the National Bank of India Limited

1st November 1951 -

continued

IN WITNESS whereof the Common Seal of the Company has been hereunto affixed and the Attorney of the Bank has hereunto set his hand and seal the day and year first herein WRITTEN

SEALED with the Common Seal)
of KENTILES LIMITED pursuant)
to a resolution of the Board)
in the presence of:-)

30 (Sgd) Leon Zuckerman)
Director)

(Sgd) A.H. Clough)
Director)

SIGNED SEALED AND DELIVERED)
by R.J.W. Irving)
the duly constituted Attorney)
of The National Bank of India)
Limited in the presence of:-)

(Sgd.) R.J.W. Irving

40 (Sgd) I. Paxham)
Bank Official)
The National Bank of India)
Limited, Nairobi.)

(SEAL)

Colony of Kenya, Crown Lands Registry, Nairobi.

Registered at 11.30 a.m. 19.11.51.
Presentation No. 6635 Volume N.6
Folio 27629 File 1131.

REGISTRY OF COMPANIES
Presented 5/2/1952
Date of Registration 5/2/1952

T.R.PENNY - Registrar

D.J. COWARD
Registrar.

Exhibits

7 (part) - MINUTES OF MEETING OF DIRECTORS
OF KENTILES LTD DATED 17th NOVEMBER, 1956

7 (part)

KENTILES LIMITED

Minutes of
Meeting of
Directors of
Kentiles Ltd

MINUTES OF A MEETING OF THE DIRECTORS OF KENTILES
LIMITED HELD AT THE OFFICES OF KAPLAN & STRATTON,
QUEENSWAY HOUSE, AT 9.30 A.M. ON SATURDAY 17th
NOVEMBER, 1956

17th November
1956

PRESENT:-

Sir Charles Mortimer, C.B.E.
Col. S.G. Ghersie, O.B.E. M.L.C.
Mr. A. Mackie-Robertson
Mr. J. Avinadav

10

IN ATTENDANCE:- Mr. P. Katzler

1. MINUTES

The Minutes of the last Board Meeting held on the 22nd October, 1956 were read, confirmed and signed by the Chairman.

2. MATTERS ARISING THEREFROM

Re: the E.A. Marketing Company Limited Arbitration. Mr. Mackie-Robertson stated that as he has no copy of the Arbitration or the Award, he was unable to finalise this matter before this meeting. As soon as he receives a copy of the arbitration and award from the Auditors, the matter will be dealt with.

20

3. FINANCIAL POSITION

Mr. Mackie-Robertson stated that this meeting had been called as the financial position of the Company was now desperate. Continuing he stated that the Industrial Development Corporation could not consider financial aid to the Company until an analysis of the clay had been done. Mr. Palfrey of the Lands and Mines had informed Mr. Avinadav that this would take up to six weeks. Col. Ghersie stated that there was a possibility of assistance from the I.D.C. but time was against the Company. Mr. Mackie-Robertson told the Board that the E.A.

30

Marketing Co. Ltd., scheme with Kentiles had now fallen through. Mitchell Cotts were prepared at one stage to 'come in' on certain terms but now felt the Beam Account with the B.E.A. Corporation was far greater than had been anticipated and consequently decided not to participate with Kentiles at the moment. In view of the Beam Account, Mitchell Cotts wrote to the Company requesting an explanation, a copy of the letter being sent to the National Bank of India Limited. A letter was also received from the Bank requesting the Company to repay the loan in full by the 19th November, 1956. After a discussion Mr. Mackie-Robertson stated that the Company was in fact insolvent and that the Board had no option but to put the Company into Liquidation.

10

The Meeting then adjourned. The Directors then went to Mitchell Cotts with the hope that they would reconsider their decision, but the meeting proved in vain.

20

When the Board reassembled, IT WAS RESOLVED that application be made to the Court for the winding up of the Company by the Court and a Liquidator be appointed.

Mr. Mackie-Robertson stated that he would deal with the Liquidation affairs on behalf of the Company.

Mr. Avinadav was instructed by the Board to continue operating the business until further notice.

30

Date:-

Chairman.

Exhibits

7 (part)

Minutes of
Meeting of
Directors of
Kentiles Ltd.17th November
1956 -

continued

Exhibits

1 (part) (iv) APPOINTMENT BY NATIONAL
BANK OF INDIA LIMITED OF HUBERT RICHARD
BRICE AS RECEIVER AND MANAGER DATED
20th NOVEMBER 1956

1 (part)

(iv)

KENTILES LIMITED

Appointment
by National

Bank of India
Limited of
Hubert
Richard Brice
as Receiver
and Manager

20th November
1956

Appointment of Receiver and Manager NATIONAL BANK OF INDIA LIMITED a Limited Liability Company having its registered office at 26 Bishopsgate in the City of London in England (hereinafter called "the Bank") being the registered holder of a Debenture dated the First day of October One thousand Nine hundred and Fifty-one to secure a principal sum not exceeding Shillings One Million Eight hundred thousand in respect of which the principal sum of Shillings One million six hundred thousand is now due and payable hereby appoints HUBERT RICHARD BRICE of Nairobi in the Colony of Kenya Accountant to be Receiver and Manager of the property charged by the said Debenture and so that the said Hubert Richard Brice shall have power:-

10

20

1. To take possession of collect and get in all or any part of the property charged by the said Debenture and for that purpose to take proceedings in the name of the Company or otherwise as may seem expedient;

2. To sell or concur in selling any property charged by the said Debenture in such manner and generally on such terms and conditions as he shall think fit and to carry any such sale into effect by conveying in the name and on behalf of the Company or otherwise;

30

3. To carry on or concur in carrying on the business of the Company and for that purpose to raise money from the Bank or from others with the consent of the Bank on the security of any property now charged in favour of the Bank in priority to the said Debenture or otherwise;

4. To make any arrangement or compromise which the Bank or the Receiver and Manager shall think expedient;

40

5. To appoint dismiss and remove managers accountants servants and agents for the aforesaid

purposes upon such terms as to remuneration or otherwise as the Receiver and Manager may determine;

6. To do all such other acts and things as may be considered to be incidental or conducive to any of the matters and powers aforesaid and which the Receiver and Manager can or may lawfully do as agent for the Company.

10 AND IT IS HEREBY DECLARED that all monies received by such Receiver and Manager are to be dealt with in the manner provided in the said De-
benture.

AS WITNESS the hand of James Salmond the duly appointed Attorney of the Bank (by virtue of a Power of Attorney dated the Fourteenth day of May One thousand Nine hundred and twenty-nine)

this Twentieth day of November One thousand Nine hundred and Fifty-six.

(Sgd) JAMES SALMOND

1.P/A 3407/1.

Exhibits

1 (part)

(iv) Appointment by National Bank of India Limited of Hubert Richard Brice as Receiver and Manager

20th November 1956 -

continued

Exhibits

8 - ORDER FOR WINDING UP OF KENTILES LIMITED DATED 11th FEBRUARY, 1957

8

(COPY)

Order for winding up of Kentiles Limited

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI, BANKRUPTCY & WINDING UP CAUSE NO.50 OF 1956

11th February 1957

IN THE MATTER OF: KENTILES LIMITED

AND

IN THE MATTER OF: THE COMPANIES ORDINANCE (CAP. 288 OF THE LAWS OF KENYA)

WINDING UP ORDER

10

UPON READING the Petition of KENTILES LIMITED duly incorporated under the Companies Ordinance and having its Registered office at Land Reference No. 57, Kasarini beyond Ruaraka near Nairobi, preferred unto this Court on the 19th day of November, 1956, AND UPON HEARING Counsel for the said Petitioner, AND UPON READING an Affidavit of J. AVINADAV, one of the Directors of the said Petitioner sworn on the 19th day of November, 1956, verifying the said Petition and an Affidavit of JAMES ANGUS MACKIE-ROBERTSON an Advocate of this Court who had the conduct of the said Petition, sworn on the 4th day of January, 1957, and the exhibits therein referred to, namely the Notice No. 98 published in the Kenya Gazette dated the 1st day of January 1957, and the Notice published in the East African Standard dated the 21st day of December 1956, and containing an advertisement of the said Petition, THIS COURT DOTH ORDER:

20

1. That Kentiles Limited aforesaid be wound up by this Court under the provisions of Section 167(e) of the Companies Ordinance;
2. That the Official Receiver attached to this Court continue as Provisional Liquidator of the affairs of the said KENTILES LIMITED;

30

3. That a certified copy of this Order be served on the Registrar of Companies;
4. That the costs of this Petition be paid out of the assets of the said company;

Exhibits

8

GIVEN under my hand and the Seal of the Court at Nairobi this 11th day of February 1957.

Order for winding up of Kentiles Ltd.

Extracted on the 8th day of March, 1957.

11th February 1957 -

(Sgd) E.A.J. Edmonds
JUDGE
SUPREME COURT OF KENYA

continued

10

NOTE:- It will be the duty of such of the persons as are liable to make out or to concur in making out a statement of affairs as the Official Receiver may require to attend on the Official Receiver at such time and place as the Official Receiver may appoint and to give him all information he may require.

20

I certify that this is a true copy of the original

(Sgd)

Registrar, Supreme Court, Nairobi.

Exhibits

1 (part) (v) LETTER: DEPUTY OFFICIAL
RECEIVER TO NATIONAL BANK OF INDIA LTD
DATED 28th OCTOBER, 1957

1 (part)

(v) Letter
Deputy
Official
Receiver to
National
Bank of
India Ltd.

Department of the Registrar General,
Office of the Official Receiver,
Law Courts,
P.O.Box 30031,
NAIROBI.

Ref: No. ORW.50/56 28th October 1957.

28th October
1957

The Manager,
National Bank of India Ltd,
Nairobi.

10

Dear Sir,

IN BANKRUPTCY & WINDING UP CAUSE
NO.50 OF 1956 RE: KENTILES LTD.
(IN LIQUIDATION)

1. It appears that a debenture was created by the above-named company in favour of your bank on the 1st October 1951 to secure a sum of £90,000. Further it appears that there is in existence a legal mortgage dated 1st November 1951 whereby the company's land, L.R. No.57 at Kasarini River, was also charged in favour of the bank to secure £90,000.

20

2. You will no doubt be aware that a Winding-up Order was made on the 11th January last and the Official Receiver was appointed as Provisional Liquidator.

3. You will appreciate that it is the duty of the Official Receiver as Provisional Liquidator to verify all securities and I shall be grateful if you could inform me when it would be convenient for a representative from this department to visit your office for this purpose. If you could also conveniently manage to let me have a copy of the document such a favour would be appreciated.

30

sic.

4. Although I have not seen the relevant document, it appears to me likely that the bank will no title to deal with plot L.R. No.57 at Kasarini. The reason for this is that the land concerned is situate in the White Highlands and it appears that

40

your bank is one to which Part XIII of the Companies Ordinance applies. If you will refer to Section 328 of the Companies Ordinance you will observe that the power thereby conferred to hold land does not extend to land situate in the Highlands. As the National Bank of India Limited has not been registered in accordance with the provisions of the Companies Ordinance but has merely delivered documents in accordance with Part XIII thereof, the proviso operates and the bank is thereby debarred from acquiring any legal or equitable title or interest to any land in the Highlands.

10

Yours faithfully,

DEPUTY OFFICIAL RECEIVER

RHM/PJP.

101

Exhibits

1 (part)

(v) Letter
Deputy Official
Receiver to
National Bank
of India Ltd.

28th October
1957 -

continued

Exhibits

9 - LETTER: ACTING OFFICIAL RECEIVER TO
 NATIONAL BANK OF INDIA LIMITED DATED
22nd APRIL, 1958

9

Letter: Acting
 Official Re-
 ceiver to
 National Bank
 of India Ltd.

DEPARTMENT OF THE REGISTRAR GENERAL,
 OFFICE OF THE OFFICIAL RECEIVER
 CENTRAL GOVT. BUILDING,
 P.O.BOX 30031. NAIROBI.

Ref: ORW/50/56/151

22nd April, 1958

22nd April,
 1958

BY HAND

The Manager,
 National Bank of India Limited,
 P.O.Box 30081,
Nairobi.

10

H.R.Brice Esq.,
 c/o Messrs. Brice & Gill,
 Mansion House, Queensway,
 P.O.Box 5026,
Nairobi.

Dear Sir,

IN BANKRUPTCY & WINDING-UP CAUSE
 NO.50 - 1956
RE: KENTILES LIMITED -(IN LIQUIDATION)

20

With reference to the discussions on this matter which have taken place between myself and Messrs. Hamilton, Harrison & Mathews, your advocates, I am writing formally to request:-

a) that you should, not later than mid-day on Thursday next, the 24th instant, vacate the premises of the Company at L.R.57 Kasarini, on the Thika Road, near Nairobi, together with all fixed and movable assets thereon, of which, I am advised, you are unlawfully in possession.

30

b) an account for rent and mesne profits as from the date you unlawfully entered into possession of the property, to the date of vacation thereof.

c) damages for trespass amounting to, say, £30,000.

2. Failing compliance, I shall have no alternative but to ask the Committee of Inspection for consent to file a suit to satisfy the demands listed in this letter.

Yours faithfully,

(Sgd) R. H. Munro

ACTING OFFICIAL RECEIVER

RHM/RH

10

Copy to: Messrs. Hamilton, Harrison & Mathews,
Stanvac House, Queensway,
Private Bag,
Nairobi.

Exhibits

9

Letter: Acting
Official
Receiver to
National Bank
of India Ltd.

22nd April
1958 -

continued

Exhibits

2 (part) (i) LETTER: AKBARALI G. NANJI
AND OTHERS TO OFFICIAL RECEIVER DATED
3rd SEPTEMBER, 1958

2 (part)

COPY

(i) Letter
Akbarali
G. Nanji &
Others to
Official
Receiver

Nairobi.

3rd September, 1958.

3rd September
1958

The Official Receiver,
NAIROBI.

For the attention of Mr. R.H. Munro

Dear Sir,

10

Re: Kentiles Ltd., in Liquidation

With reference to Mr. Munro's discussion of
yesterday with Mr. Akbarali G. Nanji and Mr. S.L.
Freeberne, this is to confirm the verbal offer we
made you for the purchase of the assets of Kentiles
Limited, (Movable and Immovable) by a Company to be
formed by the undersigned. This offer is subject to
acceptance within eight days from date.

PRICE £145,000 (one hundred and forty five
thousand pounds)

20

PAYMENT ... 10% Cash. Payable on possession.

Balance to be paid in 10 to 12 equal
annual payments, the first payment
commencing 12 months after the date
of possession.

INTEREST ... 5% per annum on balances remaining
after each payment.

SECURITY ... Mortgage over the assets now be-
longing to Kentiles Limited.

Personal guarantees of Mr. Akbarali
G. Nanji, Mr. Tajdeen G. Nanji and
Mr. S.L. Freeberne.

30

10 This offer is made on the basis that all plant machinery, vehicles equipment, tools and all other movables now on any part of Kentiles premises belong to Kentiles. If any of such plant, machinery, vehicles, equipment tools and other movables are held by Kentiles under agreements for hire purchase or purchase by instalments then Kentiles will make all such payments and do all such acts and things as shall be necessary to vest in the purchasers the entire property in the same free from encumbrances. All such, plant, machinery, vehicles, equipment, tools and other movables shall be delivered to the purchasers intact and in good condition and in complete working order.

20 The sale and purchase shall also be subject to the satisfactory consents to this transaction being granted by the Land Control Board and the Governor under the Crown Lands Ordinance and all other authorities (if any) whose consent thereto shall be necessary.

Yours faithfully,

AKBARALI G. NANJI, TAJDEEN G. NANJI,
AND S. L. FREEBERNE.

Exhibits

2 (part)

(i) Letter:
Akbarali G. Nanji
& Others to
Official Receiver

3rd September
1958 -

continued

Exhibits

2 (part)

(ii) Letter:
Akbarali G.
Nanji and
Others to the
Receiver
Manager
Kentiles Ltd.
23rd September
1958

2 (part) (ii) LETTER: AKBARALI G. NANJI
AND OTHERS TO THE RECEIVER MANAGER KEN-
TILES LTD. DATED 23rd SEPTEMBER
1958

P.O. Box 1004,
Nairobi.

23rd September, 1958.

The Receiver Manager,
Messrs. Kentiles Ltd (In Liquidation),
Nairobi.

10

Dear Sir,

KENTILES LIMITED

We submitted an offer on the 3rd September to the Official Receiver, copy of which we enclose. Up to the time of writing we have had no reply from the Official Receiver. Following the discussion we had with you, on the 15th September, we now repeat to you, at your request for finalisation (as you assured us you now had the authority to finalise this matter) the offer we made to the Official Receiver. Our offer, subject to acceptance not later than the 30th September, is as follows:-

20

PRICE £145,000 (one hundred and forty five thousand pounds).

PAYMENT ... 10% Cash. Payable on possession. Balance to be paid in 10 to 12 equal annual payments, the first payment commencing 12 months after the date of possession.

INTEREST ... 5% per annum on balances remaining after each payment.

30

SECURITY ... Mortgage over the assets now belonging to Kentiles Limited.

Personal guarantees of Mr. Akbarali G. Nanji, Mr. Tajdeen G. Nanji and Mr. S.L. Freeberne.

10 This offer is made on the basis that all plant machinery vehicles, equipment, tools and all other movables now on any part of Kentiles premises belong to Kentiles. If any of such plant machinery, vehicles, equipment tools and other movables are held by Kentiles under agreements for hire purchase or purchase by instalments then Kentiles will make all such payments and do all such acts and things as shall be necessary to vest in the purchasers the entire property in the same free from encumbrances. All such plant, machinery, vehicles, equipment, tools and other movables shall be delivered to the Purchasers intact and in good condition and in complete working order.

20 The sale and purchase shall also be subject to the satisfactory consents to this transaction being granted by the Land Control Board and the Governor under the Crown Lands Ordinance and all other authorities (if any) whose consent thereto shall be necessary.

Yours faithfully,

AKBARALI G. NANJI, TAJDEEN G. NANJI
AND S. L. FREEBERNE.

Exhibits

2 (part)

(ii) Letter:
Akbarali G.
Nanji & Others
to the Receiver
Manager Kentiles
Limited

23rd September
1958 -

continued

Exhibits

2 (part) (iii) LETTER: HAMILTON HARRISON
AND MATHEWS TO SHAPLEY, BARRET, ALLIN & CO
DATED 23rd JUNE, 1959

2 (part)

(iii)

2/125/267 (CON)

Letter:

Hamilton

JFHH/RL

23rd June, 1959

Harrison

& Mathews

to Shapley,

Messrs. Shapley, Barret, Allin & Company,

Barret,

Advocates,

Allin & Co.

Cotts House,

Eliot Street,

23rd June

NAIROBI.

1959

10

For the attention of Mr. Marsh

Dear Sirs,

Kentiles Limited (In Liquidation)

We enclose herewith four copies of the draft Contract for approval by you and return to us of one copy in due course.

This draft is submitted specifically subject to any variation thereto which may be required by our clients, to whom the draft has been sent today.

Yours faithfully,

20

for HAMILTON HARRISON & MATHEWS

Encs.

2 (part) (iv) LETTER: HAMILTON HARRISON & MATHEWS TO THE SECRETARY THE LAND CONTROL BOARD DATED 3rd JULY, 1959

Exhibits

2 (part)

HAMILTON HARRISON & MATHEWS,
Advocates,
Stanvac House,
Queensway,
Private Bag,
NAIROBI.

(iv) Letter:
Hamilton
Harrison &
Mathews to The
Secretary The
Land Control
Board

10

3rd July, 1959.

2/125/267 (CON)
JFHH/EMF

3rd July 1959

The Secretary,
The Land Control Board,
Department of Lands,
NAIROBI.

Dear Sir,

20

L.R.Nos. 57/1 - 57/15, and 57/17 - 57/24
- Mortgage to National & Grindlays Finance
& Development Corporation Limited

30

Recently, probably on the 22nd or 23rd June Mr. Akbarali Gulamhusein Nanji on behalf of himself and his associates Mr. Tajdin Gulamhusein Nanji and Mr. Sydney Lawrence Freeberne filed with you a Land Control application for the approval of your Board to a sale by the Receiver of Kentiles Limited to Mr. Nanji and his associates or to a Company to be formed by them of the above pieces of land which application was, we believe, considered by your Board at its meeting on 24th June and referred to the Highlands Board for further consideration.

40

In order to allow of the purchase being completed if approved by your Board it is necessary that the whole of the purchase price be raised and an approach having been made by Mr. Nanji and his associates to the National and Grindlays Finance and Development Corporation Limited that Corporation has agreed to advance the moneys on the security of inter alia a Legal Mortgage or, as the case may be, a Mortgage Debenture over the subject properties.

Exhibits

2 (part)

(iv)

Letter:
Hamilton
Harrison
& Mathews
to The
Secretary
The Land
Control Board

3rd July
1959 -

continued

We accordingly enclose herewith Land Control application in duplicate for favour of the consideration of your Board contemporaneously with consideration of the application for the purchase.

We regret that, through a misunderstanding between Mr. Nanji and his advocates and ourselves the enclosed application was not lodged at the same time as the application in respect of the purchase by Mr. Nanji.

Yours faithfully,

for HAMILTON HARRISON & MATHEWS

(Sgd) James F.H. Hamilton

10

2 (part) (v) LETTER: COMMISSIONER OF LANDS
TO HAMILTON HARRISON & MATHEWS DATED 17th
JULY, 1959

Exhibits

2 (part)

Department of Lands,
P.O.Box 30089,
NAIROBI.

17th July, 1959.

(v) Letter:
Commissioner of
Lands to Hamilton
Harrison &
Mathews

17th July 1959

Ref: No: 5698/III/78

10 Messrs. Hamilton Harrison & Mathews,
Advocates,
Private Bag,
NAIROBI.

Gentlemen,

KASARINI, L.R. NO. 57

20 I have the honour to refer to your letter
No. 2/125/267 (CON) dated 3/7/1959 and to inform
you that the Deputy Official Receiver and Liqui-
dator has now advised that the proposal for the
sale of the above mentioned land does not meet
with his approval and that this was the first he
had heard of the proposed transaction, and adds
that the matter is sub judice.

2. I shall accordingly be glad to receive your
further advices as a matter of urgency, as the
application is to be considered by the Highlands
Board on the 28th instant and it is not certain
when the next meeting will take place after that
date.

30 I have the honour to be,
Gentlemen,
Your obedient servant,

(Sgd)

for COMMISSIONER OF LANDS

JVDM:LMS

Exhibits

2 (part) (vi) LETTER: COMMISSIONER OF LANDS
TO SHAPLEY, BARRET, ENNION & MARSH DATED
6th AUGUST 1959

2 (part)

(vi) Letter:
Commissioner
of Lands to
Shapley Barret
Ennion & Marsh

Department of Lands,
P.O.Box 30089,
NAIROBI.

Ref: 5698/III/86

6th August 1959.

6th August
1959

Messrs. Shapley, Barret, Ennion
& Marsh,

Advocates,
P.O.Box 286,
NAIROBI.

10

Gentlemen,

PURCHASE OF L.R.NO.57 FROM KENTILES
LIMITED (IN LIQUIDATION)

I have the honour to refer to your letter KJM/GC
of the 23rd June, 1959.

I am directed to inform you that this matter was
considered by the Highlands Board at its meeting on
the 30th July 1959, when it concluded that it was not
in a position to consider the application since it
appeared that the vendor named was not in a position
to dispose of L.R.57 or competent to convey the title
to the land to the proposed purchasers. The Board
agreed, however, to consider a fresh application if
and when the legal title holder of L.R.57 wished to
sell to the present (or other) applicants.

20

I have the honour to be,
Gentlemen,
Your obedient servant,

30

A.W. HORNER,
COMMISSIONER OF LANDS

Copy to:-

Messrs. Hamilton Harrison & Mathews,
Private Bag,
NAIROBI. (Ref. your letter 2/125/267 (CON)
of 3rd July, 1959).

2 (part) (vii) LETTER: OFFICIAL
RECEIVER AND LIQUIDATOR TO ROBSON
HARRIS & CO. DATED 25th AUGUST 1959

Exhibits

2 (part)

DEPARTMENT OF THE REGISTRAR GENERAL
OFFICE OF THE OFFICIAL RECEIVER
CENTRAL GOVERNMENT BUILDING
P.O.Box 30031,
NAIROBI.

(vii) Letter:
Official
Receiver and
Liquidator to
Robson Harris
& Company

ORW/50/56

25th August 1959.

25th August
1959

10

Messrs. Robson, Harris & Co.,
Advocates,
P.O.Box 5305,
NAIROBI.

Dear Sirs,

KENTILES LTD (IN LIQUIDATION)

Thank you for your letter No.E/10/13 of
20th August, the contents of which I note.

20

2. I do not propose to deal in detail with the
various matters raised therein, but I agree with
your conclusion that as the result of our recent
discussions it was generally accepted that all
parties having claims against this company would
be well served if the assets were sold forthwith.

3. I have now had an opportunity of discussing
the offer put forward by Mr. Nanji and his associ-
ates in the light of the discussions referred to
in your letter under reply.

30

4. Although it remains my opinion that it is
for the liquidator to make title in connection
with any sale with the concurrence of the debenture
holders in respect of any interest which they
may have, I am perfectly willing to join in any
form of agreement acceptable to the other parties
herein to ensure that a sale takes place without
delay providing, of course, that my rights are
expressly preserved and safeguarded.

5. I am, therefore, prepared to consent to the
proposed sale to the Nanji group, subject to the

Exhibits

consent of the Land Control Board, of all the assets of Kentiles Ltd., at not less than £137,500 on the following terms:-

2 (part)

(vii) Letter:
Official
Receiver and
Liquidator to
Robson Harris
& Company

25th August
1959 -

continued

- (a) That the purchase price shall be paid as to 10% by deposit forthwith as a stake and as to the balance on completion of sale. 10
- (b) That all such moneys shall be paid into a special account in the joint names of the liquidator and the receiver and manager appointed by the Bank, at some bank or building society other than the first debenture holders pending decision or settlement of current law suits. 10
- (c) That possession should be given only upon completion of sale which shall take place as soon as possible after completion of formalities and before 31st December next or within a period of two months from the date of Land Control Board consent, whichever may be the later. 20
- (d) That negotiations are to be subject to a formal contract acceptable to the liquidator and the first and second debenture holders which should state the allocation of purchase price as between immovable and other assets (the second draft contract prepared by the advocates for the first debenture holders can, of course, be considered as a basis from which to work). 30

6. I would add that it is the view of my committee of Inspection that the proposed purchase price is well below the figure which the property should realise, but in all the circumstances they have reluctantly agreed to the fresh offer providing that the sale can be speedily completed on the above mentioned terms.

7. I would be grateful if I may be informed whether or not you and the first debenture holders are prepared to accept these terms and, if so, whether the purchaser is similarly prepared to enter into an exchange of letters on this basis. On receiving your confirmation as to this I am prepared to sign an application to the Land Control Board, the exact form of which I am at present considering.

10

Yours faithfully,

(Sgd) D. J. Coward

OFFICIAL RECEIVER AND LIQUIDATOR

c.c.

Messrs. Hamilton Harrison & Mathews,
Advocates,
Private Bag,
NAIROBI.

Exhibits

2 (part)

(vii) Letter:
Official Receiver and
Liquidator to
Robson Harris
& Company

25th August 1959

continued

Exhibits 2 (part) (viii) LETTER: SHAPLEY, BARRET,
ENNION & MARSH TO OFFICIAL RECEIVER DATED
2 (part) 29th OCTOBER, 1959

(viii) SHAPLEY, BARRET, ENNION & MARSH,
Letter: Advocates,
Shapley, Prudential Assurance Bldg,
Barret, Eliot Street,
Ennion & P.O.Box 286,
Marsh to NAIROBI.
Official Receiver

Ref: 66/205/2 29th October, 1959. 10

29th October 1959 The Official Receiver and Liquidator,
P.O.Box 30031,
NAIROBI.

Messrs. Hamilton, Harrison & Mathews,
Advocates,
Private Bag,
NAIROBI.

Messrs. Robson, Harris & Co.,
Advocates,
Lullington House,
NAIROBI. 20

Dear Sirs,
Re: Kentiles Ltd (In Liquidation)

We thank you for your letters indicating acceptance of the conditions laid down in ours of the 7th September last.

Since our previous letter of the 7th October, 1959, our clients have given this matter further and very careful thought, and have considered the change in circumstances brought about by the publication of the White Paper on Land Policy and of public reaction thereto. 30

Having regard to the possibility of long delays attendant upon the clarification of official land policy and the enactment of the legislative machinery to give effect to such policy and bearing in mind the numerous important points, e.g. the breakdown of the purchase price, which remain to be settled before any finality can be reached in the present negotiations,

our Clients have decided to discontinue such negotiations.

Please therefore accept this letter as formal notice of discontinuance of negotiations and accept our Clients' apologies for any inconvenience caused.

Yours faithfully,

SHAPLEY, BARRET, ENNION & MARSH

(Sgd) K. J. Marsh

Exhibits

2 (part)

(viii) Letter:
Shapley, Barret,
Ennion & Marsh
to Official
Receiver

29th October
1959 -

continued

Exhibits

A - STATEMENT OF JAMES ANGUS MACKIE-ROBERTSON
DATED 19th SEPTEMBER, 1961

A

IN HER MAJESTY'S SUPREME COURT OF KENYA AT
NAIROBI

Statement
of James
Angus Mackie-
Robertson

CIVIL CASE NO. 658 OF 1958

KENTILES LIMITED (In Liquidation) and

19th September 1961 THE OFFICIAL RECEIVER as Liquidator

thereof PLAINTIFF

versus

HUBERT RICHARD BRICE FIRST DEFENDANT

10

and

NATIONAL & GRINDLAYS BANK LIMITED.... SECOND DEFENDANT

JAMES ANGUS MACKIE-ROBERTSON will say:-

1. At all material times I was and I still am a Partner in the firm of Messrs. Kaplan & Stratton, Advocates of Queensway House, York Street, Nairobi.

2. Late in 1951 my firm received instructions to form a company known as Kentiles Limited "to purchase or otherwise acquire all the undertaking, freehold and leasehold premises, goodwill, plant, machinery and stock-in-trade of or connected with the business of brick and tile manufacturers now carried on by Kenboard Limited,"

20

3. At that time the land known as L.R.57 had been mortgaged by Kenboard Limited in favour of Barclays Overseas Development Corporation and also of Mr. Block and the relative title deeds came into my firm's hands from Barclays Bank about 2nd September 1951 and were held by me to Barclays' order.

4. My instructions (as part of the re-construction of the Kenboard Group) entailed the formation of Kentiles Limited to take over the business of brick and tile manufacturers from Kenboard Limited, including the property at Kasarini and certain financial arrangements with the National Bank of India Limited

30

out of which the monies then owing to Barclays Overseas Development Corporation were to be repaid.

Exhibits

A

Statement of
James Angus
Mackie-
Robertson

19th September
1961 -

continued

5. The negotiations with the defendant Bank (then known as "The National Bank of India Ltd") for the facilities which the new company would require had, in fact, been carried out direct with the Bank by Mr. Zuckerman, the principal shareholder of Kenboard Limited, and Mr. Clough whom Mr. Zuckerman had selected for appointment as Managing Director of Kentiles Limited after formation, and before I came into the picture at all, but I did on one occasion - probably early September 1951, accompany Mr. Zuckerman to a meeting with Mr. Irving, the then Manager of the National Bank. The object of this meeting was primarily to inform him (Irving) of the arrangements we had concluded with Barclays for the liquidation of the liabilities there and the consequent release of the titles which would enable the arrangements with the National Bank to proceed. I had been instructed generally by Kentiles Limited, embracing the whole matter, and necessarily entailing steps to have the titles released from the then encumbrances in favour of Barclays and Mr. Block, to make them available to the National Bank.

6. In my view I was never at any time holding these title deeds to the order of either Kenboard Limited or Kentiles Limited. It was always on behalf of one Bank or the other. I could not at any time claim a lien for due fees by Kentiles Limited or Kenboard Limited. I was initially holding the titles to Barclays' order and, in order to get them released from that, I had to obtain and deliver to Barclays a letter of guarantee from the National Bank. That letter I obtained from the National Bank on the condition and understanding that the letter would release the title deeds from Barclays lien and immediately render them subject to a lien in favour of the National Bank. Therefore as soon as the letter of guarantee was passed to Barclays i.e. from about 5 October 1951 I regarded myself as holding these deeds to the order of the National Bank.

7. My letter of 6th October to Barclays was crossed by their letter dated 5th October

Exhibits

A

Statement
of James
Angus
Mackie-
Robertson

19th September
1961 -
continued

authorising my firm to deliver the title deeds to Kenboard Limited unconditionally. That letter dated 5th October I acknowledged and said I was releasing the deeds to Kenboard Limited. Kenboard Limited was Barclays' customer - Kentiles Limited never was. I got a receipt from Kenboard Limited but I knew by that date that the Conveyance had already been signed by Kenboard Limited and of the undertakings given by me to the National Bank, so that despite the terms of the letter of 5th October 1951 from Barclays Bank I did not release the title deeds to Kenboard Limited at all, but immediately on receipt of the letter of the 5th October from Barclays, held them to the order of the National Bank. I was holding those title deeds to the Order of the National Bank in pursuance of an arrangement made between Kentiles Limited and the National Bank.

10

8. Following his appointment to the National Bank as Receiver and Manager Mr. Brice got in touch with me on the afternoon of the 22nd November 1956 when I had a two hour meeting with him and I think it was the next morning that I took him out (accompanied by his partner, Gill) to Kentiles Limited and, in fact, handed the place over to him, taking him all round the works and introducing him to certain of the senior staff as the Receiver appointed by the Bank, and I explained to them that he was now taking over as from that moment control of the assets in the business. I did that in my own capacity as an alternate Director of the Company and in pursuance of the meetings which the Board had just then recently held. So far as I am aware my action has never been challenged or criticized by the Company or by any of its Directors.

20

30

(Sgd) J.A.MACKIE-ROBERTSON

19th September, 1961.

B - STATEMENT OF HUBERT RICHARD BRICE
IN HER MAJESTY'S SUPREME COURT OF KENYA AT
NAIROBI

Exhibits

B

CIVIL CASE NO. 658 OF 1958

Statement of
Hubert Richard
Brice

KENTILES LIMITED (In Liquidation) and

THE OFFICIAL RECEIVER as Liquidator

thereof PLAINTIFF

versus

HUBERT RICHARD BRICE FIRST DEFENDANT

10

and

NATIONAL & GRINDLAYS BANK LTD ... SECOND DEFENDANT

HUBERT RICHARD BRICE will say:-

1. I am a partner in the firm of Brice & Gill, Accountants and Auditors, which carry on business at Mansion House, Nairobi.

20

2. I was appointed Receiver and Manager of Kentiles by the 2nd Defendant by an instrument in writing dated the 20th November 1956. On or about the 22nd November 1956, I went to Kentiles' place of business on the lands known as L.R.57 accompanied by Mr. Mackie-Robertson, who was then an alternate director of Kentiles Limited, with a view to taking possession of all the property and other assets which had been charged to the Defendant Bank by a Debenture dated the 1st day of October 1951. Mr. Mackie-Robertson then introduced me to various employees of Kentiles Limited and handed over the premises and assets to me.

(Sgd) H. R. BRICE.

Exhibits

COPY BANKING ACCOUNT OF KENTILES LIMITED
28th SEPTEMBER, 1951 to 8th NOVEMBER 1951

Copy
 Banking
 Account of
 Kentiles Ltd
 28th Sept-
 ember 1951
 to 8th
 November
 1951

KENTILES LIMITED.

Any exception error or change of
 address should be promptly advised
 to the Bank otherwise the account
 will be presumed to be in order.

In Account With NATIONAL & GRINDLAYS BANK LIMITED
 NAIROBI.

Date	Particulars	Debit	Credit	Balance
28 Sep 51	PS	15.00		
28 Sep 51		50.00		
			6,000,00	5,935.00T
3 Oct 51		2.50		
3 Oct 51		13.00		5,919,50T
4 Oct 51	846,	400,390.09		394,470,59DR
5 Oct 51			12,733,75	381,736,84DR
6 Oct 51		183,75		
6 Oct 51	849,	4816,40		386,736,99DR
9 Oct 51	848,	7000,00		
9 Oct 51	850,	500,00		
9 Oct 51	853,	1000,00		
9 Oct 51	852,	1966,80		397,203,79DR
10 Oct 51	847,	1000,00		398,203,79DR
11 Oct 51	855,	815,84		
11 Oct 51	854,	4000,00		403,019,63DR
12 Oct 51	PS	50		
12 Oct 51	826,	1000,00		
12 Oct 51	827,	400,00		404,420,13DR
13 Oct 51			226,75	404,193,38DR
13 Oct 51	831,	170000,00		
13 Oct 51	828,	3679,89		577,873,27DR
17 Oct 51	829,	382,75		
			124000,00	454,256,02DR
18 Oct 51	834,	1000,00		455,256,02DR
18 Oct 51		1,25		455,257,27DR
19 Oct 51	832,	1504,80		456,762,07DR
20 Oct 51	833,	2000,00		
20 Oct 51		9,00		458,771,07DR

Date	Particulars	Debit	Credit	Balance	Exhibits
22 Oct 51				458771,07DR	Copy Banking
22 Oct 51	830,	37,50		458808,57DR	Account of
23 Oct 51	836,	980,97			Kentiles Ltd
23 Oct 51	835,	1,000,00			28th
			10714,78	450074,76DR	September
24 Oct 51	838,	1,000,00		451074,76DR	1951 to 8th
25 Oct 51	839,	1,827,84			November 1951
25 Oct 51	840,	10,000,00		462902,60DR	continued
27 Oct 51			40302,00	422600,60DR	
29 Oct 51	837,	260,00		422860,60DR	
31 Oct 51	843,	600,00			
31 Oct 51	841,	8,000,00		431460,60DR	
1 Nov 51	842,	9,000,00		440460,60DR	
2 Nov 51			10000,00	430460,60DR	
2 Nov 51	845,	8,000,00			
2 Nov 51	844,	20,000,00		458460,60DR	
3 Nov 51	846,	1,752,30			
3 Nov 51	847,	14,289,00		474501,90DR	
5 Nov 51	850,	905,00			
5 Nov 51	848,	2,360,00		477766,90DR	
6 Nov 51	862,	1,316,80			
6 Nov 51	861,	8,175.10			
6 Nov 51	852,	1,574,00			
6 Nov 51	855,	1,960,00		490792,80DR	
7 Nov 51	859,	971,52			
7 Nov 51	854,	4,960,00			
7 Nov 51	857,	1,587,12		498311,44DR	
8 Nov 51			200.00	498111,44DR*	
8 Nov 51	864,	96,95			
8 Nov 51	863,	1,820,80		500029,19DR	

ON APPEAL FROM THE COURT OF APPEAL
FOR EASTERN AFRICA AT NAIROBI

B E T W E E N :

NATIONAL AND GRINDLAYS BANK LIMITED
(2nd Defendant)

Appellant

- and -

KENTILES LIMITED (in liquidation) and
THE OFFICIAL RECEIVER (as Liquidator
thereof) (Plaintiffs)

Respondents

RECORD OF PROCEEDINGS

SANDERSON LEE MORGAN PRICE & CO.,
77, Bishopsgate,
London, E.C.2.
Solicitors for the Appellant.