No.49 of 1964

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

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

BETWEEN :

NATIONAL AND GRINDLAYS BANK LIMITED (Defendant) — Appellant

- and -

DHARAMSHI VALLABHJI,
KESHAVJI DHARAMSHI,
BACHULAL DHARAMSHI,
MORARJI DHARAMSHI and
RAGHAVJI DHARAMSHI
trading as "DHARAMSHI VALLABHJI & BROS." (Plaintiffs) — Respondents

---

RECORD OF PROCEEDINGS

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

MERRIMAN WHITE & CO.,
3, Kings Bench Walk,
Inner Temple,
London, E.C.4.
Solicitors for the Respondents.

CLASS MARK
GFI 6 2
ACCESSION NUMBER
87109

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
24 APR 1967
25 RUSSELL SQUARE
LONDON, W.C.1.

No.49 of 1964

IN THE JUDICIAL COMMITTEE OF THE 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
(Defendant) Appellant

- and -

DHARAMSHI VALLABHJI,
KESHAVJI DHARAMSHI,
BACHULAL DHARAMSHI,
MORARJI DHARAMSHI and
RAGHAVJI DHARAMSHI
trading as "DHARAMSHI VALLABHJI
& BROS." (Plaintiffs) Respondents

RECORD OF PROCEEDINGS

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In the Supreme Court of Kenya at Nairobi

No.1

Plaint 12th September 1961

NO.1

PLAINT DATED 12TH SEPTEMBER 1961

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI

CIVIL SUIT NO: 1516 OF 1961.

DHARAMSHI VALLABHJI)
KESHAVJI DHARAMSHI)
BACHULAL DHARAMSHI)
MORARJI DHARAMSHI)
10 RAGHAVJI DHARAMSHI all)
trading as "DHARAMSHI)
VALLABHJI & BROTHERS")... PLAINTIFFS

versus

NATIONAL AND GRINDLAYS BANK
LIMITED ... DEFENDANTS

P L A I N T

1. The plaintiffs are Indian Merchants carrying on business at Nairobi and their address for service herein is care of A.S.G. Kassam, Advocate, Sheikh Building, Victoria Street, Post Office Box 9040, Nairobi.

2. The Defendants are a limited liability company incorporated in the United Kingdom and registered in the Colony and Protectorate of Kenya and carrying on business at Nairobi and their address for service of the summons herein is Government Road, Nairobi.

3. Up to 4th April 1960 or thereabouts the plaintiffs were customers of the Standard Bank of South Africa Limited, Delamere Avenue, Nairobi (hereinafter called the Standard Bank.)

4. On or about the said 4th April, 1960 the Defendants through their broker or representative induced the plaintiffs to close their account at the Standard Bank and to open it instead with the

In the Supreme Court of Kenya at Nairobi

No. 1

Plaint 12th September 1961 continued

Defendants by promising them a bigger overdraft of Shs. 140,000/- and better banking facilities than the Standard Bank had been affording the Plaintiffs.

5. Induced by the said promises and representations the Plaintiffs on or about the said 4th April 1960 closed their account at the Standard Bank and opened an account with the Defendants and on the same day it was agreed between the Plaintiffs and the Defendants that the Defendants would up to 30th April, 1961 lend and advance to the Plaintiffs or allow to them overdraft facilities in the following :- 10

(a) Shs. 95,000/- on the security on the Plaintiffs' Plot L.R. No.209/2490/10, Nairobi, (hereinafter called the said Plot), the documents of title whereof were then lying with the Standard Bank;

(b) Shs. 45,000/- on the security of a hypothecation over the Plaintiffs' shop goods; 20

(c) Shs. 10,000/- overdraft for 15 days to meet the Plaintiffs' immediate liabilities.

It was a fundamental term or condition at the root of the said contract that the said hypothecation would be allowed by the Defendants to remain a hypothecation and that the Defendants would not before the said 30th April, 1961 call in or require payment of the loan, that they would not seize or remove the Plaintiffs' said shop goods nor take any steps to enforce their securities, or alternatively. The aforesaid was the fundamental term or condition at the root of the said contract unless the Plaintiffs were guilty of some breach of their obligations thereunder. 30

6. Accordingly in pursuance of the said agreement and in consideration of the said loan and facilities, the Plaintiffs, on or about the 25th April 1960, at the request of the Defendants executed and delivered to them an equitable mortgage in their favour over the said Plot and on or about the said 4th April, 1960 the 40

In the Supreme Court of Kenya at Nairobi

No. 1

Plaint 12th September 1961 continued

Plaintiffs executed and delivered to the Defendants a Letter of Hypothecation in blank over the Plaintiffs' said shop goods. The documents executed by the Plaintiffs were prepared by and were on printed forms of the Defendants and no copies of any of the said documents were furnished at or about the time of execution to the Plaintiffs by the Defendants.

7. In pursuance of and in compliance with the said Contract the Plaintiffs, on the said 4th April, 1960, by letter requested the Standard Bank to release to the Defendants the documents of title to the said Plot held by the Standard Bank as security for the Plaintiffs' overdraft with the Standard Bank, against the Defendants undertaking to liquidate the overdraft in the Plaintiffs account with the Standard Bank; and accordingly the said documents of title were forthwith released to and deposited with the Defendants as security aforesaid.

8. The said letter of Hypothecation, though executed by the Plaintiffs on or about the said 4th April, 1960, has been dated by the Defendants (as the Plaintiffs have subsequently discovered) the 9th day of May, 1960, and the said equitable mortgage has been dated by the Defendants some date not known to the Plaintiffs.

9. By their letter to the Plaintiffs dated 13th May, 1960 the Defendants confirmed to the Plaintiffs "having established an overdraft facility in your (i.e. the Plaintiffs') account with us (i.e. the Defendants) to the extent of Shs. 140,000/- until 30th April, 1961."

10. On the 6th October, 1960 it was agreed between the Plaintiffs and the Defendants that the said long term overdraft facility of Shs.140,000/- should be increased to Shs. 150,000/-, thus converting and extending the said short-term overdraft facility for Shs. 10,000/- for 15 days into a long-term overdraft or facility up to the said 30th April, 1961. At the same time at about 10.30 in the forenoon at the request of the Defendant, the Plaintiffs signed in favour of the Defendants a fresh Letter of Hypothecation or extension of the said previous Letter of Hypothecation dated 9th May 1960, and a further document

In the Supreme Court of Kenya at Nairobi

No. 1

Plaint 12th September 1961 continued

confirming that the documents of title of the said Plot were deposited with the Defendants by way of continuing security, the said two documents being signed by the Plaintiffs in consideration and as a result of the Defendant's assurances that no steps would be taken by the Defendants on the securities held by them before the said 30th day of April, 1961, of which two documents also the Defendants did not at that time furnish to the Plaintiffs any copy or copies. Further, at or about the same time and on the same day, the Plaintiffs gave to the Defendants, on them demanding the same, their four life insurance policies as additional securities for the said loans. 10

11. It was a fundamental term or condition at the root of the aforesaid contract and acts of the said 6th day of October, 1960, and a consideration therefor promised to the Plaintiffs by the Defendants or implied, and/or it was understood between the Plaintiffs and the Defendants that the Defendants would not, before the said 30th day of April, 1961, call in or require payment of the said loan or any part thereof nor seize or remove the Plaintiffs' said goods nor take any steps to enforce their securities or alternatively such was the fundamental term or condition at the root of the said contract and acts unless the Plaintiffs were thereafter guilty of some breach of their obligations under the said contract. 20 30

12. Nevertheless, wrongfully, in breach of the said term or condition and of their obligations, and in fraud of the Plaintiffs, and although there had been no breach of their obligations on the part of the Plaintiffs, the Defendants, a few hours later on the said 6th day of October, 1960, at about 2.15 in the afternoon, came to the Plaintiffs' said shop premises with a large number of men and motor lorries, trespassed into the said premises, and seized the Plaintiffs' goods and chattels, including goods and chattels not included in or covered by the said Letters of Hypothecation, and removed them from the said premises and wholly deprived the Plaintiffs of the same. The Defendants neither made nor gave to the Plaintiffs then, or in spite of demands by the Plaintiffs at any time thereafter, 40

any inventory of the said goods and chattels so seized and removed.

13. Further, wrongfully, in breach of the said term or condition and of their obligations, and in fraud of the Plaintiffs, and although there had been no breach of their obligations on the part of the Plaintiffs, the Defendants by their letter dated 8th October, 1960, demanded immediate re-payment of the whole of the said loan, although the same was not re-payable until the said 30th day of April, 1961, and they further required the Plaintiffs to arrange for the sale of the Plaintiffs' said goods and chattels which the Defendants had wrongfully seized and removed as aforesaid in the afternoon of the said 6th October, 1960.

14. Further, wrongfully, in breach of the said term or condition and of their obligations and in fraud of the Plaintiffs, and although there had been no breach of their obligations on the part of the Plaintiffs, notwithstanding that the said loan was not re-payable until the said 30th April, 1961, the Defendants caused damage to the Plaintiffs' credit and reputation by writing on 24th October 1960 to one Messrs. Jesang Popat & Co., to whom the Plaintiffs had given an option on the said plot, conveying to the said Jesang Popat & Co., that they, the Defendants, would sell the said Plot after 15th December, 1960 if the Plaintiffs did not re-pay the said loan by the said last mentioned date.

15. By reason of the premises and the Defendants' aforesaid wrongful acts the Plaintiffs suffered great loss and damage and were unable to carry on their business and had to close down their shop and suffered loss of profits, and after the Defendants' said letter of 24th October, 1960, they the Plaintiffs were forced by their financial difficulties caused by the Defendants' said wrongful acts to call and hold a meeting of their creditors and had to make a Deed of Arrangement with their creditors on or about the 15th day of November, 1960.

16. The Plaintiffs say that neither of the said Letters of Hypothecation were valid and that the Defendants were not entitled to act thereunder,

In the Supreme Court of Kenya at Nairobi

No. 1

Plaint
12th September 1961
continued

and, even if they were valid, the Defendants were not entitled, having regard to the premises, to seize or remove the Plaintiffs' said goods and chattels on the said 6th October, 1960, and further, as stated above, the whole of the said goods and chattels seized and removed by the Defendants were not included in or recovered by the said Letters of Hypothecation.

17. The cause of action arose at Nairobi within the jurisdiction of this Honourable Court. 10

18. Notice of intention to sue has been duly given to the Defendants.

WHEREFORE the Plaintiffs pray for Judgment for:

(a) Damages, general and special;

(b) Interest at 8% per annum from the date of filing this suit to the date of Judgment, and thereafter at the rate of 6% till payment in full;

(c) Costs of this suit;

(d) Such further or other relief as to this Honourable Court may seem meet. 20

DATED at Nairobi this 12th day of September, 1961.

A.S.G. KASSAM,
Advocate for the Plaintiffs.

Drawn by:

J.M.Nazareth, Esq.,
Queen's Counsel,
Kenya Chambers,
Victoria Street,
NAIROBI. 30

Filed by:

A.S.G.Kassam,
Advocate,
Sheikh Building,
Victoria Street,
P.O. Box 9040,
NAIROBI.

In the Supreme Court of Kenya at Nairobi

No. 2

Defence 1st November 1961

NO. 2

DEFENCE DATED 1ST NOVEMBER 1961

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI

CIVIL CASE NO: 1516 OF 1961.

DHARAMSHI VALLABHJI
KESHAVJI DHARAMSHI
BACHULAL DHARAMSHI
MORARJI DHARAMSHI
10 RAGHAVJI DHARAMSHI
trading as "DHARAMSHI
VALLABHJI & BROTHERS" ... PLAINTIFFS

versus

NATIONAL AND GRINDLAYS BANK
LIMITED ... DEFENDANT

D E F E N C E

1. Paragraphs 1 and 2 of the Plaint are admitted.

2. The Defendant is a stranger to and has no
20 personal or other knowledge as to the correctness or otherwise of the allegation contained in paragraph 3 of the Plaint. The Defendant states that the said paragraph is unnecessary and is not material to the issues in question in this suit.

3. Each and every allegation contained in paragraph 4 of the Plaint is denied. In or about the month of April 1960, the Plaintiffs requested the Defendant to open a current
30 account in their name and for a loan or an overdraft facility to be made to them in the proposed new account of Shs. 140,000/-.

4. In answer to paragraph 5 of the Plaint the Defendant states that on or about the 4th day of April, 1960, the parties hereto agreed, inter alia, that :-

(i) the Defendant should open the said

In the Supreme Court of Kenya at Nairobi

No. 2

Defence
1st November 1961
continued

account and should grant to the Plaintiffs a loan or overdraft facility in the said account of Shs.140,000 (hereinafter called the "said overdraft") ;

(ii) the said overdraft, or so much thereof as should be outstanding from time to time would become due and repayable by the Plaintiffs to the Defendant upon demand and that in any event the same would not be permitted to continue beyond the 30th day of April, 1961;

10

(iii) the Plaintiffs should pay interest on the said overdraft or on so much thereof as should be outstanding from time to time at current Bank rates;

(iv) the Plaintiffs should by way of security for the repayment of the said overdraft, deposit with the Defendant the title deeds of L.R. 209/2490/10 and execute and deliver up to the Defendant an Equitable mortgage over the said L.R.209/2490/10, a letter of Deposit, a joint and several continuing guarantee and a letter of Hypothecation as hereinafter appears.

20

Subject to the provisions of this paragraph, each and every allegation contained in paragraph 5 of the Plaint is denied..

30

5. With regard to paragraphs 6, 7 and 8 of the Plaint the Defendant states that pursuant to the aforesaid agreement it opened the said account and made available to the Plaintiffs the said overdraft and the Plaintiffs deposited with the Defendant the title deeds to the said L.R. 209/2490/10 (hereinafter referred to as the "mortgaged plot") and executed and delivered up to the Defendant the said Equitable Mortgage, a letter of Deposit, a joint and several continuing guarantee for the said sum of Shs.140,000/- and a letter of Hypothecation, dated the 9th day of May, 1960, pursuant to which the Plaintiffs hypothecated to the

40

In the Supreme Court of Kenya at Nairobi

No. 2

Defence 1st November 1961 continued

Defendant, as a continuing security, their stock in trade consisting of "piece goods, ready made clothes, fancy goods, tailoring materials, sewing machines and their spare parts, trade fittings and fixtures" together with certain other goods and chattels more particularly referred to in the said Letter of Hypothecation. The Defendant will contend that a copy of the said Letter of Hypothecation would have been made available to the Plaintiffs upon a request being made in that behalf. Save and except as hereinbefore admitted the Defendant denies each and every allegation contained in paragraphs 6, 7 and 8 of the Plaint.

6. With regard to paragraph 9 of the Plaint the Defendant admits having written a letter to the Plaintiffs on the 13th day of May, 1960, but says that the said letter confirmed the arrangement arrived at between the parties on or about the 4th day of April, 1960, referred to in paragraph 4 above, and did not, nor was it intended to create or to confirm the alleged creation of an overdraft facility in favour of the Plaintiffs until the 30th April, 1961 in any event. No such overdraft facility was ever created or given by the Defendant to or in favour of the Plaintiffs as alleged or at all.

7. With regard to paragraphs 10, 11 and 12 of the Plaint the Defendant states that on or about the 27th day of September, 1960, the said overdraft amounted to Shs.148,868/43 and was then Shillings 8,868/43 in excess of the said agreed limit of Shs. 140,000/-. Further, on the 29th day of September, 1960, it was agreed that in consideration of the Defendant agreeing to increase the said overdraft from Shillings 140,000/- to Shillings 150,000/-, until the 3rd day of October, 1960, the Plaintiffs should :-

(a) execute and deliver up to the Defendant forthwith:

(i) a fresh joint and several continuing guarantee for a maximum sum of Shs. 150,000/-;

(ii) A Letter of Deposit confirming that the amount secured by the said

In the Supreme Court of Kenya at Nairobi

No. 2

Defence
1st November 1961
continued

Mortgage would be Shillings 150,000/-;

(iii) a letter declaring, inter alia, that the said hypothecated goods should be a continuing security up to the said new limit of Shs. 150,000/-.

(b) assign unto the Defendant, by way of additional security, certain life Insurance Policies; 10

(c) repay to the Defendant, without prior demand, on the said 3rd day of October, 1960, the amount of the overdraft then in excess of the said sum of Shs. 140,000/-.

8. In further answer to paragraphs 10, 11 and 12 of the Plaint, the Defendant states that on the said 3rd day of October, 1960, the said overdraft amounted to Shs. 153,240/66 upon which date, the Plaintiffs failed to pay the amount, 20 namely, Shs. 13,240/66 then in excess of the said limit of Shs. 140,000/- or any other sum. On the 6th day of October, 1960, the said overdraft amounted to Shs. 154,934/41, upon which date the Plaintiffs :-

(i) returned the documents referred to in (i) (ii) and (iii) (a) paragraph 7 above, duly executed;

(ii) informed the Defendant that they could not pay the said overdraft of 30 Shillings 154,934/41 or any part thereof;

(iii) gave notice, or were about to give notice to their several creditors that they, the Plaintiffs, were then about to suspend payment to their creditors of their several debts;

(iv) permitted the Landlord of their shop premises to levy a distress or 40 execute warrant of attachment against the said hypothecated goods;

In the Supreme Court of Kenya at Nairobi

No. 2

Defence 1st November 1961 continued

(v) executed and delivered to the Defendant a letter dated the said 6th day of October, 1960, authorising the Defendant to take immediate possession of the said hypothecated goods.

9. Upon the Plaintiffs' aforesaid failure on the said 6th day of October, 1960 to pay off the said overdraft or any part thereof and upon receipt of notice of the said act or intended act of Bankruptcy, the Defendant, on the said 6th day of October, 1960, and with the aforesaid consent of the Plaintiffs in writing, took possession of the said hypothecated goods (full particulars whereof are known to the Plaintiffs) pursuant to the Defendant's rights under the said Letter of Hypothecation dated the said 9th day of May, 1960. The Defendant admits having written the letter dated 8th October, 1960, referred to in the said paragraph but save as hereinbefore admitted each and every allegation contained in paragraph 13 of the Plaint is denied.

10. As to paragraph 14 of the Plaint, the Plaintiffs by letter to the Defendant dated the 19th day of October, 1960, stated that on the 15th day of September, 1960, they had given a three months' option to Messrs. Jesang Popat & Company of P.O. Box 3349, Nairobi, to either purchase or sell the said mortgaged plot. By letter dated the said 19th day of October, 1960, the said Messrs. Jesang Popat & Company informed the Defendant of the said option, and in its reply dated 24th October, 1960, which is the letter complained of, the Defendant informed the said Messrs. Jesang Popat & Company that the Defendant would take no action in disposing of the said mortgaged plot until the 15th day of December, 1960, upon which date the said option would expire. Save and except as hereinbefore admitted, each and every allegation contained in paragraph 14 of the Plaint is denied.

11. The Defendant denies that it acted wrongfully as alleged in paragraph 15 of the Plaint or at all and further denies that the Plaintiffs suffered loss and damage and that they were unable to carry on their business as alleged or at all. The alleged meeting of creditors and the alleged Deed of Arrangement are not admitted by

In the Supreme Court of Kenya at Nairobi

No. 2

Defence 1st November 1961 continued

the Defendant.

12. Paragraph 16 of the Plaint is denied.

13. Paragraphs 17 and 18 of the Plaint are admitted, save and except that the Defendant denies that the Plaintiffs have a cause of action as therein alleged or at all.

14. In or about the month of May, 1961, the said mortgaged plot was sold with the consent of all parties and the nett proceeds of sale, namely Shs. 145,991/50, were credited by the Defendant on the 12th day of May, 1961, in part payment of the amount then due in respect of the said overdraft, At the date hereof, namely, the 1st day of November, 1961, there is due and owing by the Plaintiffs to the Defendant in respect of the said overdraft, certain discounts unpaid, costs incurred by the Plaintiffs arising out of the taking of possession of the said hypothecated goods and monies paid by the Defendant for and on behalf of and to the use of the Plaintiffs, a total sum of Shs. 63,069/54, which said sum carries interest at 8% p.a. from the 1st day of November, 1961, until the date of payment thereof in full.

15. If the Defendant acted wrongfully and in breach of the agreement, which is denied, and if the Plaintiffs are entitled to special and general damages, which is also denied, the Defendant will seek to set off against the amount of the damages (if any) that may be awarded to the Plaintiffs the aforesaid sum of Shs. 63,069/54 together with such additional sum due to the Defendant in respect of further interest. Further, the alleged claim for special damages should be struck out as no particulars thereof have been pleaded in the Plaint or supplied to the Defendant.

WHEREFORE the Defendant prays that the Plaintiffs suit against the Defendant be dismissed with costs to the Defendant.

DATED at Nairobi this 1st day of November, 1961.

For HAMILTON HARRISON & MATHEWS,
Advocates for the Defendant.

Drawn and filed by :-

HAMILTON HARRISON & MATHEWS,
Stanvac House,
Queensway,
NAIROBI.

To be served upon :-

A.S.G. Kassam, Esq.,
Advocate, for the Plaintiffs,
Sheikh Building,
10 Victoria Street,
NAIROBI.

In the Supreme Court of Kenya at Nairobi

No. 2

Defence
1st November 1961
continued

I confirm that I have no objection to this defence being filed out of time.

A.S.G. KASSAM.

NO. 3

REPLY TO DEFENCE DATED 21ST DECEMBER 1961

No. 3

Reply to Defence
21st December 1961

IN HER MAJESTY'S SUPREME COURT OF KENYA
AT NAIROBI

CIVIL SUIT NO:1516 OF 1961.

20 DHARAMSHI VALLABHJI
KESHAVJI DHARAMSHI
BACHULAL DHARAMSHI
MORARJI DHARAMSHI
RAGHAVJI DHARAMSHI all
trading as "DHARAMSHI
VALLABHJI BROTHERS" ... PLAINTIFFS.

versus

NATIONAL AND GRINDLAYS BANK
LIMITED ... DEFENDANTS.

---

30 REPLY TO DEFENCE

1. The Plaintiffs join issue with the Defendant upon its Defence, save as to such allegations therein as are hereinafter expressly admitted and save as to allegations made in

In the Supreme Court of Kenya at Nairobi

No. 3

Reply to Defence 21st December 1961 continued

the Plaint and admitted in the Defence.

2. In addition to the joinder of issue aforesaid or, in the alternative, in answer to paragraph 7 of the Defence, the Plaintiffs say that some time prior to 27th September, 1960 the Defendant agreed to allow the Plaintiffs an increase in their overdraft from Shs. 140,000/- by Shs. 10,000/- to Shs. 150,000/- (such agreement as to the said increase by Shs. 10,000/- having taken place in September, 1960 and not, as stated by mistake in paragraph 5 of the Plaint, on 4th April, 1960): and save as stated in this paragraph no agreement as alleged or at all was made between the parties on or about 27th September, 1960 or 29th September, 1960. In consequence of the said agreement for an increase the Plaintiffs' overdraft on the said 27th September, 1960 amounted to Shs. 148,868/43, but it did not, having regard to the agreement aforesaid, thereby exceed the agreed limit on that date.

3. (a) In addition to the joinder of issue aforesaid or, in the alternative, in answer to paragraph 8 of the Defence, the Plaintiffs admit that the said overdraft amounted on 3rd October, 1960, to Shs. 153,240/66 and that on 6th October, 1960 it amounted to Shs. 154,934/41, but on the said date the Plaintiffs, by virtue of the said agreement made prior to 27th September, 1960 as mentioned in the last preceding paragraph hereof, were entitled to an overdraft of up to Shs. 150,000/-. On or about 3rd October, 1960 the Plaintiffs paid into their account with the Defendant a number of up-country cheques and in respect of these it was agreed by the Defendant with the Plaintiffs that they should be allowed to draw cheques up to the amount of the said up-country cheques. The amount so drawn by the Plaintiffs against the said up-country cheques at no time exceeded the amount thereof and the Plaintiffs' overdraft with the Defendant at no time exceeded the limit agreed taking into account the amount of the said up-country cheques.

(b) The Plaintiffs repeat paragraphs 10 and 11 of the Plaint and deny every allegation made in paragraph 8 of the Defence as to what happened on 6th October, 1960. On the said date at the

In the Supreme Court of Kenya at Nairobi

No. 3

Reply to Defence 21st December 1961 continued

request of the Defendant, and on the Defendant confirming that the overdraft facilities agreed upon for Shs. 150,000/- would be continued until 30th April, 1961, the Plaintiffs executed and gave to the Defendant a fresh guarantee for a maximum sum of Shs. 150,000/-, a Letter of deposit confirming that the amount secured by the mortgage would be Shs.150,000/- and a letter confirming that the hypothecated goods should be a continuing security up to the said sum of Shs.150,000/-. Having obtained the said documents from the Plaintiffs, the Defendant immediately thereafter on the said 6th October, 1960 in breach of their obligations under the agreement between the parties wrongfully and fraudulently seized the Plaintiffs' goods as alleged in the Plaint.

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(c) The Plaintiffs specifically deny sub-paragraphs (ii), (iii), (iv)and (v) of paragraph 8 of the Defence.

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4. In further answer to paragraph 8 of the Defence, the Plaintiffs say :-

(i) that the notice to the Plaintiffs' creditors was given only after and in consequence of the Defendant's wrongful seizure of the Plaintiffs' goods on 6th October, 1960.

(ii) that the levy of distress was much against the will of the Plaintiffs and was due to and was made in consequence of the Defendant's said wrongful seizure on 6th October, 1960.

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(iii) that the signatures of some of the Plaintiffs to the said letter dated 6th October, 1960 was obtained by the Defendant under duress and after the Defendant had seized the Plaintiffs' goods and removed some of them from the Plaintiffs' premises; and that such of the Plaintiffs who signed the said letter do not understand or read English and they were not explained nor did they understand the contents of the said letter and that such of the Plaintiffs as signed the said letter

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In the Supreme Court of Kenya at Nairobi

No. 3

Reply to Defence 21st December 1961 continued

had no authority from the other Plaintiffs to sign any such letter.

5. In addition to the joinder of issue aforesaid or, in the alternative, in answer to paragraph 14 of the Defence, the Plaintiffs admit that the mortgaged premises were sold and the net proceeds from the sale thereof paid to the Defendant in reduction of the Plaintiffs said overdraft, but the Plaintiffs dispute the Defendant's alleged claim of Shs. 63,069/54; the Plaintiffs further state that upon payment of the net proceeds of the sale of the mortgaged premises to the Defendant, the Plaintiffs owed the Defendant an approximate sum of Shs.7,000/- being the balance of the said overdraft and the Plaintiffs were always ready and willing, and are still ready and are still ready and willing, to pay the said balance to the Defendant if the Defendant would release and return the Plaintiffs' goods seized and removed by it, but the Defendant has, notwithstanding the Plaintiffs' demand, refused and continued to refuse to release or return the Plaintiffs' said goods.

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DATED at Nairobi this 21st day of December, 1961.

A.S.G. KASSAM,
Advocate for the Plaintiffs.

Drawn and filed by :-

A.S.G. KASSAM,
Advocate,
Sheikh Building,
Victoria Street,
P.O.Box 9040,
NAIROBI.

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To be served upon :-

Messrs. Hamilton Harrison & Mathews,
Advocate for the Defendant,
Stanvac House,
Queensway,
NAIROBI.

40

We confirm that we have no objection to this Reply to Defence being filed out of time.

HAMILTON HARRISON & MATHEWS.

In the Supreme Court of Kenya at Nairobi

No. 4

Note of Amendment of Reply 1st October 1962

NO. 4

NOTE OF AMENDMENT OF REPLY HANDED TO COURT ON 1ST OCTOBER 1962.

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI

CIVIL SUIT NO.1516 OF 1961.

DHARAMSHI VALLABHJI & OTHERS ... PLAINTIFFS

versus

NATIONAL & GRINDLAYS BANK
10 LIMITED ... DEFENDANT.

PARA 3(a) OF THE REPLY TO BE AMENDED AS FOLLOWS:-

Delete all the words appearing after the words "in answer to paragraph 8 of the Defence" and substitute therefore the following words. "On or about 26th September, 1960, the Defendant through its employees, Prabhudas S. Patel, further agreed that the Defendant would honour the Plaintiffs' cheques drawn against up-country and deferred cheques of other persons banked by the 20 Plaintiffs prior to their clearance. Further, on or about 3rd October, 1960, at the request of the Plaintiffs made through the above-named Bachulal Dharamshi, the Defendant through its employee, Mr. Nagesh, agreed that, in addition to all the aforesaid loans and/or overdraft facilities, the Defendant would honour cheques which the Plaintiffs had drawn and issued to an extent not exceeding Shs.3,000/- and that such amounts shall be repaid to the Defendant by the Plain- 30 tiffs along with the said loan of Shs.10,000/- on the 8th day of October, 1960. The overdraft did not exceed the sum of Shs.153,000/- (being the amount of the total overdraft facility plus the amount of the said up-country and deferred cheques to which the Plaintiffs were, as shown above, entitled) on the 3rd and 6th October 1960, the excess over the said sum of Shs.153,000/- alleged by the Defendant being due to a sum of Shs.1,815/60 debited on 6th October, 1960 to the 40 Plaintiffs' account by the Defendant because of a local bill which had been paid into the Plaintiffs' account some months previously having been dishonoured on or about the said 6th October,1960."

In the Supreme Court of Kenya at Nairobi

No. 5

Notes of opening address of Counsel for the Plaintiffs 1st October 1962

NO. 5

NOTES OF OPENING ADDRESS OF COUNSEL FOR THE PLAINTIFFS ON 1ST OCTOBER 1962.

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI

CIVIL SUIT NO.1516 OF 1961.

DHARAMSHI VALLABHJI,
KESHAVJI DHARAMSHI,
BACHULAL DHARAMSHI, 10
MORARJI DHARAMSHI and
RAGHAVJI DHARAMSHI
all trading as
"DHARAMSHI VALLABHJI
AND BROS." ... PLAINTIFFS.

versus

NATIONAL AND GRINDLAYS
BANK LIMITED ... DEFENDANT.

11.25 a.m. Monday 1st October, 1962.

Nazareth and Kassam for Plaintiffs. 20

Lindsay and Desai for Defendant.

Nazareth: Applied to amend plaint and reply, Notice given long ago.

Lindsay: Do not object but reserve right to cross-examine on it.

Nazareth: Defendant certainly can cross-examine on it.

ORDER: Plaint and reply to defence amended in accordance with application.

Nazareth: Agreed between Plaintiff and Defendant that issue be limited to that of liability and question of damages stand over. Ask order that Plaintiff give defendants' particulars of special damage. Reads paras.14 and 15, 16 of the Plaint. 30

In the Supreme Court of Kenya at Nairobi

No. 5

Notes of opening address of Counsel for the Plaintiffs 1st October 1962 continued

Lindsay: Objection plaint filed 12.9.61 - no mention of particulars of special damages also claimed in para.15 of defence that claim for special damages be struck out as no particulars pleaded.

Nazareth: I will make my application regarding particulars of special damages later and if necessary also make application to amend the plaint to include particulars of special damages later.

Nazareth opens: F & B P Exhibit A, Reply Ex.B, Bundle of agreed correspondence, Ex. C 1-15 except 6.

Trespass, wrongful removal of goods. Until April 1960 Plaintiffs dealt with Standard Bank of South Africa - persuaded by Mr.Amin to transfer to National & Grindlays Bank. In April 1960 (4th) Defendant agreed to grant overdraft up to Shs. 140,000/- minimum 1 year - part of original arrangement. Bank seized goods of Plaintiffs on 6th October 1960 only 6 months after loan granted. Defendant obtained plaintiffs' signature to blank letter of hypothecation (L/H) dated 9th May 1960 - letter of hypothecation contains no reference to agreed period of the loan - printed form signed in blank.form inappropriate to the agreement between the parties. About five months after documents signed, on 23rd September, 1960, Plaintiffs saw one Prabhudas at the bank and asked for further Shs. 5,000/- for 15 days - agreed by bank, repayable 8th October 1960. 26th September 1960 Plaintiffs saw Prabhudas and asked for further Shs.5,000/0 also to be repaid on 8th October 1960. 3rd October Plaintiffs further obtained loan of Shs.3000.00 also repayable on 8th October 1960. 6th October 1960 Morning Prabhudas came to Plaintiffs' shop and offered to convert Shs.10,000/- to long term loan repayable 30th April 1961 - asked Plaintiffs to sign fresh documents and to furnish additional security. Morning of 6th October fresh documents signed for Shs.150,000/- Plaintiffs on same day handed over 4 insurance policies as additional security. Afternoon of 8th October 1960 Defendants men came to the Plaintiffs' shop and started removing all their goods.

In the Supreme Court of Kenya at Nairobi

No. 5

Notes of opening address of Counsel for the Plaintiffs 1st October 1962 continued

In consequence of this the landlord of premises came to levy distress a few hours after Defendant's action. Letter signed by two of the Plaintiffs. Say that Defendants in removing goods acted wrongfully - had security which Bank itself had valued at Shs.150,000/-. Defendants say they removed goods after becoming aware of Plaintiffs giving notice to creditors. As a result of seizure Plaintiffs forced to close down business and give notice to creditors and sign Deed of Arrangement with creditors. Say value of goods removed was Shs. 225,000/-. No inventory of goods supplied. 10

LAW:

1. L/H on which Defendant rely is invalid. Document falls within Section 2 (e) or (f) of The Chattels Transfer Ordinance Cap. 281. Re Townsend, Ex-parte Parsons (1886) 16 Q.B.D. 532, commented on and explained in Re Hardwick, Ex-parte Hubbard (1886) 17 Q.B.D. at p. 696 bottom. Say no property was transferred in goods only a licence given to possess it. 20

2. L/H not attested. Chattels Transfer Ordinance Section 15. Effect of non-attestation. Plaintiffs say effect is to wholly avoid the instrument. Maxwell on Interpretation of Statutes, 10th Ed. p.374, 375. Liverpool Borough Bank v. Turner (1861) 30 L.R.Ch 379. Dales' case (1881) 6 Q.B.D. 376 at p.454. Importance of attesting witness vital to avoid confusion and fraud, e.g. ante dating to avoid effect of bankruptcy. Ex-parte Van Sander (1846) 41 E.R. 763 at p.765. R. v. Local Board of Health of W (1864) 34 L.R.M.C. 220 30

3. L/H Effect of agreement of loan to 30th April, 1961. Halsbury's Laws of England. (3rd, Simonds Edition) Vol. 27, para.200, p.338. Brighty v. Norton (1862) 122 40

In the Supreme Court of Kenya at Nairobi

No. 5

Notes of opening address of Counsel for the Plaintiffs 1st October 1962 continued

E.R. 116 at p.118. Toms vs. Wilson, same volume p.524. Massy v. Sladen (1868) L.R. 4 Exch. 13, when money payable on demand reasonable notice must be given - do not conceed money payable on demand - say payable 30th April 1961. Halsbury's Laws of England 3rd Edn. V. 11 para 415 pp. 671 and 672. 2nd Edn. V. 7 para 331 p. 460, Glyn v.
10 Margheton (1893) A.C. at p. 354-5.

Adjourned to 2.15 p.m.

sd. James Wicks J.

2-15 Court resumes as before.

4. Defendant rely on Hypothecation. Meaning of Hn. - passes neither property nor possession - only licence to seize the goods: Simonds 3rd Edn. V. 3, p.

5. Say seizure by bank was wholly wrongful - bank had no right to seize any property
20 until 30th April 1961. Yeoman credit Limited v. Apps. (1961) 2 All. E.R.281. The Cap palas (1921) L.R. P.474.

6. Loan given in respect of an overdraft. Plaintiffs entitled to draw up to a certain limit. Sheldon on Banking 8th Edn. p.323. Loan specified period not entitled to proceed until date arrives.

In the Supreme Court of Kenya at Nairobi

Plaintiffs' Evidence

No. 6

Keshavji Dharamshi 1st, 2nd and 4th October 1962 Examination

NO. 6.

EVIDENCE OF KESHAVJI DHARAMSHI

KESHAVJI DHARAMSHI Sworn in Gujerati :

I am the second Plaintiff named in the plaint and a partner in the Plaintiff firm. There are five partners in the firm and they are the ones named in the plaint. This was the position in March 1960. My firm was formed in Mombasa in 1919, in 1922 it was transferred to Nairobi when it has carried on business since. The business is cloth merchants and tailoring. Our goods were seized in October 1960, that was in our Bazaar St. shop. We had been in these premises since March 1939. Up to March 1960 our Bankers were The Standard Bank Delamere Avenue. In about the beginning of January 1960 Mr. Bulakhidass Amin, told us we had an account with S.B. and suggested we transfer it to the Defendant bank. At the time we had an overdraft of Shs. 95,000/- secured on Plot 209/2490/10 Ngara Road, Nairobi. Mr. Amin said his bank would grant us an overdraft of Shs. 140,000/- made up of Shs. 95,000/- on the plot at Ngara Road and Shs. 45,000/- hypothecation on the shop goods. After negotiation Mr.Amin said this on 3rd April 1960. We agreed to these on the same day. On 4th April 1960 Mr. Amin came to our shop and told us to go to his bank at 9.30 a.m. I asked Mr. Amin on what conditions his bank was giving us this loan of Shs. 140,000/- Mr. Amin said his bank was giving us these overdraft facilities for one year. I went to the Bank as Mr. Amin suggested and he took me to see the sub-manager. I do not remember his name, Mr. Amin explained the position to the sub-manager that the bank would not claim back any money for a year. The sub-manager agreed to the proposal and 30th April 1961 was the date fixed for repayment. The sub-manager agreed to advance Shs. 95,000/- on the security of the Nagara Road property and Shs. 45,000/- on the shop goods, a total of Shs. 140,000/-. I was asked to sign documents and I signed. One document on that day I think it was one. It was a printed form, and nothing was written on it when I signed it.

In the Supreme Court of Kenya at Nairobi

Plaintiffs' Evidence

No. 6

Keshavji Dharamshi
1st, 2nd and 4th October 1962
Examination continued

It was not read over to me. I did not read it, a Mr. Nagesh an official of the bank who asked me to sign the forms. He said this is the form in connection with the Banking rule and it is a hypothecation form. He also told me they had to give me a letter which I would receive later on and that was for the repayment on 30th April 1961. Mr. Nagesh said they would fill in the blanks on the form later on. I was not given a copy of the form. The only other parties present were Dharamshi Vallabhji my father and the 1st Plaintiff. Mr. Nagesh told us to send the other partners to the Bank later on to sign the form. Somebody in the Defendant bank wrote a letter for us to be taken to the Standard Bank, and this was dated 4th April, 1960. The latter concerned the plot at Ngara Road to release the title deeds on the Defendant bank liquidating the over draft. On the same day I signed a form requesting the Defendant bank to open an account with us. At the time the deeds of our Ngara Road plot were with the S. Bank Mr.Nagesh said I was to come on 25th April, 1960, and sign the forms of equitable mortgage on our Ngara Road plot. On the same day I paid in Shs. 2,300/- to open the account with the bank. After about a week I met Mr. Amin again. I told him I had not received the letter from the Bank yet, that is Shs. 140,000/- repayable on 30th April 1961. Later I signed forms of equitable mortgage on our Ngara Rd. plot. This was on about 25th April 1960. This was a printed form but nothing was written on it.

In September 1960 I saw a Mr. Prabhudas Patel the Broker for the Defendant bank it was on 23rd I asked him to give us Shs. 5000.00 overdraft for a short time for 15 days that is until 8th October 1960. Mr. P. Patel agreed to this. I again saw Mr. P. Patel on 26th September 1960 and I asked him to give us further overdraft facilities for Shs.5000/- repayable on 8th October 1960 all together Shs. 10,000/-. On 3rd October 1960 another partner Bachulal Dharamshi obtained a further overdraft of Shs.3,000.00 from Defendant: <u>Lindsay</u> Is being called <u>Nazareth</u>. Yes. <u>Witness</u> On 6th October 1960 our shop goods were seized. At about 8.30 a.m. on that day Mr. P. Patel came to our shop. He talked to

In the Supreme Court of Kenya at Nairobi

Plaintiffs' Evidence

No. 6

Keshavji Dharamshi 1st, 2nd and 4th October 1962 Examination continued

us about the loan for Shs.13,000/- taken by us for a short period and said that if we could give additional security the bank would increase our overdraft facilities from Shs.140,000/- to Shs.150,000/- to be repayable on 30th April, 1961. This meant that I had to repay Shs. 3000/- overdraft on 8th October 1960. Mr. P. Patel produced two documents and said that it was for Shs. 150,000/-, one was hypothecation and the other mortgage. Mr. P. Patel was alone when he came at about 8.30 a.m. and he said he would return after an hour with other persons and he produced the documents when he returned with about 4 persons at about 9.30 a.m. The other persons were Mr. Pandya Mr.Nagesh and another man whose name I did not know. He had a beard. I signed the two documents, and gave Mr. Patel four insurance policies. When Mr. P. Patel returned with the other people he said that the further Shs.10,000/- was to be paid on 30th April, 1961 together with the other loan and the Shs. 3,000/- on 8th October 1960, Mr. P. Patel and his companions left. At about 2.15 p.m. Mr. P. Patel returned to our shop. He came with 15 to 20 people in two or three lorries. I know some of these people they were Mr. Pandya, Mr.Nagesh, Mr.Mehta, Mr. Modi, a European. I think he is the manager of the Defendant bank River Road Branch. He had a small hand gun. They closed the shop and started removing the shop goods. We asked them what they were doing as we had signed the documents that morning. I asked them why they were doing this. They would not listen to us and started removing the goods. The court Bailiff came, he came at about 3.00 p.m. and some of the goods had been removed by that time. The court bailiff came with a distress warrant for rent. I do not know his name - he came from Bharmal Jivraj & Co. the landlords and the Bailiff firm Jamal Pirbhai. We were surprised at the removal of the shop goods. After the court broker came Mr. P. Patel asked me to sign a paper. I do not read or speak English and I did not read this paper. I was told what it was. Mr. P. Patel told me it was in connection with the papers I had signed that morning concerning the loan repayable on 30th April 1961. The paper was a letter already signed by the bank. I did not give these

people permission to remove the goods. All our goods were removed that day except the shop furniture and fitting. No inventory was made of the goods removed. I asked for an inventory of the goods removed. That was on the same day but it was refused. I asked Mr. P. Patel many times between 6th October and 8th December 1960. I asked Mr. Patel on many occasions for an inventory but he never gave me one. On 8th December 1960 Mr. P. Patel said that the Bank had packed the goods and we were to ask for an inventory. After the goods were removed on 8th October 1960 our shop was closed and we sent a letter to our creditors. Shsh, Gautama, Maini & Patel drew up this letter. I saw them on about 22nd October 1960 and Exh.C. 12 is the letter. A creditors meeting was held on 1st November 1960 at Shah Gautama Maini & Patels office and as a result of the meeting we signed a Composition deed Exb. D. Shortly after the goods were removed we vacated the shop and the landlord re-entered possession. We had been in the shop since 1939 and during all that time we had never had a distress levied on us nor had any attachment been levied. We used to pay our rent monthly sometimes two months together sometimes three months together. The landlord had never raised any difficulty about the rent accumulating. At the time when the goods were removed from the shop we had given the landlord a cheque post-dated to 10th October 1960 for shs.2000/-. Had the goods not been removed from premises by the bank the landlord would not have levied the distress. The Bank has debited our account for rent paid to the landlord this was done after the goods were removed from the shop. The value of goods removed from the shop was between Shs. 200,000/- and Shs. 250,000/-.

Adjourned to 10.30 tomorrow.

sd. James Wicks J.

10.30 a.m. Tuesday 2nd October 1962.

Court resumes as before.

Witness reminded of his former oath.

Q. Will you identify Bulakhidas Amind?

In the Supreme Court of Kenya at Nairobi

Plaintiffs' Evidence

No. 6

Keshavji Dharamshi
1st, 2nd and 4th October 1962
Examination continued

A. Man into Court gives name as Bulakhi Dass Amin and says my nick-name is Bulakhidass Amin. Witness: This is Bulakhidass Amin.

Q. Will you identify his sub-manager?
A. I only saw him once.

Q. Is this the Man? (James McCraig. Mc William comes into Court.
A. If he was the sub-manager at the time he is the one.

Q. He approved your overdraft? A. Yes. 10

Q. Is this the European who was at the shop when your goods were seized on 6th October 1960?
A. That man had a beard, the man who came was the sub-Manager of the River Road Branch.
(Name of man brought into Court: John Ronald Scott) Witness: I think the man who came was carrying a small pistol.

The firm's name is Dharamshi Vallabhji & Bros. Dharamshi Vallabhji is my father and fourth and fifth and sixth plaintiffs are my brothers. 20

Q. Why is it Dharamshi Vallabhji & Bros.?
A. That was the firm's name in the very beginning.

Q. When did you enter the business?
A. I worked for the firm for twenty years and was a partner since 1955.

Q. Who of the five partners is most active?
A. I and my father.

Q. Are you your father's right hand man? 30
A. Yes.

Q. You sign in English, your father in Gujerati? A. Yes.

Q. How long ago is it that your firm negotiated a loan with a bank for trading?
A. About five years after the war.

Q. About 1950? A. Yes.

Q. So you have been dealing with banks for 12 years?

In the Supreme Court of Kenya at Nairobi

Plaintiffs' Evidence

No. 6

Keshavji Dharamshi
1st, 2nd and 4th October 1962
Cross-examination continued

A. Longer than that but with overdraft about 12 years.

Q. During those 12 years, have you become familiar with the rules that govern overdrafts and current accounts? A. Yes.

Q. Are you aware that one of the rules is that the Bank reserved the right to close the account if it is not being conducted in a proper manner?
A. Yes, I know that.

10 Q. I am going to bring evidence to show that between 17th June and 12th August 1960 you exceeded the authorised limit Shs.140,000.0 on 38 separate days?
A. I would have to look at the statements.

Q. Look at this (Exhb.E) This is a copy of your account?
A. Yes, I have not checked it carefully; I can see 25 or 26; I may have missed some.

Q. During that period, do you agree that, apart
20 from verbal warning you were warned three times in writing to bring your overdraft within the authorised limit?
A. Yes, I agree, I did get three warning letters.

Q. Did Mr. B. Amin verbally warn you at the beginning of the account that whether or not you continued the account depended on your conducting the account properly?
A. No, that is not correct.

Q. Did he not warn you that if you went over the
30 limit you ran the risk of having your overdraft called in? A. No.

Q. If Mr. B. Amin says on oath he did warn you, he would be lying? A. Yes, he is lying.

Q. I took you up to 12th August, I now take you up to about 21st Sept. 1960. On or about 21st September, 1960, what was your overdraft?
A. Shs.128,052.18. There are two items for the day, the first is Shs.139,682.18.

Q. At about this time did the Bank return 7
40 cheques to you "effects not cleared".

In the Supreme Court of Kenya at Nairobi

Plaintiffs' Evidence

No. 6

Keshavji Dharamshi
1st, 2nd and 4th October 1962
Cross-examination continued

A. Mr. Bachulal 3rd Plaintiff dealt with the Bank.

Q. You would know of the cheques were returned.
A. Yes, but not the amounts, Bachulal knows about this.

Nazareth : I am calling him.

Q. 24th September 1960 - Shs. 142,809/01. 27th September 1960 - Shs. 148,868.43. You say that on 23rd September 1960 you met Mr. P. Patel and you requested an overdraft in excess of Shs. 140,000/- of Shs. 5,000/- until 8th October. A. Yes, I did. 10

Q. Did you make the request to him. A. Yes.

Q. With your knowledge of brokers did you know that Mr. P. Patel had no authority himself to authorise an increase in overdraft.
A. After approaching Mr. P. Patel in the Bank he went into a neighbouring office, I do not know who he saw, but he came back and said - yes your extra overdraft of Shs.5000.00 over the limit of Shs. 140,000/- is approved. 20

Q. Mr. Patel will say he told you you have to see the sub-manager and it was not approved.
A. No, that is not correct.

Q. If he gives that evidence will he be lying.
A. Yes, he will be lying.

Q. Mr. Williamson who took over from Mr. Mc William will say that there was no increase approved, beyond Shs. 140,000/- until 29th September 1960. A. No, that is not correct. 30

Q. Do you agree that he is the official who authorises increase over authorised overdrafts.
A. That I do not know.

Q. You have dealt with Banks for 12 years on overdraft, have you ever received written approval to an over-draft other than from the sub-manager?
A. The manager signs the letter.

Q. When you receive authority to exceed the amount of an overdraft from a broker that is 40

only when the sub-manager has authorised it.
A. Yes, that is so.

Q. So you agree that the broker has no independent authority to approve an overdraft, or an increase of overdraft.
A. That is so, but the broker went and saw someone I presume the sub-manager.

Q. The evidence of Mr. Williamson will be that on 29th September 1960 that at the request of Mr. Williamson you went to see him at his office. A. No.

Q. You did not see Mr. Williamson on 29th September 1960. A. No.

Q. Mr. Williamson and Mr. Nagesh will say that at the request of Mr. Williamson you came to Mr. Williamson's office on 29th September 1960. Mr. Williamson pointed out the unsatisfactory state of your current account. It was then overdrawn in excess of his authorised amount of Shs. 140,000/- by Shs. 9464.38. You then asked for an increase from Shs.140,000.00 to Shs. 150,000.00 for a temporary period. You said you were expecting certain monies in a few days' time. Mr. Williamson then agreed to increase the amount from Shs. 140,000.00 to Shs.150,000.00 until, and only until, 3rd October 1960, and this was on condition that you and your partners execute fresh security documents. At this meeting you were handed these fresh security documents for immediate execution by yourself and your other partners and you were asked to return them immediately to the bank.
A. None of that is true, I can verify how I got the overdraft over my limit.

Q. Did any of your partners go and see Mr. Williamson on 29th September 1960.
A. I do not remember.

Q. Do you agree that if one or more of your partners had gone to see Mr. Williamson on that day, you would have been informed of the result.
A. Yes, there was no talk so they did not go.

Q. If there had been a meeting you would have known about it.

In the Supreme Court of Kenya at Nairobi

Plaintiffs' Evidence

No. 6

Keshavji Dharamshi
1st, 2nd and 4th October 1962
Cross-examination continued

Q. If Mr. Williamson says you or your partners came to his office on 29th September 1960 and a temporary increase to Shs.150,000.00 was approved to 3rd October 1960 only, Mr. Williamson is also a liar.
A. Yes, he will be lying.

Q. (Exh.E) At the close of business on 29th September 1960 the overdraft was Shs.151,777.62.
A. Yes, but two cheques were not credited. There may have been one or two up-country cheques that were not cleared. 10

Q. Did you know that Banks do not normally allow drawings on uncleared up-country cheques.
A. They used to do it formerly.

COURT : Even though would take the overdraft over its limit.

A. Yes but they stopped this on 26th September 1960. Then Mr. P. Patel on the same day said we could draw against uncleared up-country cheques. 20

Q. Was that to your evidence of increased over draft facilities. A. Yes.

Q. So you could only draw against uncleared up-country cheques up to the limit of your increased overdraft. A. Yes.

LINDSAY :

Q. Did Mr. P. Patel claim the authority of the sub-Manager.
A. He used to go into another room but I do not know to whom he used to go. 30

Q. Are you familiar with these Pay-in-slip (Exb.F) A. Yes.

Q. Exb.F states "handed in to be collected and to be available as cash when paid".
A. I cannot understand the language.

Q. Mr. Williamson, Mr. P. Patel and Mr.Nagesh will all say that no authority was given to you, or any of your partners, that up-country cheques would be treated as cash before they

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were cleared.
A. This matter was only discussed on 26th September 1960 when it was said that uncleared cheques could be cashed.

Q. The evidence will be that you and your partners failed to return the security documents handed to you or your partners on 29th September 1960. A. No documents were given to us.

Q. After repeated requests for their return on 6th October 1960 Mr. Nagesh brought fresh security documents to your shop which were executed by you and your partners.
A. Yes on 6th October 1960 Mr. Nagesh was at my shop and handed over the documents to me.

Q. Are these the documents handed over at the shop. A. Exb. G 1-3.

NAZARETH : I object to Exb. G 1 on legal grounds that I have mentioned, admitted de bene esse.

Q. Look at Exb. E. 1st October 1960 the sum overdrawn were Shs. 151,341.80.
A. Yes, but I think that cheques are not entered. According to my records the overdraft on 1st October 1960 is Shs. 150,745.85 but this was giving credit for up-country cheques and local deferred cheques.

Q. 3rd October 1960. The Defendants say the authorised limit was reduced to Shs. 140,000/- on that day. A. No.

Q. On 3rd October 1960 the overdraft was Shs. 153,240/66.
A. Yes. According to my record it was Shs. 152,644/71 and this was because I took into credit up country and local deferred cheques not cleared.

Adjourned to 2.15 p.m.

sd. James Wicks J.

2.15 p.m. Court resumes as before.

Witness reminded of his former oath for further cross-examination.

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Q. The two figures you gave this morning Shs. 150,745/85 and Shs. 152,644/71. You explained that the difference between these figures and the Bank's figure which is the same and each case, the difference is because of uncleared cheques. A. Yes.

Q. What were these cheques.
A. On 24th September 1960 a cheque for Shs. 415.30 was put into the bank but not cleared until 5th October 1960, another cheque was paid into the bank on 27th September 1960 for 150/- which was cleared on 4th October 1960 I have not got the details of the other amount of Shs.30.65. 10

Q. On 4th October 1960 Exb.E shows Shs. 152,626.66. Defendants say that is Shs. 12,826/66 in excess of Shs.140,000/-.
A. We obtained permission for a special overdraft for a total of Shs. 13,000/-, making Shs.153,000/-. 20

Q. I put it to you you were requested to reduce your overdraft to Shs.140,000/- and on that day it was Shs.153,240/-.
A. Yes.

Q. On 4th October 1960 it was Shs.152,826/66 and on 5th October 1960 it was Shs.152,517/86.
A. Yes but again there were uncleared cheques.

Q. 6th October 1960 at the close of business the Bank showed your overdraft at Shs. 154,934.41. That is in excess of the Shs. 153,000.00 you say you have. 30
A. Yes, I say it is Shs.151,535.66, there was an unpaid bill for Shs.1,815.60 making a total of Shs.153,351.26.

Q. Was the Shs. 1,815.60 a bill that had been discounted and unpaid.
A. I agree it was dishonoured.

Q. The balance of Shs.184,40.
A. My brother Bachulal could explain this.

Q. How does the account (Exb.E) go after 7th October 1960. 40
A. The overdraft went on increasing.

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Q. You say you were entitled to facilities extending to Shs. 150,000/- up to 30th April, 1961. A. Yes.

Q. You had credit facilities extending to Shs. 16,000.00 up to 30th April, 1960. A. Yes.

Q. The day the goods were seized 6th October 1960. You explained you signed certain documents that day.

Q. Did Mr. Nagesh tell you and your partners
10 that Mr. Williamson wanted you urgently at the Bank.
A. No, I think it was Mr. Pandya told us, I ran to the Bank.

Q. Did a relative named Dhanji Virji Valabhji go with you. A. I knew no one by that name.

Q. Did a relative go with you.
A. Yes his name is I think Dhanji, he is my relative and I think he was with me.

Q. When you appeared before Mr. Williamson did
20 he not say you have broken your promise to reduce your overdraft to Shs.140,000/- on 3rd October. A. He did not say that.

Q. Did you inform Mr. Williamson that your firm was not in a position to reduce its overdraft.
A. No I did not say that.

Q. Did you promise Mr. Williamson that the money promised on 29th September had been delayed?
A. No.

Q. Did you ask Mr. Williamson for a further
30 Shs.5,000.00 overdraft facility against a guarantee of an unnamed person.
A. No I did not ask for the overdraft.

Q. Did your relative say to Mr.Williamson that he was prepared to give the guarantee. A. Yes.

Q. Did Mr.Williamson refuse to accept your relatives guarantee for this extra amount.
A. Yes Mr.Williamson refused.

Q. Did Mr. Williamson then not demand from you the immediate reduction of your overdraft. A.No.

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Q. Did you tell Mr. Williamson you were not in a position to reduce the overdraft.
A. I did not say that.

Q. I put it to you that when Mr.Williamson refused to extend your overdraft facility your relative produced this document.
A. Yes on 10th October 1960.

Q. I put it to you that was 6th October 1960 before the goods were seized.
A. No on 1st October I myself went to the bank and handed this document (Exb.H) to the sub-manager. 10

Q. I put it to you that on the morning of 6th October 1960 you appeared before Mr.Williamson at his request, the conversation I put to you took place. The relatives guarantee was refused and your relative disclosed then that your firm were trying to make an arrangement with your creditors.
A. I did appear before Mr. Williamson at his request. My relative accompanied me, that was at about 12.30 p.m. 6th October 1960. 20

Q. What do you say took place.
A. We discussed the overdraft of Shs.3000 taken on 3rd October which was to expire on 8th October. It was decided that we should pay the Shs.3000.00 on 8th October 1960.

Q. In your evidence in chief you say nothing about Mr. Williamson, You say all the negotiations were with Mr. P. Patel. 30
A. I agree I did not mention this.

Q. I put it to you the reasons you did not was because you did not want the Court to know about it.
A. It was a small matter Shs.3000.00.

Q. I put it to you when you say the seizure of your goods came as a surprise, you are not telling the truth. A. How.

Q. I put it to you you told Mr. Williamson before the seizure that you could not reduce the overdraft, Mr. Williamson refused to accept your relatives guarantee and your relative told Mr. Williamson that you were trying to make an 40

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arrangement with your creditors.
A. There was no talk of reducing the overdraft. I didn't agree that I had a conversation with my relatives.

Q. I put it to you it is true and you could not be surprised at the seizure. A. I was shocked.

Q. And you are still shocked. A. Yes.

Q. You said yesterday that Bachulal on 3rd October 1960 obtained a further Shs.3,000.00
10 increase from Mr. P. Patel. A. Yes.

Q. Why then do you say you discussed the question of the Shs. 3,000.00 with Mr.Williamson on 6th October.
A. Mr.Williamson told me that the due date for the Shs.3,000.00 was 8th October 1960 and for the Shs. 155,000.00 it was 30th April, 1961.

Q. You explained to the Court that on the afternoon of 6th October 1960 the Bank Officials came along with several lorries and to your utter
20 surprise started seizing the goods. A. Yes.

Q. Whatever happened in the shop it is quite clear that you signed this letter on 6th October 1960.
A. Yes, that was one hour after the goods were seized.

Nazareth : I say the Defendant cannot rely on this document for the reason that it was altered after signature.

COURT: Then it goes in as an Exhibit in Issue (Exb.C 6).

30 LINDSAY :

Q. You say someone from the bank obtained your signature to this Exhibit C 6 after the goods were removed.
A. After some of the goods were removed.

Q. The other signatures are.
A. My father (1st Plaintiff).

Q. Can you give any explanation of the manuscript writing on the third line?

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A. That was added after the signatures were obtained.

Q. How do you know?
A. Because it is not on the duplicate which I have.

Q. Will you produce the document?
A. This is it (Exb.J).

Q. Look at Exhibit J, any signature on it.
A. No.

Q. So it does not help, it does not show if the writing was made before or after. A. No. 10

COURT :

Q. You say the manuscript writing was made after signature. Did you see that done with your own eyes. A. No, I did not see.

Q. You say that Exb. C.6 was signed under duress. A. Yes.

Q. What was the duress there that caused you and your father to put your signature to the document. 20
A. They told me it related to the documents I had signed that morning at the Bank. My father signed first.

Q. You have been in business 20 years and have signed thousands of documents in English.
A. Yes.

Q. And you ask the Court to accept that you do not understand English. A. Somebody used to explain to me.

Q. Didn't someone explain to you. 30
A. Somebody used to explain to me.

Q. Did not someone explain to you?
A. When they came, they told me this related to the hypothecation. I had signed that morning. They said sign this and we will not take any further action and you can continue with your overdraft.

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Q. I put it to you you are not telling the truth. I put it to you Mr. Scott brought the letter Exb.C 6 to the shop premises and asked you and your father to sign it?
A. No, this letter was brought in by Mr. P. Patel.

Q. Mr. P. Patel was with Mr.Scott, was he not?
A. Yes, he joined Mr. P. Patel later on.

Q. He discussed this document C 6 with you?
10 A. Yes, he discussed it in Gujerati but as I have said before...

Q. Do you know the meaning of duress?
A. Yes, that my signature was obtained under pressure.

Q. So you told your Advocate that you signed under pressure?
A. Yes, I told him that, indicating Mr.Kassam.

Q. To sign a document not knowing its contents is not the same as signing it under duress.
20 A. There is a difference.

Q. I put it to you you signed the document voluntarily. A. No.

Q. You knew what it meant? A. No.

Q. You fabricate the reason you now say you signed it? A. No.

Adjourned to 10.30 a.m. Thursday 4th October 1962.
James Wicks J.

10.30 A.M. Thursday 4th October, 1962.

30 Court resumes as before.

Witness reminded of his former oath for further cross-examination.

Q. The time when you and your partner first opened the account. You say you were persuaded to change your account. A. Yes.

Q. Mr. B. Amin will say you and your father

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were introduced to him by one Mr.K.F.Shah, a director of Shah Nemchand Fulchand & Co. Is that so?
A. We know Mr. B. Amin well before that.

Q. Repeated. A. No. That is not true.

Q. Did you and your partner ask Mr. B. Amin to negotiate with the Defendant to open an account? A. No.

Q. So the position was that you did not want to open an account with Defendant. 10
A. That is so.

Q. That you were overpersuaded to open an account with Defendants.
A. Mr. Amin persuaded us.

Q. You say that in about 4th April 1962 Defendants granted your firm an overdraft up to Shs. 140,000.00. A. Yes.

Q. You say that the security that was given was a plot to secure Shs.95,000.00 and the goods were to be hypothecated to secure its 20 balance. A. Yes.

Q. Defendants will bring evidence that the shop goods and the plot were both charged to secure the full amount of the overdraft. Is this the Original Letter of hypothecation?

Nazareth : The evidence on this should be struck out if the document is not later proved Section 68 Indian Evidence Act and Section 15 C.T.O.

Lindsay : I agree Court: Document marked 30 Identification 2 and evidence taken de bene esse.

Witness:

Q. Indentification 2 - your signature is on this also that of your partner. A. Yes.

Q. Did you understand it. A. No.

Q. Any of your partners understand it.
A. No.

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Q. Why do you and your partners carry on business in the English Language, and not understand it. A. Somebody used to explain to me.

Q. Evidence will be brought that indentification 2 was filled in before and your partners signed it. A. That is not so.

Q. Indentification 2 states in the first three lines that the goods were to be hypothecated up to Shs. 140,000.00.

10 Q. Apart from the manuscript writing on Indent. 2 do you understand any of the printed words.
A. I do not understand much.

Q. (Cl. 5 Cl. 9 Cl. 11 read)
In this letter of hypothecation you have signed. A. Yes, the

Q. (Exh.G1) This refers to Indent.2.
A. Yes.

Q. Do you say that was blank when you signed it.
A. When I signed it all the typing was there.

20 Q. Did you point out to the bank that the figure should not be Shs.140,000.00 but Shs. 45,000.00. A. I did not.

Q. Your evidence that the shop goods were only hypothecated for Shs. 45,000.00 is not supported by Exb. G 1.
A. I agree this was a joint agreement on the shop goods and plot on that day.

Q. Repeated. A. That is so.

Q. You now agree that both the plot and the shop
30 goods were given as security, jointly, for the overdraft. A. This is correct.

Q. Was this a document signed on opening your account with Defendants. A. Yes. (Exb.K).

Q. Your signature is on it.

Q. You agreed to confirm to the rules governing current accounts of Defendant. A. Yes.

Q. Did you ask for a copy of the rules.

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A. I asked for one, it was not sent.

Q. You have said that if your account was not conducted properly the Bank could close your account. A. I did not know that.

Q. But you have already said so.

Q. (P 8)
A. I say that we were granted an overdraft of Shs. 140,000.00 and if I go over that it was agreed I could go to one of the brokers and if the broker then we could continue the overdraft. 10

Q. So if the limit is exceeded and an extension of the amount the Bank is entitled to call in the money, to call for the whole amount of the overdraft to be repaid.
A. (Difficulty of interpretation not answered).

Q. Exb. C 1 This was a result of Mr. B. Amin telling you that your overdraft arrangement would be reviewed after a year.
A. Mr. B. Amin told me the overdraft was up to 30th April, 1961 and the money would not be demanded back until then. He did not say anything about review. 20

Q. Did not Mr. B. Amin make it clear to you that if the account was not conducted properly the money due must be repaid and the account would be closed?

Q. You know that if an account is not conducted properly no bank in the world would agree to continue an overdraft? 30
A. My account was conducted properly.

Q. You know that all the 1st para. of Exb.C meant was that if the account was conducted properly the account would be continued until 30th Apr. 1961?
A. My account was conducted properly. I was not told that if I did not conduct my account properly they would demand the repayment of the overdraft.

Q. Is this the original charge you signed in respect of the Ngara RD. Plot. A. Yes. 40

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Q. Two documents? A. Yes.

Q. One signed when you originally borrowed the money, the other when an overdraft was increased from Shs.140,000.00 to Shs.150,000.00?
A. Yes, Exhbs. numbered 1 & 2 respectively.

Q. Was this filled in before it was signed?
A. Yes, it was signed before an Advocate.

Q. So you knew that the Ngara Road plot was given to the Bank to secure the whole amount of
10 the overdraft? A. Yes, that is correct.

Q. Then why did you tell the Court the plot was given to secure Shs. 95,000.00 only?
A. I signed two documents both for Shs. 140,000.00 each and the one I signed for the stock was also for Sh.140,000.00 that was blank when I signed.

Q. Repeated.
A. It was agreed on 4th April, 1960 that Sh. 95,000.00 was on the plot and Shs.45,000.00 on
20 the goods.

Q. Exbs. C2, C3 and C4: Did you receive the original of the letter?
A. Yes, I did receive them.

Q. On 6th October, 1960 at about 3.15 p.m. did your landlord demand payment of rent?
A. He did not.

Q. The bank paid that rent amounting to Shs. 6,100.00 to your landlord Jamal Pirbhai & Sons.

NAZARETH: That is admitted.

30 Q. You signed this document.
A. Yes. (Exhibit M).

Q. Did you sign this.
A. Yes (Exhibit N) it was blank when I signed it.

Q. (Exhibit M) Was this blank when you signed it. A. Yes it was blank.

Q. Did you sign this.
A. No it is signed by my partner Bachulal (erd Pl).

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Q. You recognised his signature.
A. Yes Exhibit O.

Q. (Exhibit C.7) You received the original of this. A. I did.

Q. (Exhibit C.8) You signed this. A. Yes.

Q. The plot referred to is the one secured to the Bank. A. Yes.

Q. You were asking people to buy it. A. Yes.

Q. (Exhibit C.10) You remember this. A. Yes.

Q. What was your overdraft on the date of that letter. 10
A. According to the bank statement Shs. 156,304/24.

Q. Is that amount.
A. I make it amount Shs. 150.00 less.

Q. On that day it was roughly Shs.156,000.00.
A. Yes.

Q. And on that day you were arranging for the Nagara Road plot to Popat. A. Yes.

Q. And (Exhibit C.11) was received by you. 20
A. Yes.

Q. In para.14 of the plaint you say the Bank caused damage to you by sending this letter.
A. Yes.

Q. Yet you agreed with the Bank that the plot could be sold to Popat. A. Yes.

Q. Did the Bank subsequently give you every opportunity to reduce the overdraft and finally pay it off.
A. Yes after the sale of the plot. 30

Adjourned to 2.15 p.m.

James Wicks J.

2.15.
Court Resumes as before.

Witness reminded of his former oath for further cross-examination.

Q. (Exhibit H) This is a document you say you took to the Bank on 10th October 1960. Defendants say that it was taken to Mr.Williamson on 6th October, 1960. Who typed this.
A. P.N. Dank.

10 Q. He is the same that went with you to the bank and offered to be guarantor. A. No.

Q. Who drafted it. A. P.N.Dank.

Q. Why did you take Exhibit H to the Bank.
A. On 8th October 1960 I received a letter from the Bank asking what steps I had taken to guarantee the overdraft.

Q. Is that Exhibit C.7. A. Yes.

Q. What possible reasons could there be to take this Circular letter to the Bank.
20 A. I took it to see whether if it was signed they would release the goods.

Q. Signed by who. A. The creditors.

Q. Who do you say you showed this to on 10th.
A. Either Mr. P. Patel or the sub-manager I do not remember which.

Q. Where did you the copy.
A. In either Mr. P. Patel or in sub-manager's office.

Q. The proceeds of the sale of the Ngara Road
30 plot was paid by your advocates to the Bank on 9th May 1961, in reduction of your overdraft.
A. This is correct.

Q. You agree that this was the first payment in after your shop goods were seized.
A. This was the first large sum.

Q. The allegation that the Bank refused to make inventories of the goods they seized. The

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evidence will be that your firm was repeatedly requested to attend the making of an inventory but you disagreed.
A. On 8th December 1960 my father and I went to the Bank and saw Mr. P. Patel. Mr. P. Patel told me that on goods were locked in the store so there is no need for you to see the goods.

Q. Did you receive this letter.
A. Yes Exbt.P. 10

NOTE : Witness took some time in reading this letter, from this and the admission of other letters as being received by him after appearing to read them it would seem that the witness can read and understand English.

Q. Where were the goods stored.
A. I do not know, I think it was in the go-down of the Nyaza Timber & Hardware Store.

Q. You were asked to make an inventory, before the goods were sold. 20
A. I received this (Exhibit P.)

Q. What does it say?
A. It says we are to make an inventory.

Q. Did you respond to the invitation.
A. Yes we approached the bank broker and they said there was no need to make an inventory now.

Q. When was that? A.Soon after 8th August, 1961. 30

Re-examination

Re-examination:

Q. Exhibit P your Advocates sent a reply dated 14th August 1961. A. Yes. Exhibit Q.

Q. Did the Bank refrain from selling the property or go ahead with the sale of the shop goods. A. Yes.

Q. Notwithstanding your request not to sell the goods.
A. The goods were sold on 3rd December 1961.

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Q. During all the time you dealt with the Bank were any of the cheques you drew dishonoured.
A. Two or more were in September 1960 and they were marked effects not cleared.

Q. Apart from that no other cheques were dishonoured. A. I do not think so.

Q. You say a bill for Shs.1,815.60 was dishonoured. When did you come to know of that.
A. The next day 7th October 1960.

10 Q. The interview with Mr.Williamson on 6th October 1960. You say you went to his office at about 12.30. A. Yes.

Q. You signed some documents. A. Yes.

Q. Before or after you saw Mr. Williamson.
A. Before it was in my office.

Q. You say you saw Mr. Williamson; who invited that?
A. I received a call from the Bank.

Q. You went with a relative. A. Yes.

20 Q. Why?
A. Because my English was not good. He asked the manager Do you want a guarantee now?

Q. What did Mr. Williamson ask.
A. Nothing particular, he refused to the guarantee.

Q. Did he refer to the documents you had signed.
A. He said the documents we had signed were all right. That the policies were good and he did not want a guarantee. He was happy.

30 Q. Was any reference made to a sum of Shs. 3,000.00. A. Yes.

Q. What was said?
A. I said I would pay it on 8th October 1960 and he said it was all right.

Q. What do you know about guarantee?
A. My relative mentioned about Guarantee and Mr. Williamson said a guarantee was no longer necessary as we had given policies of insurance and

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they were sufficient.

q. The conversation with Mr. Williamson was before lunch. A. Yes.

Q. Afternoon of 6th October 1960 (Exhibit C.6) Did you sign this in the morning or afternoon. Before the removal of the goods was completed or after.
A. After some of the goods had been removed.

Q. Were the words in ink there. A. No.

Q. Were they put there in your presence. 10
A. No.

Q. Was you consent asked to putting those words into the C letter. Q. Did your father sign it in your presence.
A. Yes, He signed it first.

Q. Was his consent given to the alteration to the letter. A. No.

Q. Does your father understand English or not.
A. No.

Q. Exhibit C.6 was it read to you? 20
A. It was read by Mr. P. Patel.

Q. What did he say?
A. The documents you signed on 9th May plus the documents you signed this morning are with this letter.

Q. Had Mr. P. Patel told you this letter authorised the Bank to remove all your goods from your shop, would you have signed it?
A. No.

Q. What effect would the removal of all your goods result in. 30
A. The business would be closed down.

Q. Did you then realise that if all your goods were sold the business would be closed down. A. Yes, definitely.

Q. You say the letter Exhibit C.6 was brought to you by a Mr. Patel, the person who came

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into Court. (Mr. Scott) was he there. A.Yes.

Q. The European with a beard, was he there when you signed Exhibit C.6.
A. Yes he was in the shop but further away from us.

Q. Did he talk to you about the letter.
A. No, he only requested us to sign the letter.

Q. Who is "he" A. The European with a beard.

10 Q. You were asked about the right of the Bank to seize the goods. At any time before you signed identification 2 were you told that the goods could be seized at any time.
A. I was not told that.

Q. Had you been told that the Bank could seize the goods at any time would you have taken an overdraft from the Bank. A. No.

Q. What was the amount of your overdraft with the Standard Bank? A. Shs.95,000.00.

20 Q. On what? A. The Ngara Road Plot.

Q. Any advance on hypothecation of your shop goods. A. No.

Q. The Standard Bank advanced on the security of the Ngara Road plot. Q. When you negotiated the advance from the Defendant was any amount mentioned as secured on the plot.
A. Yes, Shs.95,000.00 and Shs.45,000.00 on the shop goods.

Q. Was the Bank made aware that the S.B. had
30 given you an overdraft of Shs.95,000.00 on the security of the Ngara Road plot alone.
A. Yes that was made clear to Defendants
(Defendants Produce Document put in as Exhibit R.)

Q. Did your landlord come to the shop on 6th October 1960.
A. He came with a Court Broker who had an attachment.

Q. For what purpose? A. To levy distress.

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Q. Was that before the goods were removed.
A. After the goods were removed.

COURT: How long after the removal of the goods had started.

A. Mr. P. Patel came at about 2.15. The Broker came at about 3.00 p.m.

Nazareth: At least 3/4 of an hour after the Court Broker came.

A. Yes.

Q. (Exhibit H) Was this ever signed by you or your partner. A. No. 10

Q. Signed by any creditors. A. No.

Q. Before you took it to the Bank did you get it signed by any creditor or show it to any creditor. A. No.

Q. Was it ever signed by any creditor. A. No.

No. 7

Bachulal Dharamshi
4th and 5th October 1962
Examination

No. 7

EVIDENCE OF BACHULAL DHARAMSHI

Bachulal Dharamshi sworn in Gujarati.

I am one of the partners in the Plaintiff firm, and a brother of the last witness. I am a salesman and accountant in the firm. As accountant I checked the Bank account from time to time. 20

Q. On 3rd October 1960 what was the Bank position.
A. At the opening of business is was Shs. 151,341/80.

Q. On your account what was your position.
A. 150,745.85. 30

Q. Had you issued any cheques. A. Yes.

Q. Did you notice if the overdraft had been

In the Supreme Court of Kenya at Nairobi

Plaintiffs' Evidence

No. 7

Bachulal Dharamshi
4th and 5th October 1962
Examination continued

exceeded. A. Yes.

Q. Had you issued any cheques which had not been presented.
A. Yes, I had issued these cheques which had not been presented by 3rd.

Q. What did you do.
A. I met Mr. Nagesh at the Bank. I told him I had issued three cheques so my overdraft will be Shs. 2,700.00 over the limit.

10 Q. What was the limit at that time.
A. Shs. 150,000.00

Q. What did you ask Mr. Nagesh.
A. He agreed.

Q. What.
A. That we pay the amount by 8th October 1960.

Q. What happened about the cheques, had you not seen Mr. Nagesh.
A. These cheques would have been dishonoured.

Q. Was anything said about Shs.3,000.00.
20 A. The talk was that I had Shs.10,000.00 before and now Shs.3,000.00 which I had to pay before 8th October 1960.

Q. You heard your brother's evidence given to Court. A. Yes.

Q. If Mr. Nagesh gives evidence that he never agreed that you or your firm should draw against uncleared cheques is that correct.
A. He would be lying.

Q. Do you know when the authorised limit of
30 Shs. 140,000.00 was increased to Shs.150,000.00.
A. They gave me Shs. 5,000.00 on 23rd September 1960 and a further Shs. 5,000.00 on 26th September 1960.

Q. The 23rd September 1960, who do you say gave that authority.
A. My father and brother went to the Bank.

Q. You have no personal knowledge of what happened, at the Bank.

In the Supreme Court of Kenya at Nairobi

Plaintiffs' Evidence

No.7

Bachulal Dharamshi 4th and 5th October 1962 Examination continued

A. Yes, they came back from the Bank and told me that they had a further overdraft of Shs. 5,000.00.

Q. So you were informed on 23rd September that the overdraft was Shs.145,000.00 and on 26th September that it was Shs.150,000.00.
A. Yes.

Q. And that excess over Shs.140,000.00 were you told how long that would be permitted.
A. Yes to 8th October. 10

Q. Did you go to the Bank with other partners on 29th September.
A. Nobody went on 29th.

Q. Are you quite sure of that. A. Yes.

Q. (Exhibit G1) Did you sign this. A. Yes.

Q. (Exhibit M) Did you sign this.
A. Yes I signed this.

Q. You heard your brothers evidence and the question I put to him. Do you agree with everything your brother has said. A. Yes. 20

Q. Can you give details of the three cheques which you say that were issued by 3rd October 1960 but not presented by that date.
A. They were cleared on 3rd October 1960 they were Shs.1,300/- Shs.73/61 and Shs.2,530.25.

Q. You say Nagesh said that would be all right.
A. Nagesh himself agreed.

Q. Did he go and see anyone?
A. I do not know.

Q. Try to remember. 30
A. He agreed I do not know if he went to see anyone after I left.

Q. He did not see anyone between your making the request and it being granted.
A. That is so.

Q. What did Nagesh allow you in exceeding your overdraft of Shs.150,000.00?

In the Supreme Court of Kenya at Nairobi

Plaintiffs' Evidence

No. 7

Bachulal Dharamshi
4th and 5th October 1962
Examination continued

A. Shs. 3,000.00.

Q. Even on that, you see, you went over the limit of Shs. 153,000.00 on 3rd October and again on 6th October 1960.
A. In the first place, two cheques are not credited.

Adjourned to 10.30 a.m. tomorrow.

sd. James Wicks J.

10.30 a.m. Friday, 5th October 1962.

10 Court resumes as before.

Witness reminded of his former oath.

Q. On 3rd October 1960, what did you pay into the bank? A. Shs.2,005.00.

Q. If you deduct Shs.2,005.00 from your figure of Shs. 150,745.85 it makes Shs.148,740.85?
A. I agree.

Q. The three cheques you had drawn and were due that day were Shs. 1,300.00, Shs.73.61 and Shs. 2,530.25. A. Yes.

20 Q. Three other cheques had been issued but not presented by that day, for Shs.500.00, Shs. 195.00 and Shs. 1,000.00.
A. I issued these three cheques during the afternoon of 3rd October.

Q. That for Shs.300.00 is dated 20th September 1960. A. I do not remember the date.

Q. (Shown a document).
A. I agree the date was 20th September.

Q. That is for Shs. 195/- was dated 1st October
30 1960, and that for Shs.1,000/- was also dated 1st October 1960? A. I agree.

Q. Say if you add these three cheques you get a total of Shs. 5,398.86. A. Yes.

Q. If this is added to Shs.148,740.85 you give

In the Supreme Court of Kenya at Nairobi

Plaintiffs' Evidence

No. 7

Bachulal Dharamshi 4th and 5th October 1962 Examination continued

it makes Shs.154,139.71 overdraft if the cheques you had drawn were to be met.
A. I agree but in fact the last three cheques you mention were drawn later, two on the 4th and one on the 5th.

Q. When did your overdraft figure go over Shs. 150,000.00? A. 29th Sept.1960.

Q. I put it to you it was on that day that Mr. Williamson told you you had to reduce the overdraft to Shs.140,000.00 by 3rd October. 10
A. No, that is not so.

NO RE-EXAMINATION.

No. 8

T.G.Bakrania 5th October 1962 Examination

No. 8

EVIDENCE OF T.G.BAKRANIA

T.G.BAKRANIA in ENGLISH: I am an advocate. In October 1960, I gave instructions for the levy of a distress to Jamal Pirbhai & Sons, auctioneers, Nairobi. I gave this on behalf of my clients B. Jivraj Shah and Amratlal B. Shah both of Nairobi. It was to levy distress on a 20 premises rented by Dharamshi Vallabhji and Bros. in Bazaar Street and belonging to my clients. I do not remember the exact time when I gave the instructions but I think it was in the afternoon. I gave instructions orally over the telephone; normally I send a letter. As I understood from my clients, National & Grindlays Bank were removing goods from the premises and my clients felt that the distress should be levied, before all the goods were 30 removed by the bank - as a result the instructions were given by telephone. I do not remember the actual date.

Cross-examination

CROSS-EXAMINED:

Q. Did your clients give
A. Mr. B.J. Shah came to our office.

Q. Was it before or after lunch that the matter was first raised.
A. I cannot be sure but I think it was after lunch. 40

RE-EXAMINATION: None.

In the Supreme Court of Kenya at Nairobi

Plaintiffs' Evidence

No. 9

Sultanali Jamal Pirbhai 5th October 1962 Examination

NO. 9

EVIDENCE OF SULTANALI JAMAL PIRBHAI

Sultanali Jamal Pirbhai sworn in English:

I am a partner in the firm of Jamal Pirbhai & Sons and a Court Bailiff authorised to levy distress for rent. On 6th October 1960 I received instructions from Mr. Bakrania, the advocate to levy distress on premises occupied by Dharamshi Vallabhji & Bros. Bazaar Street, 10 Mr. Bakrania telephoned me at about 2.30 p.m. on 6th October 1960. We usually receive instructions by letter. In this case Mr.Bakrania said that the National & Grindlays Bank Ltd. were removing the goods from the shop and there was no time to write a letter. He asked me to proceed forthwith. On receipt of these instructions I went to the shop in question and found its front door in Bazaar Street locked. I went to the rear of the building and found 20 some officer of National and Grindlays Bank were removing the goods from the shop. I saw at least two sewing machines and a show case on a lorry. I went inside the shop through the back door and said that no further goods could be removed unless the rent due was paid. Mr. Bulakhidas (Amin) telephoned the Bank after consulting the Manager he undertook to pay the amount due on the following day. On the following day the Bank paid the rent and our charges - 30 that was on 7th October 1960. Besides Mr.Bulakhidas there was an asian clerk of the Bank who later wrote out the undertaking. There were also two European officials from the Bank and one of them signed the undertaking.

Cross-examination

CROSS-EXAMINATION:

Q. Exhibit C.5 This is addressed to you by Mr. Scott. Is your signature on it.
A. No it is my brothers.

Q. You took this at the premises. A. Yes.

40 Q. It was your security for the rent.

RE-EXAMINATION: NONE.

NAZARETH: That closes the case for the Plaintiffs on the issue of liability, the only issue at present before the Court.

In the Supreme Court of Kenya at Nairobi

No.10

Notes of opening address of Counsel for Defendant 5th October 1962

NO.10

NOTES OF OPENING ADDRESS OF COUNSEL FOR DEFENDANT ON 5TH OCTOBER 1962.

LINDSAY:

Defendant's version of facts fully set out in Defence.

Defendant say Plaintiffs approached Defendant Bank early in 1960 with a view to obtaining better overdraft facilities - No question of persuasion to come over. Overdraft charged on plot of land in Ngara Road and shop goods, not part on one, part on the other. Exhibit C.1 1st para. will say only a limit of time provided account conducted properly. Contend overdraft repayable on demand. Circumstances just before 6th October 1960 justified seizure of goods under the hypothecation. 10

L A W :

Grant on Banking 7th Edn.P.95 and P.189. Hart Law of Banking 2nd Edn. p.196-197 614 and 615, p.150. 20

Rowe v. Bradford Banking Company 1894 A.C. 586 at page 596: Bankers at liberty at any time to close the overdraft by notice to the Customer.

Berry v. Halifax Commercial, Banking Company 1901, 1. Ch. 188.

Letters of hypothecation invalid: will say Chattels Transfer Ordinance can have no application to the facts in this case because relates only to certain specified persons of which the Defendant Bank is not one and cannot be one. Also Ordinance refers to fixed assets not trade goods being turned over. Section 13 and 14 of the Chattels Transfer Ordinance, also Sections 18 and 19 of C.T.O. limited to persons stated in Section 13 and 14. Section 15 of C.T.O. does not in Kenya render letters of hypothecation invalid as against a Bank. 30 40

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.11

James McCraig McWilliam
5th October 1962
Examination

NO.11

EVIDENCE OF JAMES McCRAIG McWILLIAM

Calls - JAMES McCRAIG McWILLIAM Sworn in English :

I am employed at National & Grindlays Bank Kisumu as Manager. From August 1959 to August 1960 I was sub-manager of the Banks Government Road Nairobi Branch.

On 4th April 1960 I reached agreement with
10 the Plaintiffs for the Bank, to grant them an overdraft up to Shs.140,000.00 up to 30th April 1961. I wrote Exhibit C.1. I had agreed with Plaintiffs further that they might have an overdraft up to 30th April 1961 up to Shs.140,000.00 provided the account was conducted properly. If the account was not conducted properly I would regard the overdraft as being immediately repayable. The securities that were given consisted of a charge on a plot of
20 land in Ngara Road (Exhbt.L.1) and a hypothecation of the shop goods. Identification 2. Also a guarantee was given (Exhibit M). I do not know whether these documents were signed in my presence. On 23rd April 1960 a document Exhibit N depositing the deeds on the plot of land. Guarantees and letter of hypothecations are not normally taken in my presence nor are letters of equitable mortgages. The procedure is that the staff fills in these forms and they
30 are signed by the parties in the manner laid down by law as far as witnessing is concerned. Exhibit E. During the period I was at the Bank the authorised limit of plaintiffs overdraft was Shs.140,000/- and it was exceeded before I left in August 1960 on a number of occasions.

Adjourned to 2.15 p.m.

James Wicks J.

2.15 Court resumes as before.

Witness reminded of his former oath for further
40 Examination.

I do not know the circumstances under which

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.11

James McCraig McWilliam
5th October 1962
Examination continued

the account of the Plaintiffs was closed with the S.B. and an account was opened with us as far as I remember the Bank Broker Mr. B. Amin gave me an outline and I approved it in principle. Exhibit R. My initials are on this Exhibit R appears to have been made by Mr. P. Patel not Mr. V.J. Amin. I wrote on it agreed in principle it was overdraft Shs. 140,000.00 against property value at Shs. 150,000.00 made up equally of plot and building Shs.70,000 each and stocks about Shs. 200,000/-. The stocks were to secure the full amount of the overdraft. 10

The Manager and sub-Manager of the Bank are the only ones authorised to approve overdraft and increases in overdraft. Mr.Nagesh is an assistant to the sub-Manager - he has no authority, Mr. P. Patel is a Broker and assists the management to keep in touch with what is going on in the market, he has no authority to approve overdrafts or increase of overdrafts. Mr. B. Amin is the senior broker and is in the same position as Mr. P. Patel. 20

Drawing against uncleared cheques is not allowed except in cases where it has been agreed on by the Bank and any such agreement will also be dependant on the status of the drawer. Only senior officials could make such agreements that is Manager, sub-Manager, the two accountants - four in all. Mr. Nagesh, Mr. B. Amin and Mr. P. Patel are all well below the status of accountant. 30

Exhibit K rules governing accounts is mentioned These are a copy of the rules at the time. Exhibit S. This specifically in Rule 6 refers to drawing against cheques drawn on other banks in course of collection. The rules governing conduct of current accounts have varied very little during past decade and Mr. Nagesh and the Broker would be aware of them. 40

During my time at the Bank, three warnings were given to the Plaintiffs that they were exceeding their overdraft: Exhibit C.2, 3 and 4.

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.11

James McCraig McWilliam
5th October 1962
Cross-examination

CROSS-EXAMINATION :

Q. You have been many years in Banking.
A. 30 odd years.

Q. When an account is in credit the Bank is a debtor to the customer to the amount of the credit. A. Yes.

Q. When funds are available the Bank - bound to honour cheques drawn on the bank.
A. Yes provided everything is otherwise in
10 order.

Q. When a customer has an overdraft the Bank is the creditor and the customer the debtor.

Q. When the Bank is not bound to honour a cheque unless the Bank has agreed to honour cheques up to that amount. A. Yes.

Q. So if Plaintiffs drew on their account in excess of the overdraft authorised the Bank in the absence of an arrangement would not be bound to honour the cheques. A. Yes.

20 Q. The fact that the customer drew cheques in excess of the authorised overdraft did not place any obligation on the bank to honour the cheque.

Q. So when there 36-38 cheques were drawn over the amount of the overdraft they were paid because an arrangement was made at the bank voluntarily here to honour the cheques.
A. Yes under a degree of protest.

Q. In effect what happened was this when the amount authorised is exceeded the Bank makes a
30 further loan.
A. Yes it does but again under protest.

Q. There is no obligation on the Bank to lend the excess amount unless it has agreed to.
A. That is so.

Q. When negotiations take place with Indian clients, do brokers take an important part.
A. Very often they do.

Q. Did you carry on any negotiations with Plaintiffs in Gujerati or Hindustani. A. No.

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.11

James McCraig McWilliam
5th October 1962
Cross-examination continued

Q. When the accounts happened to be overdrawn you yourself were not approached by the Plaintiffs.
A. It is so long ago but had I agreed to any temporary facility it would have been recorded.

Q. The practise is for Indian customers to negotiate with the Broker.
A. Not necessarily so they might see the sub-manager along with the broker or see the broker alone. 10

Q. If the customer does not speak English well.
A. In such a case I call for a clerk to interpret.

Q. In most cases arrangements are made through the broker with Indians.
A. No discussions take place proposals are made and the broker refers them to the sub-manager.

Q. When an account is overdrawn and an overdraft is authorised would there be a note on the account. 20
A. No. Nothing known to the staff generally. All cheques overdrawn are referred to the sub-manager.

Q. Unless the sub-manager authorises payment on the cheque it would not be paid.
A. That is so.

Q. Was this practise of referring all cheques followed in the Plaintiffs' case.
A. I believe so. 30

Q. When the account was first opened on 4th April 1960.

Q. Are the documents to be signed by the customer read to him.
A. I cannot say the sub-manager take no part in the physical opening of accounts.

Q. Did you take part in the physical opening of this account.
A. It is so long ago I cannot say for certain but I would say almost certainly not. 40

Q. Can you recollect having had any conversation with the Plaintiffs. A. No.

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.11

James McCraig McWilliam
5th October 1962
Cross-examination continued

Q. So it was not you who explained to any of the Plaintiffs the terms of opening the account, if any was given. A. No.

Q. You have identified a number of documents and said they were not signed in your presence, can you tell why they were signed.
A. Only looking at the dates on them that is the only indication.

Q. You were aware that so far as the plot and
10 buildings are concerned the Standard Bank's limit Shs.95,000.00 on it.
A. I see an Exhibit R "S.B.S.A. about Shs. 95,000.00" I wrote this I imagine I was told this verbally but I do not know what the security was.

Q. Do you know anything about hypothecation of goods with S.B.A. A. I know nothing of that.

Q. Is it normal practise to make securities jointly for the whole amount and not split them
20 up. A. Usually that is the practise.

Q. An advantage to the bank. A. Yes.

Q. Exhibit S. you did not send a copy of this to the Plaintiffs.
A. At this distance of time I would not say so but it is most unlikely.

RE-EXAMINATION:

Re-examination

Q. Do you recognise 1st, 2nd and 3rd Plaintiffs.
A. No.

Q. You cannot say if you spoke English with any
30 of them. You say an overdraft is exceeded either because you have made an arrangement or the Bank chose to honour it you say under protest. What do you mean.
A. The principle consideration is not to damage our customers reputation. We therefore take into consideration the payee of the over authorised cheque. The standing of the customer is considered, the nature of his business and so on.

Q. In an account of this rank what would be the
40 attitude to discounted bills that are dishonoured.
A. In that case I would hesitate to discount any further bills unless a good explanation was given.

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.12

Vithalbhai Jhaberbhai Amin
5th October 1962
Examination

NO.12

EVIDENCE OF VITHALBHAI JHABERBHAI AMIN

VITHALBHAI JHABERBHAI AMIN sworn in English:

I have a nick-name It is Bulakhidas. I have been with Defendant Bank for 39 years and employed as a Broker since 1945.

Plaintiffs account was opened in April 1960. The circumstances were that I was introduced by Keshavlal Fulchand Shah a director of Shah Nemchand Fulchand Ltd. one of our customers to the Plaintiffs. As a result of the introduction I saw 1st and 2nd Plaintiffs. I asked them what their proposals were and they told me they needed an overdraft to the extent of Shs.140,000.00 against the security held then by The S.B. of S.A. I told them as the security was not enough they should give us additional security on stocks machinery etc. or insurance policies, if any. They agreed to give me security of property goods and stock including machines. I took both 1st and 2nd Plaintiffs to see Mr. McWilliam and put the proposal to him he agreed in principle. The security was not to be apportioned - each security was to be against the full amount. I did not discuss the time for which the overdraft would last, and 1st and 2nd Plaintiffs did not ask me the period of the overdraft. The usual practise is to ask the sub-manager. I did not tell the 1st and 2nd Plaintiffs the general terms on which the overdraft was given. I usually in the course of negotiations tell people that if an overdraft is granted and the account is not satisfactorily conducted the Bank might withdraw the facility at any time I cannot be sure that I specifically warned the plaintiffs. In May or June 1960 Plaintiffs went slightly over the limit and I warned one of the partners that they were over the limit. When I came to hear of it. Exhibit R. No period is mentioned here of the period for which the overdraft is granted.

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Cross-examination

CROSS-EXAMINATION:

Q. 39 years in the Bank. All the time in Nairobi. A. Yes.

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.12

Vithalbhai Jhaberbhai Amin
5th October 1962
Cross-examination continued

Q. Broker since 1945. A. Yes.

Q. During the time you have been in Nairobi you came to know Plaintiffs firm. A. Yes.

Q. Know 1st Plaintiff well.
A. Yes, I knew him well, not his sons.

Q. You would not need an introduction then.
A. No. It is not my practice to approach even people I know well on their banking if they are customer of another bank.

10 Q. What was the object of Mr.Shah's introduction.
A. That I should try and negotiate Plaintiffs as a customer of my bank.

COURT: Was Mr.Shah trying to help you or Plaintiffs.
A. He may be trying to help Plaintiffs I do not know.

NAZARETH:

Q. To whom you were introduced.
20 A. Definitely Dharamshi 1st Plaintiff.

Q. Did you greet him as an old friend.
A. No not as friend.

Q. What did Keshavlal Shah say.
A. Find out their requirements and try and help them.

Q. As a Bank Broker you make it your business to know about the business affairs of customers of the Bank and other Banks.
A. Our Banks customers only.

30 Q. You move about a lot in the Bazaar.
A. Yes.

Q. You pass this firms premises about every day of the week. A. May be twice a week.

Q. In course of conversation you would know business temperature of the Indian Community.
A. Yes.

Q. Plaintiffs have been in Bazaar Street for

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.12

Vithalbhai Jhaberbhai Amin
5th October 1962
Cross-examination continued

about 22 years. A. May be.

Q. It would be your endeavour to get fresh customers. A. Yes.

Q. Part of your work. A. Yes.

Q. You knew they had an overdraft of Shs. 95,000.00 with the S.B.
A. That is what they told me and they showed me their accounts.

Q. Was that when you were first introduced.
A. Yes. 10

Q. You were introduced in their shop.
A. That is what I remember.

Q. You went there to get a fresh customer.
A. I was taken there by Mr. K. Shah to be introduced.

Q. It was you who suggested that they could get a large advance if they give a letter of hypothecation.
A. They asked for Shs.140,000/- and I suggested other security. 20

Q. Shs.140,000/- is an odd figure would they ask for Shs.150,000/-.
A. No they asked for Shs.140,000/-.

Q. Would you have been prepared to lend more than Shs.95,000/- on the plot and land.
A. Not over Shs.30,000/- on the plot and land it would depend on the Bank Manager.

Q. Exhibit R. The note is in Mr.McWilliam's handwriting. A. Yes.

Q. You supplied Mr. McWilliam with the figure Shs.95,000/-. 30
A. No as far as I remember they came with their accounts.

Q. A letter of hypothecation is not a good security.
A. I do not know I am not a lawyer.

Q. As a business man.
A. According to my knowledge it is security.

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.12

Vithalbhai Jhaberbhai Amin
5th October 1962
Cross-examination continued

Q. Is it attractive security.
A. It is difficult for me to say.

Q. The stocks were valued at Shs.200,000.00 That was about right.
A. I only went into the shop once.

Q. You were satisfied it was a fair valuation.
A. Yes.

Q. I put it to you you would tell Plaintiffs we will lend you Shs.95,000/- on the plot Shs. 45,000/- on your goods. A. I did not say so.

Q. Surely when you lend money you value the security. A. Yes.

Q. Would you not place separate values on the land and building and a separate value on the goods. I do not mean for the overdraft.
A. That is what we generally do.

Q. In this case you made a separate valuation in your mind of the plot and buildings and the goods. A. Yes.

Q. Shs.95,000/- on the plot and buildings.
A. No plot and buildings Shs.150,000/- stock and machinery Shs.200,000/-.

Q. How much would you value to land and building for building Shs.95,000/-.
A. No. I would tell the Bank Shs.60,000/- about.

Q. Trustees lend 2/3 of the value of land and buildings. A. Yes maybe but not in Banks.

Q. What would the Bank lend.

Q. If the buildings and plot are worth Shs. 150,000/-, Shs.95,000/- would be a good lending value.
A. No may be it would be to another Bank not to us.

Q. I put it to you you approached the Plaintiffs. A. I did not.

RE-EXAMINATION: NONE.

Adjourned to 10.30 a.m.
Thursday 11th October 1962.
James Wicks J.

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.13

Donald Braganya 11th October 1962 Examination

10.30 a.m. Thursday 11th October 1962.

Appearance as before.

NO.13

EVIDENCE OF DONALD BRAGANYA

DONALD BRAGANYA sworn in English.

I have been employed by Defendants for 6 years and in May 1960 I was employed at Government Road Branch.

Shown Identification 2 states - I filled this in and the handwriting is mine, also on page 2. I filled in the handwriting the signatures were not there, I am sure of that. Mr. Rodriques, my supervisor gave me the information to put on Identification 2. When I had filled in the form I sent it to Mr. Rodriques for checking, I did not date the document. The word Nairobi in capital letters is not my handwriting. It was part of my duties to fill up letters of hypothecation I have never filled up a letter of hypothecation after it has been signed. Mr.Rodriques had left the employment of the bank sometimes this year. He is somewhere in Nairobi.

10

20

Cross-examination

CROSS-EXAMINATION.

Q. Are equitable mortgages sometimes sign before they filled in.
A. I do not do that work the supervisor.

Q. What are your duties.
A. To enter documents in registry, life policies, hypothecation title deeds, share certificates.

30

Q. It is common practice to have equitable mortgages signed in blank.
A. It is not part of my duties to get documents signed, they are complete when I receive them.

Q. Are you aware that it is the practice of Bank to get equitable mortgages signed in blank. A. I am not aware of that.

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.13

Donald Braganya 11th October 1962 Cross-examination continued

Q. Identification 2. You filled this in from information given you by Rodriques and no one else. A. That is so.

Q. No conversation over it with Mr. P. Patel, Mr. B. Amin Mr. Nagesh. A. No.

Q. Did you put the date on Identification 2.
A. No.

Q. Do you know who did. A. No.

Q. Any writing other than date word Nairobi
10 and signatures yours. A. All that is mine.

Q. Was it before 9th May that you filled in the document or after.
A. Before 9th May.

Q. Before letters of Hypothecation are signed do you usually fill them in. A. Yes.

Q. Do you keep a note of when you fill in the document. A. No.

Q. It is common to take the securities when the money is lent. A. Yes.

20 Q. In this case do you know that when the account was opened. A. No.

Q. If when an account is opened an overdraft is agreed that would be the time when security is taken. A. Yes.

Q. Do you only fill in letters of Hypothecation.
A. No. Others work with me.

Q. Quite often the Bank Broker fills in the letters of hypothecation.
A. No it is always done in the overdraft de-
30 partment.

Q. Any of your writings on these Exhibits G 1, 2 and 3 or Exhbt.M.
A. The date on Exhibit M is similar to mine.

Q. You are not sure.
A. Not quite sure.

Q. The Ex.M is definitely not your writing. A. That is so.

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.13

Donald Braganya 11th October 1962 Cross-examination continued

Q. Do you know whose writing it is.
A. I think it is Mr.Rodriques.

Q. Exhibit L 1 Do you know that handwriting.
A. I think it is Mr. Rodriques.

Q. Do you ever came into contact with the Bank customer. A. No.

Q. Why is it a practice for you to fill in the letters of hypothecation and not the supervisor. A. We are very busy.

Q. Do you know when Identification 2 was entered in the register. A. No. 10

Q. Anything to go besides your practice to know Ident.2 was not signed when you filled it in. A. It was not signed when I filled it in.

Q. Was it dated when you filled it in. A.No.

Q. How many supervisors in your department.
A. Two.

Q. Who were they. A.Mr.Rodriques and Mr. Nagesh. 20

Q. How do you know it was Mr. Rodriques who gave you instructions to fill in Ident.2.
A. Because he checked the entry in the Registry.

COURT: It is possible Mr.Nagesh gave you the instructions and Mr.Rodriques checked in register.
A. No. It was Mr.Rodriques who gave me the instructions, I was under him.

Q. Can you give any idea of the date on which you filled in Identification 2. Could it be May 1960. A. I cannot remember. 30

Q. Could it be May.
A. I think sometime in April.

Q. Can you say when in April or no idea at all.
A. No idea at all.

Q. Any special difficulty in filling up this

document. A. No.

Q. In the case of a mortgage and a charge of bank there would be a delay in filling up documents. A. Yes.

Q. You say no reason for delay in filling up in letter of hypothecation. A. I agree.

Q. If the letter of hypothecation was filled up on 4th April 1960 can you say why it was dated 9th May 1960.
10 A. Usually customers delay the document.

Q. Any reason why you should fill up the document.
A. I was new in the Department and was learning the job.

Q. Mr. Rodriques gave you the information written on a piece of paper. A. Yes.

Q. He could just as well have filled it up himself written on a piece of paper.
A. In this case I cannot remember if he wrote
20 it on a paper or dictated it to me.

Q. He could just as well have filled it in himself. A. I was learning the job.

Q. Do you usually fill in the
A. I was new to the job so I sent it for checking.

Q. Do you remember when you entered the document in the Register.
A. I did not enter this document. I had left the Defendant by then.

30 Q. When did you leave, were you there in May 1960.
A. I was there in May A. I cannot remember.

Q. Were you there as late as 9th May.
A. I cannot remember.

Q. Were you there in April 1960. A. Yes.

Q. How long were you in the Overdraft Dept.
A. I went there in November 1959 I was then off and on for a total of about a year.

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.13

Donald Braganya
11th October 1962
Cross-examination continued

Q. You are quite sure that Identification 2 was not entered by you in the Register.
A. Quite sure.

Q. Are you sure that Identification 2 was not signed before you filled it in.
A. The practice is that documents are filled in before they leave the Dept.

Q. When did you know you had to give evidence in this case.
A. Sometime last year. 10

Q. Any intervals between being given instructions to fill up Identification 2 and doing it.
A. I did it at once.

Q. I put it to you that Identification 2 was signed before you filled it up.

A. No, when I filled it up, it was perfectly blank.

Re-examination

RE-EXAMINATION:

Q. It was put to you that Mr.P.Patel, Mr. McWilliam and Mr.Nagesh gave you instructions to fill up Identification 2. Can you remember if Mr.Rodriques called you into his office. 20
A. I cannot remember.

Q. Do you rely on practice to say that there was no signature on Identification 2 before you filled it in.
A. No. In this particular case I remember there was no signature on it when I filled it in.

No.14

John Rae Williamson
11th and 12th October 1962
Examination

No.14 30

EVIDENCE OF JOHN RAE WILLIAMSON

JOHN RAE WILLIAMSON sworn in English.

I have been employed by Defendant Bank for 25 years. In August 1960 I was appointed sub-manager of the Defendant Bank in Government Rd. Nairobi. I am with them today.

Exhibit E. At the beginning of 1960

Plaintiffs overdraft facility was Shs.140,000.00. on 21st September 1960 Plaintiffs paid in cheque for Shs.11,630/- mainly in cheques. The Plaintiffs were not permitted to draw against these cheques because the bank did not know the financial standing of the drawers of the cheques in question so the cheques drawn by the Plaintiffs were returned to the payees marked effects not cleared. We were bound to do that because we cannot hold such cheques over night and the holder is entitled to know of the date of such cheques at the time of presentation. This Exhibit T shows several of Plaintiffs cheques so returned they amount to about Shs.10,200/-.

Q. It has been suggested that the junior officials of the Bank have authority to decide which up country cheques uncleared and cheques banks uncleared can be drawn against.
A. The Manager, Sub-Manager and in the absence of these two the No.1 accountant are the only ones to authorise payment against uncleared effects.

Q. What was your agreement with Plaintiffs regarding uncleared effects.
A. We had no specific arrangement with them.

Q. What are your arrangements about authorising additional overdraft.
A. The arrangements for increased overdraft facilities must be finalized by the Manager or Sub-Manager of the Bank.

Q. On 24th September the authorised overdraft limit of Plaintiffs was Sh.140,000/- on 24th September 1960 at close of business the overdraft of Plaintiffs was Shs.142,509.01. At the close of business on 27th September 1960 it was Shs.148,862.43. Q. Between 23rd and 27th September 1960 did Mr. P. Patel come to you and recommended that the overdraft be increased over the Shs.140,000/-.
A. An approach was made to me by an official of the bank either a Broker of the Bank or Mr. Nagesh.

NAZARETH: It is not known who it was.

LINDSAY: They will be called.

COURT: If this evidence is not supported by

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John Rae Williamson 11th and 12th October 1962 Examination continued

direct evidence it will be struck out. (Witness continues)

That the Plaintiffs were expecting funds in the very immediate future and would I permit them to draw against the anticipated payments. This was nearer to 23rd to 27th.

Q. This was an increase of overdraft.
A. No, only to draw against anticipated fund.

Q. Can you remember the amount.
A. No not exactly it was amount of the anticipated funds, it was about Shs.10,000/- if the limit of the overdraft had been increased fresh security documents for the new limit would have been executed as the funds were expected immediately it was not considered necessary to have fresh documents executed nor did we wish to increase the amount of the existing facility of Shs.140,000/-. The overdraft was allowed to go to Shs.151,777/62 because I was informed of the anticipated receipt of the funds. On 29th September 1960 I was dissatisfied with the account and there had been four to five days for the receipt of the funds and I thought this was sufficient time for them to arrive. I therefore requested representatives of the Plaintiffs to call on me. Second Plaintiff came into my office and Mr. Nagesh was present in my office. I told the Plaintiff that I was dissatisfied that the promised payments had not been received. I was informed that they would be received at any moment and at the time agreed to an overdraft limit of Shs. 150,000.00 on the distinct understanding that the additional security documents required would be executed and returned to us immediately 2nd Plaintiff was given the necessary security documents with a request for their immediate execution and return. The security documents were a supplementary letter of hypothecation fresh form of continuing guarantee and a supplementary letter of deposit increasing the amount secured from 140,000/- to Shs.150,000/-. The increase from Shs.140,00/- to Shs.150,000/- was to be allowed to continue until 3rd October 1960 which meant that the Plaintiffs had had in all approximately 10 days to receive the immediate funds which they had expected. 2nd Plaintiff assured

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Examination continued

me that the business was doing well and I would received as soon as it could be prepared a statement of sundry creditors and debtors. By 3rd October 1960 the overdraft had not been reduced to Shs.140,000.00 and it was in fact Shs.153,240/66 and the Bank had not by this time received the documents I gave to 2nd Plaintiff.

During the period 3rd to 5th October Mr. Pandya assistant broker to the Bank had been sent across continually to obtain the return of the documents and to impress on the Plaintiffs that they must adhere to the promise of reducing the overdraft to Shs.140,000/-. On the morning of 6th October 1960 as the documents still had not been received I instructed Mr. Nagesh, the supervisor of the overdraft Dept.to proceed with fresh security documents which were similar to these handed to 2nd Plaintiff, on 29th August 1960 and endeavour to have them executed or obtain the original ones if signed. The documents were received in the Bank signed shortly after 11.00 a.m. on 6th October 1960. Mr. Nagesh brought them back. Exhibit G 1, 2 and 3 are the ones, I am unable to say if these were the ones handed over by me to 2nd Plaintiff on 29th September 1960 or the ones taken by Mr. Nagesh on 6th October 1960. The documents given to 2nd Plaintiff on 29th September 1960 were filled in.

On the morning of 6th October 1960 I had also requested the partners of the Plaintiff to call upon me to discuss the state of their account. Three gentlemen called on me they were 1st and 2nd Plaintiffs and a third gentleman who I know now understand to be Mr. Dhanji Verjee he was not a partner of the firm. Mr. Nagesh was in my office and for most of the time Mr. P. Patel was there. I expressed my displeasure that the account was still in excess of the authorised limit of Shs.140,000/-. I also asked 1st and 2nd Plaintiffs if they had brought with them the statement of affairs which they had agreed to provide at the meeting of 29th September. I was told that they had not brought the statement of affairs nor were they in a position to reduce the overdraft to its approved limit of Shs. 140,000/-. The partners

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then requested me to grant a further facility of Shs. 5,000/- on a temporary basis and Mr. Dhanji Verjee said that he was prepared to guarantee this amount of Shs.5,000/-. As no satisfactory explanation was given to me regarding the non-production of the statement of affairs nor of the non receipt of the funds which they had anticipated. I stated that the overdraft must be immediately reduced to Shs.140,000/-. Further discussions took place during which letter was shown to me which purported to be a draft copy of a circular which the Plaintiffs intended to dispatch to their creditors. Exbt. H. is the letter which was handed to me. It was handed to me by Mr. Dhanjee Verjee I cannot remember if it was handed to him by Plaintiffs partners before it was handed to me. 10

Adjourned to 2.15 p.m.

James Wicks J. 20

2.15 p.m. Court resumes as before.

Witness reminded of his former oath.

Q. Exhibit H. After you read this did you speak to Plaintiff's partner.
A. Yes, I expressed surprise that they should contemplate such Action as they were the same time getting the banks indulgence on credits and getting temporary increase of overdraft. I told them I had been assured that the firm were doing satisfactory business. The Plaintiff did not produce their statement of affairs and they could not give me any information of the amount of money they owed to creditors. I demanded that the overdraft be reduced immediately to Shs.140,000/-. I gave the Plaintiffs no assurances as to what would happen. I gave them no warning that I was going to seize their goods, this was not necessary as the letter of hypothecation gave the Bank right of entering at any time. My experience is that when the Bank gives warning that they are going to seize goods every effort is made to remove all or as much of the goods as possible from the premises to which we have right of entry before we act. My own re-action on reading Exhit. H. was that 30 40

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Examination continued

the Bank security on the hypothecation was in jeopardy and if immediate action was not taken by the Bank it might be found there were writs of attachment against the goods or that the owners might commit an act of bankruptcy. In view of the imparience of the decision I consulted with my immediate superior the Manager and a result of this consultation I instructed two officials of the Bank to take over the hypothecated stocks, these officers were Mr.J. R.Scott and Mr.P.Patel. I instructed Mr.J.R. Scott to obtain a letter from the Plaintiffs they would not repay the overdraft and therefore they authorised the Bank to take over the Stocks. Exbt. C.6 is my letter without the manuscript. I handed this letter to Mr.J.R.Scott I saw this letter again because I initialled it and I saw that "sewing machines and spare parts" had been added. Identification 2 sewing machines and spare parts are included in the descriptions of goods.

Exhibit C.7 I wrote this letter to Plaintiffs. By this letter I intended to convey to the Plaintiffs that if reasonable assurances and arrangements could be made to secure the Bank we would be prepared to assist the Plaintiff in disposing of the goods or to obtain their return. I received no response to this letter.

The Plaintiff's co-operated with the Bank in the sale of the plot in Ngara Road. Exhibit C.8 was my first intimation of this. Exhibit C.9 confirms what Plaintiffs tell us in this letter of 19th October. As a result of Exh.C.9 the Bank gave the undertaking Exh. C.11. The first substantial payment in reduction of the liability was on 11th May 1962 it was for Shs. 145,991.50 reducing the overdraft from Shs. 161,767.24 to 15,775.74. In September 1960 the Plaintiffs had a current account, a Bill discount account and a loan against merchandise account, the overdraft was carried on in current account; the total indebtedness of the Plaintiffs to the Defendant is now about Shs.24,000/-. The goods seized were sold in December 1961. Between that time and the sale the Bank wrote and invited plaintiffs to have inventories made of the stocks held but they did not co-operate in having lists of the stocks made.

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In about November 1960 it came to my notice that a deed of arrangement had been made by Plaintiffs. It is G.N.5870 of 1960 (P.1539 v. 62) I gave the Plaintiffs every opportunity to reduce the overdraft by such means as they thought fit.

Cross-examination

CROSS-EXAMINATION:

Q. On 6th October you received the security documents and on the same day you seized the goods. A. I did. 10

Q. Why did you do that.
A. The documents were promised to be returned immediately after the delivery on 29th September subsequent to the return the documents dated 6th October 1960 certain facts were revealed to me which I considered very materially altered the substance of my talks with the Plaintiffs on 29th September.

Q. Did you seize the goods to release the whole of the overdraft or only the excess over Shs. 140,000/-. 20
A. On 6th October we took over the goods on the terms of the letter of hypothecation, that is the original one and one dated 6th October.

Q. You took them over under your letters of hypothecation. A. We did.

Q. You were bound to give an overdraft up to how much up to 23rd September 1960.
A. Provided the account was being conducted satisfactorily and this applies to any account and not this one particularly, the agreed limit was Shs.140,000/-. 30

Q. You had agreed to lend up to Shs.140,000.00
A. Subject to their condition.

Q. Was the agreed limit ever increased.
A. Yes, on 29th September 1960 up to Shs.150,000/-

Q. The agreed time of the overdraft was to 30th April 1960.
A. Yes, provided the account was conducted to our satisfaction.

Q. So if the account was conducted to your 40

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Cross-examination continued

satisfaction Plaintiffs could have up to 30th April 1961 to repay it.
A. No the account would be subject to be reviewed on that day and subject to agreement could be extended.

Q. Up to 30th April 1961 if the account was conducted satisfactorily the Bank was bound to honour cheques up to Shs.140,000.00.
A. Yes provided the Plaintiffs were not drawing against uncleared effects.

Q. What do you mean by an account conducted to your satisfaction.
A. It is general Banking practice. From an inspection of our accounts records a Bank may find that a client is paying in to his account certain sums of money which would not normally be earned from or be of value likely to arise from the type of business which it is undertaking. Another reason a client may issue cheques knowing full well they will overdraw his account without first having made satisfactory arrangements with his banker. There are many more reasons of this nature.

Q. So anything the Bank finds unsatisfactory entitles the Bank to close the account.
A. Yes after investigations.

Q. And immediately repayment can be demanded.
A. Yes.

Q. In spite of the facts that the overdraft is to a particular period. A. Yes.

Q. Even though a date for repayment has been agreed.
A. A date when the facility is to be reviewed has been agreed.

Q. In this case were you entitled to demand repayment of the money at any time. A. Yes.

Q. Even if the account was conducted satisfactorily.
A. Every overdraft is repayable on demand.

Q. With this case whether or not the account was conducted satisfactorily, were you entitled

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to demand repayment at any time. A. We were.

Q. So according to you if Plaintiffs arranged for an overdraft up to 30th April 1961 and they drew Shs.50,000/- in June 1960 you would be entitled to demand full payment in 1960.
A. We would.

Q. Would you also be entitled to seize the goods on that date.
A. Yes if a letter of hypothecation had been signed by that date. 10

Q. Whether or not the account was conducted to your satisfaction Q. In that case the person who has agreed for an overdraft up to a particular time is in a dangerous position.
A. The Bank would not do that.

Q. It is the right of the Bank. A. Yes.

Q. When you acted on 6th October 1960 and seized the goods did you act under a letter of hypothecation or because the account was not conducted satisfactorily. 20
A. Because of both.

Q. Your Bank does not register these letters of hypothecation. A. It does not.

Q. One result is that if the client commits an act of bankruptcy you loose your security.
A. Provided the Bank seize the goods before the act of bankruptcy they are protected by the letter of hypothecation.

Q. Do your letters of hypothecation contain a clause entitled seizure after an act of bankruptcy. A. They do not. 30

Q. Exhibit 14 you signed this. A. Yes.

Q. 2nd para. should remain outstanding, what does that mean,
A. I have given the explanation it could be demanded at any time.

Q. The provision were you not saying that apart from these two conditions the money was not repayable until 30th April 1960.
A. This letter was drafted by the Banks 40

advocates as we were replying to an advocates letter.

Q. When did you get this reference to "commit an act of bankruptcy" from.
A. As I said this letter was drafted by our Solicitor.

Q. Did you give instructions to your advocates.
A. We sent Exhibits 13 14 to our advocates to deal with and they could ask us any information they required to draft their reply.

Q. Are you in a position to explain where your advocates got an act of bankruptcy form. A. No.

Q. Do you agree with what is stated in para.2.
A. I do not want to observe on the Banks advocate's letter.

Q. Do you say the para is correct.
A. I would say that one part is left out that is that an overdraft is repayable on demand.

Q. The security documents were handed to you on 6th and the goods were seized on the same day. A. Yes.

Q. Did you go to the premises. A. No.

Q. Did the same happen in the case of the Sundry Silk Stores.
A. I cannot say the account was not conducted by me it was not with my branch.

Q. You took part.
A. Yes under instructions.

Q. In that case negotiations took place on 14th July 1962 a guarantee was to be given on 18th July 1962.
A. I have no knowledge of that case nor have I read any correspondence in connection with it.

Q. Were you present on 14th July 1962 and 15th July 1962 at the premises.
A. Yes, I was present but I did not take part in any discussions. This account was with our Delamere Avenue Branch.

Q. On 21st September 1960 the state of the

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John Rae Williamson 11th and 12th October 1962 Cross-examination continued

account was at the close of business Shs. 128,052/18. A. Yes.

Q. And the agreed overdraft was Shs.140,000/00.
A. Yes.

Q. And it was not increased to Shs.150,000/- until. A. 29th September.

Q. When a cheque is drawn on an overdrawn account it is brought to the sub-manager or manager.
A. Yes the 1st accountant in the absence of the manager. 10

Q. So the agreed limit could not be exceeded unless you or the manager have authorised it.
A. This is correct.

Q. On 23rd September the overdraft reached Shs.141,248/12. A. Yes during the day.

Q. That was done under your authority.
A. Yes or in my absence the other two people.

Q. Do you remember this incident of 21st September when the overdraft went over the limit. 20
A. I remember at that time I was told either by a Broker or the supervisor or the overdraft department that the firm had stated they were receiving funds in the immediate future.

Q. When did you make your statement to your advocate. A.It was some months ago.

Q. Did you tell your advocate about funds being expected.
A. I cannot remember that was the position. I can remember that cheques had been issued and 30 presented to the Bank for payment before I was informed about the expected arrival of the funds, and no arrangement had been made by the plaintiffs at the time the cheques were received which would overdraw the account beyond the limit.

Q. Did you authorise the payment before or after the cheques were presented. A. After.

Q. Had the Plaintiffs told you they were expecting funds. 40

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A. The Plaintiffs first told me they were expecting funds on 29th September 1960.

Q. And before that.
A. Such information was passed on to me by Senior members of my staff.

Q. Who were they.
A. Mr. Pandya Mr.P.Patel and Mr. Nagesh.

Q. All three. A. Yes at different times.

Q. Between what dates.
10 A. 23rd September and finished the arrangements on 29th September 1960.

Q. Prior to that the conversation were between Mr. Nagesh Mr.P.Patel and Mr.Pandya.
A. Yes and conveyed to me by them. Their consultations were necessary as I had only been stationed in Kenya for a little over a month.

Q. Then did you take over the sub-managership.
A. Towards the end of August 1960, on 28th or 30th.

20 Q. Did the first conversation take place on 23rd September 1960.
A. Round about that day yes.

Q. As a result of the conversation a cheque for Shs.4,229/20 was met.
A. Yes I think that was so.

Q. By its number it seems to be a post dated cheque. A. Yes.

Adjourned to 10.30 a.m. tomorrow.

James Wicks J.

30 10.30 a.m. Friday 12th October 1962.

Court resumes as before.

Witness reminded of his former oath for further Cross-examination.

Q. Can you tell me when Identification 2 was entered in your Register. A. I cannot.

Q. From 23rd September 1960 the overdraft

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continued over Shs.140,000.00. A. Yes.

Q. During that period cheques were being presented and met. A. This is so.

Q. All these cheques before they were met or cashed would be brought to you as the manager for sanction. A. That is correct.

Q. On 27th September 1960 the overdraft rose to Shs.148,868/43. A. Yes.

Q. Plaintiff says on 26th September that he had a conversation with Mr. P. Patel and the overdraft was raised from Shs.145,000/- to Shs.150,000/-. Do you say Mr. P. Patel some other official did not come to you as the manager and obtain sanction for an increase over Shs.145,000/-. A. They did not.

Q. Some cheques were presented after 27th increasing the overdraft further - How was that.
A. That was allowed because of the promise on 23rd by Plaintiffs that funds were expected in a near future.

Q. So a promise was made on 23rd September.
A. I agreed to allow funds over the overdraft figure of Shs.140,000/- on the Plaintiffs assurance of the arrival of funds but I did not increase the overdraft.

Q. You say Plaintiffs said they expected immediate receipt of funds When did you expect them.
A. Within 4 or 5 days.

Q. You never received these funds.
A. We did not.

Q. Did you write any letter to Plaintiffs on this.
A. No. I called Plaintiffs to my office and asked for an explanation.

Q. And explained over.
A. I received an explanation that the funds were further delayed.

Q. You say that on 29th September you handed Plaintiffs new security documents.
A. Not me. Some one in the overdraft department did.

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Q. You did not hand over these documents.
A. I did not.

Q. Did you make any request to Plaintiffs.
A. I requested the immediate return of the documents after execution.

Q. You did not hand this over.
A. No I do not control documents that is done by members of my staff.

Q. Had the documents been handed over when you made the request.
A. Yes. They were handed over in my presence in my office but not by me personally.

Q. Who was present at the time.
A. Mr.P.Patel, 1st and 2nd Plaintiffs and Mr. Dhanjee Verjee.

Q. Was it you who made the request for execution and return of the documents. A. I did.

Q. What did you say.
A. I told them I had agreed to grant the overdraft. Please execute these documents and return them immediately.

Q. Who brought these documents into your office.
A. I do not remember one of my staff brought them in and put them on the table. Mr. P. Patel did not bring them in or hand them over.
A. He did not.

Q. You had two of the Plaintiffs in your office did it not occur to you to get their signatures at once.
A. It did not there were five partners of the firm.

Q. Did Dhanjee Verjee take part in the conversation. A. He did.

Q. What did he say.
A. He offered to guarantee a further overdraft of Shs.5000/-.

Q. Was this before or after the documents were handed over. A. Yes.

Q. You rejected the offer of the guarantee and agreed to accept the documents.

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A. The guarantee was not in respect of the amount covered by the document.

Q. What was it.
A. An additional amount above Shs.150,000/-

Q. Were the documents handed over by Mr. P. Patel.
A. I cannot remember who handed them over.

Q. It may have been Mr. P. Patel.
A. It could be.

Q. Do you remember which Plaintiff received them. A. I cannot. 10

Q. Did you speak in English.
A. 90% in English.

Q. The request to return the documents was that in English. A. Yes.

Q. It was not interpreted.
A. It may have been to 1st Plaintiff 2nd Plaintiff appeared to understand English.

Q. When did you expect the documents back.
A. The same day or following day. 20

Q. Not receiving them what did you do.
A. I gave instructions for Mr.Pandya to call at Plaintiffs premises and ask them to return the documents duly executed.

Q. These directions only given to Pandya.
A. At first.

Q. Were these requests made every day.
A. Yes until the morning of the 6th.

Q. Always to Pandya.
A. Chiefly to him. 30

Q. What explanation was given.
A. Mainly that the matter was being attended to.

Q. Who gave the explanation. A. Mr.Pandya.

Q. And no one else.
A. I cannot say for sure as it is over two years ago.

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Q. During this period cheques were being presented and met. A. They were.

Q. And they were coming to you for sanction. A. Yes they were.

Q. Did it not occur to you to stop the cheques seeing Plaintiffs were not fulfilling the promise. A. It did not. I had no reason to believe the promise would not be fulfilled.

Q. You wrote no letter. A. I did not.

10 Q. Did not the failure to return the documents cause you concern. A. It did.

Q. And you took no action other than instructing Pandya. A. I sent fresh documents in the morning of 6th.

Q. I put it to you the conversation you say took place on 29th September is a complete fabrication. A. I disagree.

Q. You made no note or memorandum of the meeting. A. No. It is not practice to do that.

20 Q. There are no letters from your bank between 23rd September and 6th October 1960 demanding repayment of the overdraft. A. I agree the written demand was made on 8th October.

Q. No written demand for repayment of the overdraft was made to Plaintiffs between 23rd September and 5th October 1960. A. I agree.

Q. The first written demand by the Bank for repayment or reduction of the overdraft was on 8th October 1960. A. I agree.

30 Q. Prior to 6th October 1960 what were you demanding. A. From close of business on 3rd October 1960 we were demanding reduction of the overdraft to Shs.140,000/-.

Q. Did you make any demands before 3rd October. A. No.

Q. At any time did you make a written demand for reduction of the overdraft. A. We did not.

Q. Exhibit C.8. That was not a request for

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Defendant's Evidence

No.14

John Rae Williamson
11th and 12th October 1962
Cross-examination continued

reduction of overdraft. A. I agree we were asking for repayment of the whole.

Q. No letter was even written by you mentioning this meeting of 29th September 1962.
Q. You are aware of Exhibit C.2 3 and 4 although that was before you became sub-manager.
A. I am aware of those letters.

Q. I put it to you that the reason why no written demand was made for reduction of the overdraft was because it had been over authorised by the Bank. A.It was up to Shs.150,000/-. 10

Q. And over Shs.150,000/- up to 5th October.
A. Yes that had to be because unpaid bills had to be debited to the account.

Q. So even over Shs.150,000/- cheques were being met. A. I have said in most cases the Bank had no option, the account had to be debited with unpaid bills.

Q. But in the first instance you were not forced to debit the account with unpaid bills. 20
A. I am not in charge of bills, I am not concerned with the Bills discounting department the Manager deals with that.

Q. You say amount of the excess was caused by unpaid bills, Look at Exhibit E 1st October cheques were met. A. Yes.

Q. Any unpaid bills on that date. A. No.

Q. How many years experience of Banking.
A. 25 years inclusive of army service with the Bank 4 years with another Bank. 30

Q. In your experience any incident when securities have been taken in blank. A. No none.

Q. Are equitable mortgages usually left undated.
A. I have no personal knowledge of that.

Q. When did you give instructions to seize the goods on 6th. A. It must have been very shortly after 1.0 p.m.

Q. Just before you had received additional security documents. A. Yes.

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Defendant's Evidence

No.14

John Rae Williamson
11th and 12th October 1962
Cross-examination continued

Q. When. A. About 11.0 a.m.

Q. When did you see 1st and 2nd Plaintiffs.
A. They were in my room when I was informed that the documents were returned.

Q. Who were in your room. A. 1st and 2nd Plaintiffs, Mr.P.Patel, Mr.Dhanjee Verjee and myself.

Q. And you received information - that the documents had been signed. A. Yes.

10 Q. How long were they in your room?
A. A long time - ¾ of an hour, perhaps longer.

Q. What part did the 1st Plaintiff take?
A. Anything he said was translated by Mr.P. Patel.

Q. Can you remember anything he said?
A. No, he took part in the conversation and it was being conveyed to him by Mr.P.Patel.

Q. Did you address any remark to 1st Plaintiff through Mr.P.Patel. A. I cannot remember, it
20 was two years ago.

Q. You are sure 1st Plaintiff was there? A.Yes.

Q. I put it to you he was not there.
A. I remember he was on the right facing and the 2nd Plaintiff was in the centre and Mr. Dhanji Verjee was on the left as I looked at them.

Q. When they were in your office, did you come to a decision to seize the goods? A. I did not.

30 Q. When did you decide?
A. Immediately they had left, I called on the Manager. After discussion with the Manager, I decided.

Q. How long after they left that you decided to seize the goods? A. Within half-an-hour.

Q. On the morning of the 6th October, the position was that you held securities for Shs. 140,000/- and by 12.00 midday you held securities for Shs.150,000.00. A.That is correct.

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Defendant's Evidence

No.14

John Rae Williamson
11th and 12th October 1962
Cross-examination continued

Q. Had you seized the goods at 8.00 on the 6th you would have been unsecured creditors for Shs.12,517.86?
A. That is correct.

Q. Had any act of bankruptcy been committed, you would be unsecured to that amount?
A. I agree.

Q. Up to the time the Plaintiffs left you you were satisfied with the security you had for Shs.150,000.00? A. Far from it; I had become alarmed. 10

Q. What alarmed you?
A. The sight of that document (Exh H) and thinking back, I realised all that had happened the in past 12 days was unsatisfactory.

Q. Instance this?
A. First, the composition document Exhibit H.

Q. Then what? A. The delay in returning the document.

Q. Then what? 20
A. The non-receipt of funds which had been anticipated.

Q. No.4? A. These were the main ones.

Q. Before the morning of the 6th, you were not alarmed? A. Not unduly alarmed.

Q. So far as the receipt of the documents was concerned, the position was materially improved you had then? A. Yes.

Q. As far as the non-receipt of the funds, you were to that? 30
A. No, we were still assured that they were coming.

Q. The only new element was this document Exhb. H?
A. Yes, but it made me re-evaluate what had happened previously.

Q. I put it to you that Exhb.H was not handed over to you that day. A. It was.

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.14

John Rae Williamson 11th and 12th October 1962 Cross-examination continued

Q. So that an unsigned document was enough to alarm you? A. It was; it was a peculiar letter to put before a bank when you are asking for an overdraft.

Q. I put it to you that Exhb.H was brought to your office sometime after 8th October.
A. It was not.

Q. No one would be mad enough to bring such a document on the day fresh security documents were executed.
A. That was what alarmed me about it.

Q. Exhb. C.6 you dictated this?
A. That, or I wrote it out.

Q. And had it typed? What did you do?
A. I must have warned Mr.Scott to stand by as it was during the lunch period.

Q. What was during the lunch period.
A. My interview with the manager ended close to 1.0 p.m., so the letter and Mr.Scott was after that.

Q. Instructions were given to Mr.Scott only.
A. Others went I to Mr. P. Patel that Mr. Scott was in charge.

Q. Did you give these instructions together or individually.
A. I cannot remember it is two years ago.

Q. Did you give instructions to Mr. P. Patel.
A. Yes, it was necessary to get a number of the staff to organize the movement of the goods.

Q. To whom did you handover Exhibit C.6.
A. I think to Mr.Scott.

Q. Are you sure. A. No.

Q. What were the instructions.
A. To see if the partners would sign it.

Q. And if they would not To seize the goods.
A. Yes.

Q. You know Mr.Saunders. A. Yes he is manager of the River Road Branch.

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Defendant's Evidence

No.14

John Rae Williamson 11th and 12th October 1962 Cross-examination continued

Q. He was there and still is. A. Yes.

Q. What happened.
A. He called in as he usually does after lunch and as he was not busy, I asked him to go Plaintiffs premises and see how things were progressing.

Q. He has a beard. A. Correct. A. Yes.

Q. If Exhibit C.6 was explained to them did you expect the Plaintiffs to sign it voluntarily.
A. I can only say I have taken such letters personally on many occasions and had them signed voluntarily, and I had no reason to believe this one would not be signed voluntarily. 10

Q. Was such a letter signed by the Sundry Silk Stores? A. It was not.

Q. Did you ever offer to return the goods?
A. Yes, we asked Plaintiffs to enter into discussions regarding the return, but without such discussions, nothing could happen.

Q. The only offers were by letters? 20
A. Yes, in connection with the return of the goods.

Q. It was put to you that after 6th October the Plaintiffs made no payments.
A. In reduction of the overdraft but payments were made and the account shows that.

Q. Were you expecting the Plaintiffs to make any payments after 6th October?
A. It has happened that clients make other arrangements allowing them to pay off the overdraft. 30

Q. Do you know if the Plaintiffs had any other assets?
A. I know that they are concerned with another firm but they bank with another bank.

Q. Shs.16,702.80 on 22nd December 1961 was proceeds of sale of stock?

Q. Did you give Plaintiffs opportunity to reduce the overdraft .
A. We gave them every opportunity.

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Defendant's Evidence

No.14

John Rae Williamson
11th and 12th October 1962
Cross-examination continued

Q. The Inventory; The goods were seized on 6th October? A. Yes.

Q. There was nothing to prevent the Bank from making an inventory?
A. It is very difficult for the Bank to make an inventory of price goods, part rolls and various materials.

Q. There was nothing to prevent you from making an inventory? A. I agree.

10 Q. Why not make a list of the goods and send it to Plaintiffs?
A. We asked them to come and assist us to make an inventory.

Q. On 6th October? You had securities to the amount of Shs.150,000.00. A. Yes.

Q. Building Shs.150,000.00; goods Shs. 200,000.00 were you aware on 6th October 1960 that there was an option on the plot given to Jesang Popat & Co. for Shs.180,000.00?
20 A. As far as I am aware, I was not aware of the option until later.

ADJOURNED TO 3.0 p.m.

Sd. James Wicks J.

3.0 p.m. Court resumes as before.

Witness reminded of his former oath for further cross-examination.

Q. Exhb.C.6: You prepared this and had it signed? You said that you expected it to be signed. A. I hoped it would.

30 Q. You did not expect it?
A. I did not know whether it would be signed or not. I cannot say whether I expected it to be signed or not.

Q. You gave no warning of the removal of the goods? A. Did not.

Q. Because had you done so, you expected the goods to be removed? A. Yes, I did.

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Defendant's Evidence

No.14

John Rae Williamson 11th and 12th October 1962 Cross-examination continued

Q. On 6th October, 1960, you had the plot which was valued on a slip of paper at Shs. 150,000.00? A. Yes.

Q. There was an option on the plot for Shs. 180,000.00? A. Yes. I heard of that later.

Q. So the value was Shs.180,000.00?
A. As I understand it the price of Shs. 180,000.00 was subject to change of user being obtained.

Q. And that was eventually obtained? 10
A. Yes, on the change of user being obtained.

Q. The proceeds were about Shs.146,000.00?
A. Yes.

Q. Costs and expenses were deducted to arrive at this? A. Yes.

Q. In addition to the plot, you were given 3 or 4 policies of assurance? A. Yes.

Q. About 25th August 1960, (Exhb.O) you received this statement of stock as in June 1960?
A. I would say from the marking on it, the Bank did receive this. 20

Q. This showed stock amounting to about Shs. 300,000.00? A. That is so.

Q. You thought it right although you had all this security to take over the stock and close the shop? A. We considered it necessary.

Re-examination

RE-EXAMINATION:

Q. The plot given as security: the option was subject to change of user. What is your experience of value without change of user? 30
A. I could not; it might be extremely difficult to find a Purchaser.

Q. Then you would be left with your letter of hypothecation and no other security?
A. That is so.

Q. You hoped that Exhb.C.6 would be signed: how long have you been concerned with letters of hypothecation? A. Since 1949.

Q. Are they in common use in Banking?
A. Yes, one time used in Aden, India and Pakistan.

Q. You are used to handing letters of hypothecation since 1949? You have also, you say, been used to obtaining. Letters similar to Exhbt.C6 from the client to the Bank?
A. We always try to obtain them.

Q. Has your bank been experiencing difficulty in seizing goods subject to Letters of Hypothecation? A. We have been experiencing difficulty in recent months.

Q. Has that been experienced generally or only recently?
A. Only recently, in the last four months.

Q. During the last four months, has any of your constituents queried your rights under Letters of Hypothecation?
A. By only the last four months, I mean physical obstructions to our taking over goods under letters of Hypothecation.

Q. You explained that on 29th September, 1960, fresh security documents were handed over to 2nd Plaintiff in your office. You also say that 1st and 2nd Plaintiffs were present in your office on that day ......
A. Oh, no, Only the 2nd Plaintiff was present in my office on 29th September, 1960; it was on 6th October that the 1st and 2nd Plaintiffs were present in my office, when the draft letter Exhb.H was handed to me.

NAZARETH: Lindsay said 'Are you not confusing the morning of 29th September with the one of 6th October.'

LINDSAY: I did not say that but it was after the witness said no. I am entitled to clear up any confusion.

NAZARETH: The witness said Mr. P. Patel, 1st and 2nd Plaintiffs and Mr.Dhanji Verjee were present on the 29th September. (Reads Record).

COURT: It is preferable for the Court Record to be read. Agreed part P.P.54/55/56 marked blue read.

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Defendant's Evidence

No.14

John Rae Williamson 11th and 12th October 1962 Re-examination continued

LINDSAY: Q. There is a conflict in the record with what you said in evidence in chief and in cross-examination.
A. In the earlier part of what was read out just now, reference was made to the anticipated funds being still further delayed; this took place on 6th October, 1960 and I think I must have been misled here by this by this approach. In addition, Mr. Dhanji Verjee only called upon me on one occasion, the 6th October. During this meeting, I was shown the draft proposals to be forwarded to the creditors. Had I been shown this document on the 29th September, stocks would have been seized on that date and not on the 6th October.

Q. Who was present on the morning of the 29th?
A. The 2nd Plaintiff. No other member of the Plaintiff firm was present. Mr.Nagesh was also present. No one else.

Q. Who was present on the 6th October?
A. 1st and 2nd Plaintiffs, Mr.Dhanji Verjee and Mr. P. Patel.

Q. What happened on the 29th and what happened on the 6th?
A. On the 29th, an increase to Shs.150,000/- was granted to the Plaintiffs on the understanding that security documents handed to them would be executed without delay and returned to the Bank.

COURT: Where the security documents handed over to anyone?
A. They were handed over to the 2nd Plaintiff.
(Witness continues): At the meeting on the 6th October at more or less the commencement Mr. Nagesh came into my room and in the presence of the 1st and 2nd Plaintiffs and Mr. P. Patel and Mr. Dhanji Verjee and handed over the security documents to secure the additional overdraft. Then there was the production of the letters to creditors and all that prevailed which is on record.

Q. What you tell the Court now is the truth.
A. Yes.

Q. Anything you said in cross-examination which varies with what you say now Say you did not intend to make any variation. A. That is so.

Adjourned to date to be fixed by Registrar.

James Wicks J.

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.15

John Ronald Scott
16th October 1962
Examination

10.30 Tuesday 16th October 1962.

Court resumes as before.

NO.15

EVIDENCE OF JOHN RONALD SCOTT

JOHN RONALD SCOTT sworn in English.

I have been employed by Defendant Bank since 1951 and I have been in Kenya since 1956. I was employed at the Government Road Branch from April 1960 to November 1961. I am now at the
10 Delamere Avenue Branch.

On 6th October 1960. Mr. Williamson asked me to stand by this was shortly before 1.0 p.m. At about 2.15 p.m. as a result of Mr.Williamson's instructions I went to the Plaintiffs premises in Bazaar Street. Mr. Williamson had given me a letter Exhibit C.6 is the one. The letter Exhibit C.6 had the typing on it. I went into the Plaintiffs premises with Mr. P. Patel, our broker, Mr. Pandya was there. I cannot remem-
20 ber if he went with me or was at the premises 2nd Plaintiff was there and I saw 1st Plaintiffs later at the premises. I think 3rd Plaintiff was there I am not sure. I gave Exhibit C.6 to 2nd Plaintiff and Mr. P. Patel who speaks Gujarati was with me and 2nd Plaintiff and Mr. P. Patel conversed in Gujarati.. After talking for some time with Mr. P. Patel 2nd Plaintiff signed the letter Exhibit C.6 I saw an addi- tion sewing machine and spares in ink it
30 was not there when 2nd Plaintiffs signed it. The tune of conversation between Mr. P. Patel and 2nd Plaintiffs was normal and in my opinion Exhibit C.6 was signed by 2nd plaintiff voluntarily. Had Exhibit C.6 not been signed I would have referred back to Mr. Williamson. At the time when Exhibit C.6 was signed none of the goods had been removed. After the letter had been signed we started to remove the goods. Whilst the goods were being
40 removed the Court Broker came with a distress He was claiming Shs. 6,100.00 rent. Mr. P. Patel phoned Mr.Williamson and shortly after Mr. Williamson phoned me and instructed me to give the Court Bailiff a letter signed on behalf of the bank undertaking to pay the rent. Exhibit C.5 is the letter I gave the Court Broker. I understand that all the goods we removed had

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.15

John Ronald Scott 16th October 1962 Examination continued

been hypothecated to the Defendant Bank and no suggestion was made to me personally that the goods removed were not hypothecated to the Bank. I had spoken to 2nd Plaintiff once before 6th October 1960. I spoke to him in English and he replied in English.

CROSS-EXAMINATION:

Cross-examination

Q. How long after you started the goods did the court broker arrive.
A. About 10 minutes after. 10

Q. At about what time was that.
A. I would say at about 2.45 p.m.

Q. When did you arrive, at the premises.
A. At about 2.20 p.m.

Q. How many lorries arrived. A.Two I think.

Q. Did you arrange for them personally.
A. No.

Q. You say all the goods removed were hypothecated to the Bank, had you made any arrangements personally with the Bank. A. No. 20

Q. You do not know what goods were hypothecated.
A. I understood all the goods on the premises were hypothecated.

Q. Were the instructions to removal all the goods on the premises. A. Yes.

Q. That is why you say all the goods removed were hypothecated. A. Yes.

Q. When did you speak to 2nd Plaintiff before.
A. A week or so before.

Q. What was it about. 30
A. As far as I can remember he asked if one of his firms cheques had been met.

Q. You cannot remember the date. A. No.

Q. Do you attend at the bank. A. No.

Q. Did he come alone. A. Yes.

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.15

John Ronald Scott
16th October 1962
Cross-examination continued

Q. What was your position at the time.
A. In charge of deposit accounts.

Q. Do you sit at a counter.
A. I have a small cubical

Q. The information could have been obtained at the counter.
A. Yes if access could be had to the books. I believe the cheques was with Mr.Williamson.

Q. Do people usually ask such questions.
10 A. Quite often.

Q. Do you speak Gujarati or Hindustani.
A. I passed an examination a long time ago.

Q. Did you speak to Plaintiffs on 6th October.
A. Only to ask him to sign the letter.

Q. Did you speak to Mr.P.Patel before about the letter Ex.C.6. A. I did not.

Q. Are you sure of it. A. Yes.

Q. Was Exhibit C.6 signed by 1st Plaintiff immediately after you entered the premises.
20 A. Signed by the 2nd Plaintiff.

Q. When. A. About 4 minutes after I entered.

Q. Was it signed by 1st Plaintiff in your presence. A. No.

Q. Anyone else take part in the discussion between 2nd Plaintiff and Mr. P. Patel before 2nd Plaintiff signed. A. Mr. Pandya was there.

Q. Did Mr.Pandya take part in the conversation.
A. I believe he did.

Q. Was it Gujarati or Hindustani.
30 A. I could not say they spoke quietly.

Q. What happened to Exhibit C.6 when 2nd Plaintiff had signed it.

A. It was left with Mr. P. Patel.

Q. Was 1st Plaintiff there when 2nd Plaintiff

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.15

John Ronald Scott
16th October 1962
Cross-examination continued

signed the letter. A. No.

Q. Was he in the shop. A. I did not see him.

Q. Do you recall seeing 1st Plaintiff.
A. Yes, I saw him shortly after the letter was signed by the 2nd Plaintiff.

Q. Can you say how long after. A. No.

Q. Could it be half an hour - an hour?
A. I cannot say.

Q. When did you leave the premises.
A. Sometime between 5.30 and 6 p.m. 10

Q. What were you doing on the premises, directing the removal of the goods? A. Yes.

Q. Who came from the Bank?
A. Myself Mr.P.Patel, Mr.Pandya, clerk from the Govt. Road Branch; Mr.Saunders came later on.

Q. When did Mr.Saunders come?
A. Shortly after we arrived.

Q. Mr.Saunders has a beard? A. Yes.

Q. Were you and Mr.Saunders the two European?
A. Yes. 20

Q. Mr.Saunders entered the premises. A. Yes.

Q. Did Mr. Saunders carry a gun?
A. I do not remember seeing him with a gun.

Q. Have you ever seen him with a gun?
A. One always has to carry one when carrying cash.

Q. Have you ever seen Mr.Saunders carry a gun?
A. I cannot recall that.

Q. Did you take part in the Sundry Silk Store seizure? A. Not in the actual seizure. 30

Q. Were you there on the Saturday. A. Yes.

Q. On the Sunday?
A. I was outside the premises then.

Q. Was Mr. Saunders there.
A. Yes, I saw him on the Saturday and the Sunday.

Q. On 6th October, 1960 was Mr.Saunders wearing something like a police badge?
A. I do not remember him wearing a badge at all.

Q. Mr.Saunders is in the Kenya Police Reserve?
A. I believe he was.

10 Q. Was there any trouble over the seizure of the goods. A. There was not.

Q. Was there any need for Mr.Saunders presence on the premises?
A. Not that I am aware of.

Q. Mr. Saunders was, at that time, attached to the River Road Branch? Regarding River Road ....

<u>LINDSAY</u>: I object to any question relating to the River Road incident on two grounds. 1st, the facts of that case are irrelevant to the facts in this case and 2nd, facts are irrelevant to testing credibility. Plaintiffs have bought no evidence relating to the River Road incident. 20

<u>NAZARETH</u>: I do not press the matter.

Q. Have you ever before obtained a signature to a letter similar to Exhb. C.6.
A. No this is the only occasion.

<u>RE-EXAMINATION</u>: Re-examination

Q. You told the Court that Mr.P.Patel knew the contents of Exhb.C.6 and you do not recall speaking to Mr.P.Patel regarding the contents of Exhb. C.6. 30

<u>NAZARETH</u>: I object to any question related to a possible discussion before witness and Mr.P. Patel arrived at the premises.

<u>LINDSAY</u>: The allegation is that there was duress at the signing of this letter. I am entitled to re-examination relating to any

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No.15

John Ronald Scott
16th October 1962
Re-examination continued

conversation relating to the contents of this letter.

COURT: I cannot see that Mr.Nazareth's question goes to the allegation of duress it would seem to go to credit; as such the question in re-examination does not relate to cross-examination.

LINDSAY continues:

Q. You say you have never obtained signatures to a letter similar to Exhb. C.6 before. Was this the first time you have been in charge of a party seizing hypothecated goods? A. Yes. 10

Q. You say it is possible that Mr. Saunders was carrying a fire arm. To your knowledge, has Mr.Saunders a licence to carry a firearm. A. Yes.

No.16

Balwantrai Narbheram Pandya
16th October 1962
Examination

NO.16

EVIDENCE OF BALWANTRAI NARBHERAM PANDYA.

Balwantrai Narbheram Pandya sworn in English.

I have been employed by Defendant Bank for 10 years I am a supervisor. I went to work at the Government Road Branch in July 1959 and was there until April 1961, when I went on leave. In October 1960 I was assistant to Broker of the Bank. 20

On 6th October 1960 I went to the Plaintiffs premises in Bazaar St. at about 9.30 a.m. I went to collect from Plaintiffs a statement of affairs. I also went to collect some documents which had been handed to Plaintiffs by the overdraft department. I was on the Plaintiffs premises until 1.00 p.m. I did not receive the documents. I saw 1st and 2nd Plaintiffs on the premises and I spoke to them. We discussed the statement of affairs and the documents. Then Mr. Nagesh came and he received from the Plaintiffs the documents I had gone to get but I did not receive from Plaintiffs their statement of affairs 1st and 2nd Plaintiffs talked about 30

their overdraft situation and they said they wanted increased overdraft facilities. I told them that whatever arrangements they wanted to make they should make with the sub-manager, and 1st and 2nd Plaintiffs went off at about 11.00 a.m. to go to the Bank. I remained in the shop when Mr. Nagesh came he brought fresh documents which were completed by the Plaintiffs partners in my presence. By completed the 10 documents I mean signed them. I could not now recognize these documents.

When I was in the shop one of the partners of Shantilal Bros. came in. He spoke to 2nd Plaintiff and I understood that Plaintiffs had to pay money to Shantilal Brothers. Then one of the partners of Premchand Keshavji & Bros. came in and asked why I was sitting there. I did not hear what the partners said to Plaintiffs.

20 I returned to the Plaintiffs shop at about 2.30 p.m. I did this on the instructions of Mr. Williams. When I arrived the Bank Staff were there to collect the goods. The goods had not been touched then. When I arrived at 2.30 p.m. Mr. P. Patel, Mr.Scott, and Mr. Saunders were already there. They were discussing a letter to be signed by the Plaintiffs partners. I saw the 2nd Plaintiff sign the letter; he made no protest. I did not make a list of the goods.

30 About 2 weeks after the goods were seized I spoke to them on many occasions regarding this and also sent messages to them. I also spoke to them about the statement of their affairs. Exhibit C.6 is the document signed by 2nd plaintiffs, before 2nd plaintiff signed. Exhibit 6 Mr. P. Patel explained the letter to him in Gujarati. 1st Plaintiff was present when 2nd Plaintiff signed Exhibit C.6 I do not remember the words of the conversation between 2nd Plain- 40 tiff and Mr. P. Patel. Before 2nd Plaintiff signed Exhibit C.6 I was present when 1st Plaintiff signed Ex.C.6. Mr. P. Patel explained its contents to 1st Plaintiff.

Q. Were the words in ink then when 1st Plaintiffs signed Exhibit C.6.
A. When the sewing machines and spares were being removed Plaintiffs objected and asked if

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.16

Balwantrai Narbheram Pandya
16th October 1962
Examination continued

they were covered by the letter of Hypothecation. Mr. Williams the sub-manager was phoned by Mr. P. Patel and Mr. P. Patel then said that the sewing machine and spares were covered by the letter of hypothecation this was explained to Plaintiffs and the words in ink were then added and after they were added 1st Plaintiff signed it (Exb.C.6) 1st Plaintiffs understood the additions of the words Mr. P. Patel explained it to him. 10

I made a list of the goods about 2 months after the goods were seized. I did this when Plaintiffs failed to turn up to help make a list of items. This is the list I made Exhibit U. The goods had been packed into cases and stored in the Bank's godown.

I saw 1st 2nd and 3rd Plaintiffs at the Bank about a month after the seizure of the goods. Mr. Wintle was there, he is the manager. We discussed the goods seized and Plaintiffs said they would come when they had time 20 to list the stocks. There was also talk of giving the Plaintiffs Shs.10,000.00 of the seized goods provided the proceeds were credited to their account, the giving of goods under the proposal was to continue Plaintiffs having Shs.10,000/- of goods and paying in their getting other goods released.

I never went to plaintiffs shop before 6th October 1960. 30

Cross-examination

CROSS-EXAMINATION:

Q. On 6th October 1960 you arrived to Plaintiffs shop for the first time at about 9.30 a.m.
A. Yes.

Q. And left at about 1.0 p.m. to go to lunch.
A. I went to the bank and then to lunch.

Q. 1st Plaintiff was with you at the shop all the time from 9.30 a.m. to 1.0 p.m.
A. 1st Plaintiff drove me to the Bank at 1.0 p.m. 40

Q. At what time were the documents you went to collect handed over.

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.16

Balwantrai Narbheram Pandya
16th October 1962
Cross-examination continued

A. The signed documents were handed to Mr. Nagesh at about 10.30 p.m.

Q. Did any other documents remain to be signed after 10.30 a,m. A. I do not know.

Q. What was there to do at the shop after 10.30 a.m.
A. Traders were coming to the shop and talking to 1st Plaintiffs and the business seemed to be shaky and as 1st and 2nd Plaintiff had
10 gone to the Bank, I waited for their return.

Q. So you remained 2½ hours because creditors were coming to the shop to listen what was going on. A. Yes.

Q. How many creditors came to the shop apart from the two you mentioned.
A. No others came.

Q. Was 2nd Plaintiff in the shop when these creditors came.
A. This was between 9.30 and 10.30 a.m. 2nd
20 Plaintiff was there when I arrived also 3rd Plaintiff.

Q. Any one else there when you arrived.
A. I cannot remember.

Q. Know when 1st Plaintiff arrived. A. No.

Q. Did he arrive at 1.0 p.m.
A. No. He was there when they (1st and 2nd Plaintiffs) went to the Bank.

Q. When did 1st and 2nd Plaintiff return.
A. At about 1.0 p.m.

30 Q. Who remained. A. 3rd Plaintiff.

Q. No other creditors arrived.
A. No but Mr.Kantilal kept coming about every 10 to 15 minutes.

Q. Did you remain to see that no goods were removed.
A. I had that idea in my head.

Q. Who put it there.

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.16

Balwantrai Narbheram Pandya
16th October 1962
Cross-examination continued

A. The general situation was like that.

Q. No one spoke to you do that.
A. No.

Q. You remained from 9.30 to 1.0 p.m. No work to do at Bank.
A. When I am told to work I do not enquire for other work.

Q. Nobody instructed you to remain after 10.30 a.m. A. That is so.

Adjourned to 2.15 p.m. 10

James Wicks J.

2.15 Court resumes as before.

Witness reminded of his former oath for further cross-examination.

Q. On 6th October quite a number of documents were signed in your presence.
A. I saw them signed I did not examine them.

Q. First three partners signed.
A. I do not remember.

Q. Later the other two partners were sent for and signed. A. That I do not know. 20

Q. Who signed the documents first.
A. I do not remember I was talking to 2nd Plaintiff and said whatever Nagesh wants signed you get signed.

Q. Shortly after Mr. P. Patel came.
A. He did not come at all.

Q. That is between 9.30 a.m. and 1.0 p.m.
A. He did not come.

Q. Did either you or, Mr. Nagesh explain to Plaintiffs what documents they were being asked to sign. A. I did not. 30

Q. Did Nagesh explain. A. I do not know.

Q. Plaintiffs knew what they were going to do.

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.16

Balwantrai Barbheram Pandya 16th October 1962 Cross-examination continued

A. That I do not know.

Q. Did you see any policies of insurance.
A. No.

Q. Did you see the Plaintiffs affix their signatures on any policies of insurance.
A. I do not know.

Q. Do you know of policies of insurance were signed that day. A. No.

Q. No discussions took place in your presence
10 regarding signing of policies of insurance.
A. That is so.

Q. Is it not so that these partners signed and the other two were sent for and signed.
A. I do not know that.

Q. Were all five partners ever present in the shop. A. I do not remember.

Q. Did you or Nagesh ask for the documents to be signed.
A. Nagesh came I told 2nd Plaintiff what he came
20 for and then Nagesh dealt with it I do not remember what he did.

Q. What were you doing.
A. When Nagesh was dealing with the signing of the documents I spoke to the auditors who were then checking the Books of the Account.

Q. What part did Nagesh play in the signing of the documents.
A. I did not pay any attention to him.

Q. When did Nagesh leave the premises.
30 A. About 10.30 a.m.

Q. He arrived soon after you arrived.
A. No at about 10.00 a.m.

Q. And he brought the documents. A. Yes.

Q. Did you go to get these documents signed.
A. No, I went to get the statement of affairs and to get documents which had been signed.

Q. What documents.

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.16

Balwantrai Narbheram Pandya 16th October 1962 Cross-examination continued

A. I do not know Nagesh asked me to get signed documents.

Q. What did you ask Plaintiffs for.
A. Their statement of affairs and for the documents.

Q. What did you say.
A. I do not remember and they said auditors are working on the statement of affairs.

Q. Did the auditors remain until 1.00 p.m.
A. I went upstairs saw the auditors and came back and sat in the shop. 10

Q. How long did the auditors remain.
A. I do not remember.

Q. Did the auditors come whilst you were in the premises. A. I do not remember.

Q. When did 2nd Plaintiff return from the Bank.
A. About 1.00 p.m.

Q. How long had he been away.
A. Nearly two hours.

Q. 2nd Plaintiff came back and you were given a lift to the bank by 1st and 2nd Plaintiff. 20
A. Yes.

Q. And the shops were closed. A. Yes.

Q. The shops in the neighbourhood. A. Yes.

Q. Plaintiffs shop was closed when 1st and 2nd Plaintiff came back. A. Yes.

Q. And then they took you to the Bank.

Q. The two creditors who came have shops in the neighbourhood. A. Yes.

Q. They used to come to the shop from time to time. A. I cannot say. 30

Q. Both the creditors are customers of the Bank. A. Yes.

Q. And they know you. A. Yes.

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.16

Balwantrai Narbheram Pandya
16th October 1962
Cross-examination continued

Q. And Nagesh and Mr.P.Patel. A. Yes.

Q. And they were anxious to know what you were doing, in the shop.
A. I do not know they must have seen Nagesh came.

Q. When did 2nd Plaintiff go to the Bank.
A. About 11.0 a.m.

Q. Could be as late as 11.30 a.m. A. No.

Q. Why do you say that.
10 A. Immediately after Nagesh went Mr. Dhanji came there was a discussion and then 1st and 2nd Plaintiff and Mr. Dhanji went to the Bank.

Q. After Plaintiffs went to the Bank did the two creditors come back to the shop.
A. Yes. When the goods were being taken.

Q. Did they come before 1.0 p.m.
A. I do not remember.

Q. Anyone else came.
A. I remember one continue coming.

20 Q. I put it to you 1st Plaintiff did not go to the Bank he remained with you until the shop closed. A. He was not with me.

Q. Who was then.
A. 3rd Plaintiff and his younger brother.

Q. Morarji or Raghavji.
A. I could tell him by face I do not know the name.

Q. Did the younger brother remain there all the time.
30 A. I do not remember, I remember he was there at about 12.0.

Q. You and Nagesh were the only persons from the Bank who were there from 9.30 a.m. to 14.0.p.m.
A. That is so.

Q. Is there a in the Bank with a beard.
A. I do not know of one.

Q. Working in Securities department.

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.16

Balwantrai Narbheram Pandya 16th October 1962 Cross-examination continued

A. No, I am certain of that.

Q. Quite certain no person with a beard came to the shop from the Bank between 9.30 a.m. and 1.0 p.m. A. Quite certain No.

Q. Do you know Nobby Rodriques. A. Yes.

Q. Did he have a beard. A. No.

Q. What time did you go to the premises in the afternoon. A. About 2.30 p.m.

Q. The morning you say Nagesh and Plaintiffs and Mr. Dhanji were discussing the overdraft situation. What do you mean. 10
A. I meant they were discussing it in relation to the documents.

Q. What were they saying.
A. They (Plaintiffs) and Mr.Dhanji were talking about yesterday, what happened yesterday, they said you can tell what happened yesterday.

Q. Who said that.
A. Mr. Dhanji said to 2nd Plaintiff you can tell them what happened yesterday. 20

Q. When was the talk about increased overdraft facilities. A. When Nagesh was there.

Q. What did they say about overdraft facilities who wanted it. A. The Plaintiffs.

Q. Can you remember what was said.
A. No. All I can remember it was about increased overdraft facilities.

Q. Who do you mean by they. A. Plaintiffs.

Q. What was said.
A. I do not remember. Whilst Plaintiffs were talking with Nagesh I was talking to the auditors. 30

Q. Why did you say this morning that they talked about increased overdraft facilities.
A. Because they did, I said so, they discussed with Nagesh increased overdraft facilities.

Q. The afternoon Exhibit C.6. That was signed

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.16

Balwantrai Narbheram Pandya
16th October 1962
Cross-examination continued

in the office. A. Yes.

Q. Who made the request to sign it.
A. Mr. P. Patel.

Q. What did he say.
A. He said this is about the Bank taking over the goods Will you please sign this document.

Q. Who was the request made to.
A. 2nd Plaintiff.

Q. What answer did 2nd Plaintiff made.
10 A. He signed.

Q. No other talk took place. A. No.

Q. Did Mr. P. Patel have the document in his hand when he made the request. A. Yes.

Q. And he handed it over to 2nd Plaintiff.
A. Yes.

Q. What about 1st Plaintiff. Did you see him sign it. A. Yes.

Q. What was said to him.
A. After 2nd Plaintiff had signed the document
20 we started removing the goods and first we started removing the sewing machines, someone I do not remember who objected and said it does not cover the sewing machines. Then Mr. P. Patel telephoned the sub-manager.

Q. You were present when 1st Plaintiff signed Exhibit C.6. A. Yes.

Q. Was a request made to him to sign Exhibit C.6.
Q. Who was there when 1st Plaintiff signed
30 Exhibit C.6. A. I cannot remember.

Q. Was 2nd Plaintiff there. A. Yes.

Q. Wanting him sign it. A. Yes.

Q. Do you say nobody asked him to sign it.
A. That is what I have tried to explain when we tried to remove the sewing machines.

Q. I do not want to know about that. Did anyone

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.16

Balwantrai Narbheram Pandya
16th October 1962
Cross-examination continued

ask him to sign it.   A. No.

Q. No One.   A. Mr. P. Patel.

Q. What.
A. That is what I am trying to explain but you keep stopping me there was the discussions about removing the sewing machines then Mr. P. Patel phoned the sub-manager
Nazareth: Yes Yes.

Q. 2nd Plaintiff was there when 1st Plaintiff signed Exhibit C.6.   A. Yes.   10

Q. Immediately before 1st Plaintiff signed Exhibit C.6 was anything said to him.
A. I cannot remember.

Q. Can you remember what was said to 1st Plaintiff immediately before 1st Plaintiff signed Exhibit C.6.
A. Mr. P. Patel said that the Bank was taking possession of the goods including the sewing machines and he signed.

Q. Was that the only explanation given to 1st Plaintiff.   A. I do not know.   20

Q. Was a copy of Exhibit C.6 handed over to Plaintiffs.   A. I do not remember.

Q. Go back to when 2nd Plaintiff signed Exhibit C.6. It was handed over by Mr.P.Patel. He took it out of his pocket and said sign it.
A. I can only remember it was in his hand.

Q. The only person present were 2nd Plaintiff, Mr. P. Patel and you.   A. Yes.

Q. No one else said anything, to 2nd Plaintiff other than you Mr.P.Patel.   30
A. I do not remember.

Q. You listed the goods about 2 months after the seizure. You say you saw Plaintiffs to ask them about helping to make a list of the goods.
A. Yes. I saw them in their new shop I sent them messages.

Q. Was this a shop opened after 6th October.
A. Yes.

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.16

Balwantrai Narbheram Pandya 16th October 1962 Cross-examination continued

Q. Where is that.
A. Opposite Jevanjee Garden.

Q. That was after the seizure of the goods.
A. Yes.

Q. You wanted to get a list of the goods and a statement of affairs. A. Yes.

Q. You were still asking for a statement of affairs after the seizure. A. Yes.

Q. Did you get a statement of affairs on 6th
10 October. A. No.

Q. When the goods were removed no list was made.
A. That is so.

Q. There was something to prevent you or the Bank making a list of the goods.
A. We asked for their co-operation.

RE-EXAMINATION. None.

NO.17

EVIDENCE OF PRABHUDAS SHIVABHAI PATEL.

No.17

Prabhudas Shivabhai Patel 16th October and 28th November 1962 Examination

PRABHUDAS SHIVABHAI PATEL sworn in English

20 I am employed by Defendant Bank as an assistant Broker. I have been employed by Defendant Bank for the last 34 years. I first came into this matter on 19th September 1960. This was when Mr. V.J. Amin the other Broker went on leave. At that time the limit of the Plaintiffs overdraft was Shs.140,000/-. I came back from leave on 19th September 1960 and saw 2nd Plaintiff in the Bazaar on the next day 20th, 2nd Plaintiff had been told by the Sub-Manager to
30 submit his statement of affairs and I asked him if he had prepared it and submitted it. He replied that he was preparing it but it was not ready at that time. On the next day 21st seven cheques drawn by the Plaintiffs were returned by the Defendant Bank I went and saw the 2nd Plaintiff about these seven cheques and enquired of him why there no provision was made for these

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.17

Prabhudas Shivabhai Patel
16th October and 28th November 1962
Examination continued

cheques causing them to be returned. 2nd Plaintiff replied that this would never happen again. I asked the 2nd Plaintiff for the statement of affairs again and I asked him to satisfy the Bank that he would not cause cheques to be returned again. I told him he should get a third party to guarantee to the sub-manager that cheques would not be returned again, and Plaintiff said he would arrange for a guarantor. I advised the 2nd Plaintiffs that to keep a satisfactory account, he must always keep within the limit of his overdraft. On 24th September 1960, three days later another cheque was returned by the Bank as the Plaintiffs had not made provision for it. I went and saw the 2nd Plaintiffs and I said to him you are not carrying on the account as you promised on 21st and at the same time I reminded him of the statement of affairs, and of the Guarantor that he had promised.

I was not approached by any of the Plaintiffs for the purpose of obtaining an increase in the amount of their overdraft until the evening of 3rd October. Then 2nd Plaintiff asked me for an additional facility for Shs. 5,000. I told 2nd Plaintiff he had to see the sub-manager about the facility as I was not authorised to commit myself. I was seeing 2nd Plaintiff daily in the Bazaar that was from the time I returned from leave and all the time I was reminding him, after 24th September of the statement of affairs, they were always promised but never given. Plaintiffs had promised the sub-manager to give the statement of affairs and the sub-manager kept reminding me. On 30th September the sub-manager spoke to me and as a result of that on the evening of that day I saw 2nd Plaintiff in the Bazaar and told him that he had to complete the security documents and send them to the sub-manager. I do not know what these documents were I was only told by the sub-manager to remind him about the documents. 2nd Plaintiff replied that he would complete them and send them. I daily reminded 2nd Plaintiff of these documents until 5th October when 2nd Plaintiff told me in the Bazaar that his statement of affairs was rearly ready and he would sent it to the Bank in the

morning. The security documents were not mentioned by me to 2nd Plaintiff on 5th October.

Adjourned. Provisional date 2.15 tomorrow.

Should this date not be confirmed -

Adjourned to 10.30 a.m. Thursday 1st November 1962.

James Wicks J.

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.17

Prabhudas Shivabhai Patel 16th October and 28th November 1962 Examination continued

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI

10 CIVIL CASE NO.1516 OF 1961.

1. DHARAMSHI VALLABHJI
2. KESHAVJI DHARAMSHI
3. BACHULAL DHARAMSHI
4. MORARJI DHARAMSHI and
5. RAGHAVJI DHARAMSHI
all trading as "DHARAMSHI VALLABHJI & BROS." ... PLAINTIFFS

versus

20 NATIONAL & GRINDLAYS BANK LIMITED ... DEFENDANTS

10.40 a.m. Wednesday, 28th November, 1962.

Court resumes as before.

PRABHUDAS SHIVABHAI PATEL, sworn for further cross-examination in chief.

Cross-examination

I have given evidence of events up to about midday on 5th October. After seeing Mr. Keshavji, Plaintiff No.2 on the evening of 5th October as a result of something I heard in the Bazaar I decided to make enquiries on the follow- 30 ing day. On the morning of 6th October I gave instructions to Mr. Pandya to go to Plaintiff's shop to try and obtain their statement of affairs. At about 11.30 a.m. on the same day, 6th, Mr. Dharamshi 1st Plaintiff, Mr. Keshavji 2nd Plaintiff and Mr. Damji came to our office.

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.17

Prabhudas Shivabhai Patel 16th October and 28th November 1962 Cross-examination continued

Mr. Keshavji said, "here is Mr.Damji who is prepared to stand as a guarantor for us." I took them all to the sub-manager, Mr. Williamson and I was present there for the major part of the interview. Soon after the interview started Mr. Nagesh came in and told Mr. Williamson that the security documents were signed. Mr. Keshavji 2nd Plaintiff, told Mr. Williamson that here was Mr. Damji who will stand as a guarantor for us. Mr. Williamson asked Mr. Damji if he was prepared to guarantee the whole overdraft and Mr.Damji refused to do that saying he was prepared to stand as guarantor for a fresh overdraft of Shs. 5,000/-, if the Bank was prepared to grant it. Mr. Williamson refused to do this, and in view of this failure to procure the funds anticipated immediate reduction of the overdraft to Shs. 140,000/- was requested. Mr. Keshavji 2nd Plaintiff, said that he could not reduce the overdraft as required, and then considerable discussion took place - ultimately Mr. Damji produced a letter and gave it to Mr. Williamson.

I did not see the letter but from the discussion I understood that the letter was a draft which the Plaintiffs intended to submit to their creditors. Mr. Williamson was surprised and said that no previous information had been given to the Bank of this and they, the Plaintiffs, had always been assuring them that funds were going to come in. Mr. Williamson took a serious view of the situation. The meeting ended at about 12.30 p.m. with a further demand by Mr. Williamson that the Plaintiffs reduce their overdraft to Shs. 140,000/-. I left Mr. Williamson with 1st and 2nd Plaintiffs and Mr. Damji. At about 1.00 p.m. on the same day, 6th, Mr.Williamson called for me just as I was going to lunch and asked me to report to him at 2.00 p.m.

At 2.00 p.m. I reported to Mr.Williamson and Mr.Scott was also present. Mr.Williamson instructed Mr. Scott and myself; as a result of which I and Mr. Scott and a party went to Plaintiffs' premises in Bazaar Street. Mr. Scott was in charge and had a letter given him by Mr. Williamson. We went to seize the

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.17

Prabhudas Shivabhai Patel 16th October and 28th November 1962 Cross-examination continued

Plaintiffs' stock. Exhibit J. (C.6) is the document Mr. Williamson gave to Mr. Scott. When we reached the Plaintiffs' shop at about 2.30 Mr. Scott presented the letter, Exhibit J. (C.6) to 1st, 2nd and 3rd Plaintiffs, who were all present and said he had been instructed to take possession of the stock, and he asked 2nd Plaintiff to sign the letter - Exhibit J.(C.6).

The 2nd Plaintiff asked me in Gujarati why 10 the letter was brought there. I explained the matter to him and he signed the Exhibit J.(C.6). I explained to 2nd Plaintiff that as they had failed to reduce the overdraft to Shs.140,000/- the manager has instructed us to seize the stock and this was what the letter said - letter read. The letter, Exh.J.(C.6) is a confirmation of what 2nd Plaintiff told Mr. Williamson and that is, that he was unable to reduce their overdraft to Shs.140,000/-.

20 After 2nd Plaintiff had signed Exh.J.(C.6) Mr. Scott went to the back of the shop and started removing the sewing machines. Mr. Keshavji 2nd Plaintiff, then asked why we were removing the machines as he believed that the machines were not included in the hypothecation. I asked permission of 2nd Plaintiff to telephone to the Bank and find out if the sewing machines and spare parts were included in the letter of hypothecation. He gave me permis- 30 sion and I then telephoned to the overdraft department of the Bank and asked them to refer to the original copy of the letter of hypothecation, and as a result of what I was told I wrote in these words on Exh.J. (C.6). I wrote in "sewing machines and spares". As this seemed to be an alteration I asked 1st Plaintiff, after explaining the contents of the letter Exh.J. (C.6), to sign it. I spoke to him in Gujerati and explained to him that he came to 40 the office and Mr. Keshavji said they could not reduce the overdraft to Shs. 140,000/- the stock was being seized. 1st Plaintiff signed Exh.J. (C.6). The reason I got the second signature was because I had made the addition and, after explaining it to him, I thought it best to get the signature of the senior partner to it. Before 1st Plaintiff signed the letter Exhibit J.(C.6) some nearby merchants arrived

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.17

Prabhudas Shivabhai Patel 16th October and 28th November 1962 Cross-examination continued

and before signing Exhibit J.(C.6) 1st Plaintiff asked these merchants to give a guarantee for their overdraft and thus help him in preventing the removal of their stock; the merchants said that as a relative had refused to sign a guarantee they would not be accepted either; on the contrary they said, "we are your creditors". Mr. Dharamshi 1st Plaintiff, then signed the letter Exhibit J.(C.6). I explained to 1st Plaintiff the words I had written in in Exhibit J.(C.6). I explained to 1st Plaintiff that 2nd Plaintiff had queried whether sewing machines and spares were included in the hypothecation and I had telephoned the Bank and found they were and had added that they were in the letter. After 1st Plaintiff signed Exhibit J.(C.6), Mr. M.F. Patel, the advocate, came to the shop and asked me if we were removing the stock under the letter of hypothecation. I replied that we were. He then talked to 2nd Plaintiff and went away without attempting to stop what we were doing. After he left the Court Broker came in with the landlord to serve a distress warrant for 3 months rent. I telephoned to the Bank and spoke to Mr. Williamson; Mr. Scott spoke to Mr. Williamson. We then carried on removing the stock which was completed by about 5.30 p.m.

A few days after the removal of the stock I attempted to contact the Plaintiffs at their associated shop in River Road but found that the shop was closed. A notice was on the door that it was closed for non-payment of rent. I continued to try and contact the Plaintiffs; I could not find them and tried to contact them through Bazaar merchants. On one occasion I went with Mr.Phakey of Messrs. B.S. Mohindra & Co. to Haji Mansions and I was successful in seeing Mr. Keshavji 2nd Plaintiff. I told him that he should see the sub-manager, Mr. Williamson, and arrange for the disposal of the stock and repayment of the overdraft.

Sometime, about the middle of November, Mr. Dharamshi 1st Plaintiff, Mr.Keshavji 2nd Plaintiff, Mr. Bachulal 3rd Plaintiff came to the Bank and saw me at my desk. They said

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Defendant's Evidence

No.17

Prabhudas Shivabhai Patel
28th November 1962
Cross-examination continued

they were negotiating the sale of their Ngara Road property and they wanted to see the manager about the stocks. Mr. Wintle the manager, happened to pass by my cabin and I introduced the Plaintiffs to him. The Plaintiffs talked to Mr. Wintle who showed his willingness to release goods worth Shs.10,000/- at a time and the proceeds of their sale was to be credited to their account; the same pro-
10 cedure could be continued until the account was squared off. They seemed to agree to this suggestion and left. They did not come again until the middle of December.

Repeatedly I sent messages to the Plaintiffs to come and make an inventory of the goods. I myself asked them about 10 times. I first asked them to come and make an inventory of the goods in the middle of November when they came about the release of the goods. I
20 told 1st and 2nd Plaintiffs more than 10 times in person to come and make an inventory of the goods.

On 30th September, 1960, as a result of instructions from Mr. Williamson I saw Mr.Keshavji 2nd Plaintiff, and told him he must complete the documents he had been given and he said he would do so and give them to the sub-manager. They were security documents and I did not get them. I am familiar with letters
30 of hypothecation. They are letters taken by the Bank from merchants for lending money on the security of their goods. I have been in the Bank for 34 years. Plaintiffs' other shop in River Road was closed on the day after the seizure - 7th October, 1960. I saw that myself and the notice of the door.

Q. Exhibit B. "On or about 26th September, 1960 ---------- prior to this clearance" is that true? A. No.

40 Q. Plaint para 12. Did you remove any goods from Plaintiffs'shop that were not included in the letter of hypothecation? A. No.

Lindsay: There is the question of set off. I feel that I should establish this now.

Nazareth: That would arise after the issue of has been adjudicated upon.

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.17

Prabhudas Shivabhai Patel
28th November 1962
Cross-examination continued

Court: As I understand it the issue before the Court is one only and that is, "Were the Plaintiffs' goods lawfully seized by the Defendant or not?". If the answer to this is 'yes' the action will be dismissed. If the answer is 'No' then there will be further hearing for the purpose of assessing special and general damages and determining the issues on the set off. In the result evidence relative to the set off is not relevant now. 10

Nazareth: I accept that.

Lindsay: I accept that.

Adjourned to 2.15 p.m.

James Wicks J.

2.15 p.m. Court resumes as before.

Witness reminded of his former oath for Cross-examination.

Q. Have you a clear memory of September and October 1960, of the events which took place in this case? A. Yes. 20

Q. Do you remember on 23rd September, 1960, 1st and 2nd Plaintiffs asked you for a temporary loan of Shs.5,000/-? A. Not so.

Q. On 26th September, 1960, you were again approached by one of them, or both, for a further loan of Shs.5,000/-? A. Not so.

Q. Were you approached by them for a temporary loan about then? A. Yes, but not on the dates you mention.

Q. Which date? A. 3rd October, 1960. 30

Q. So you were not approached for a further loan in September 1960? A. That is so.

Q. Who approached you on 3rd October, 1960?
A. Mr. Keshavji 2nd Plaintiff - in the Bazaar.

Q. If an increase in an overdraft facility was

In the Supreme Court of Kenya at Nairobi

Defendant's Evidence

No.17

Prabhudas Shivabhai Patel
28th November 1962
Cross-examination continued

required, who would be approached? A. The sub-manager.

Q. Nobody approaches you for a loan or increase of a loan?
A. If I am approached I take the applicant to the sub-manager.

Q. Do you ever receive a request for presentation - go to the sub-manager, get the answer and tell the applicant?
10 A. No. The applicant is always taken to the sub-manager.

Q. Any cheque on an overdrawn account goes to the sub-manager? A. Yes.

Q. On 21st September, 7 cheques were dishonoured? A. Yes, the sub-manager told me.

Q. Soon after that date the overdraft amounted to Shs.141,248/12. You are aware that the overdraft agreed was up to Shs.140,000/-?
A. Yes.

20 Q. There was a cheque for Shs.4,229/20 which was honoured on that day. Would you say that cheque was honoured and paid in excess of the limit of Shs.140,000/-?
A. That would be a matter for the sub-manager.

Q. 2nd Plaintiff has said that on 23rd September, 1960, he came to you and arranged for a loan of Shs.5,000/-, do you say that is false?
A. Yes.

Q. He says that on 26th September, 1960, he
30 came to you and arranged a further loan of Shs.5,000/-? A. He did not come to me.

Q. Do you suggest that the overdraft rose to Shs.148,868/43 on 27th September, 1960, without any previous arrangement?
A. That is not in my knowledge. All such matters are for the sub-manager.

Q. Such a situation could not have come about without reference to the sub-manager?
A. I agree.

40 Q. So if the sub-manager says no reference was

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Defendant's Evidence

No.17

Prabhudas Shivabhai Patel 16th October and 28th November 1962 Cross-examination continued

made to him, either you or he are lying?
A. Yes.

Q. You say you were approached by 1st Plaintiff on 3rd October, 1960; apart from this do you say you were not approached for a temporary increase of the overdraft?
A. That is so.

Q. Did you often go to Plaintiffs' premises before 6th October, 1960? A. Yes.

Q. Alone or with Mr.Pandya? A. Alone. 10

Q. Pandya never accompanied you?
A. That is so.

Q. You went to get a statement of affairs from Plaintiffs? A. Yes.

Q. And that is what you were asking for before 6th October?
A. Yes and for the security document wanted by the sub-manager.

Q. How many times did you ask for the return of the security document? 20
A. Once, on 30th September, 1960.

Q. On 30th what did you ask for?
A. Security documents and statement of affairs.

Q. Between 30th September and 6th October what did you ask for? A. All the documents.

Q. Did you specifically ask for the security documents between 30th September and 6th October? A. I asked for the documents.

Q. What answer was made to you on 1st October?
A. I do know if that was a Sunday, if it was I did not go. 30

Q. Did you go on any day between 30th September and 6th October, except Sunday? A. Yes.

Q. What did Plaintiffs reply?
A. 2nd Plaintiff said the statement of affairs was being prepared and that, and the security documents would be sent to the sub-manager.

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Defendant's Evidence

No.17

Prabhudas Shivabhai Patel 16th October and 28th November 1962 Cross-examination continued

Q. When you went on 2nd and 3rd October, what answer did you get from 2nd Plaintiff?
A. Yes I am attending to it.

Q. Any difficulty in the signing of the security documents? A. I do not know.

Q. Were you being pressed by the sub-manager to get the documents?
A. He asked me to get them on 30th September.

Q. Did he ask you after that?
10 A. That is my job he asks me once and I have to see they are obtained; he will not ask me twice; if they are sent I would be told they have arrived.

Q. You were mainly concerned about the statement of affairs? A. Yes.

Q. That would take some time to prepare?
A. Yes, but they kept saying they are almost ready, they are almost ready.

Q. You wanted to get the statement of affairs?
20 A. Yes, it is my duty to find out their working position.

Q. Exhibit G.2 Have you seen this before?
A. No. I have seen the blank forms G.2 but I have never seen this particular one before.

Q. You went to Plaintiffs shop on 6th October in the morning? A. No. I did not go in the morning.

Q. Did you see Pandya in the shop that day?
A. Yes, whilst we were removing the stock.

30 Q. And Nagesh? A. No. Not in the shop that day.

Q. Did you speak to anyone in the shop that day apart from the Plaintiffs?
A. Yes, Mr. M.F. Patel, the Court Broker, and the landlord.

Q. I put it to you, you were in the shop during the morning with Pandya and Nagesh?
A. I was not. I never left the office in the morning.

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No.17

Prabhudas Shivabhai Patel
16th October and 28th November 1962
Cross-examination continued

Q. You went there not once but twice? A. No.

Q. Do you work with Nagesh and Pandya?
A. With Pandya but not Nagesh.

Q. Pandya was not there? A. I sent him to Plaintiffs to get their statement of affairs.

Q. Did you tell Pandya to remain in the shop?
A. Yes, until he got their statement of affairs because they told me the previous night they were ready.

Q. Did you get the statement of affairs that morning? A. No. And we have never had them. 10

Q. What were his duties that morning? A. His duties are Bazaar duties; he has to report anything he sees or hears to the Bank.

Q. Was not his duty to report if goods were being removed? A. Not specifically but if goods were being removed he would have to report it.

Q. He waited all morning and did not get the statement of affairs? A. That is so. 20

Q. In the afternoon of 6th October did you go alone? A. No with the others.

Q. You asked 2nd Plaintiff to sign that letter?
A. No, Mr. Scott did.

Q. Mr. Pandya says you asked 2nd Plaintiff to sign the letter and later you asked 1st Plaintiff to sign it? A. I asked 1st Plaintiff to sign it.

Q. Why? A. Because of the alteration.

Q. And you were satisfied that one signature is sufficient? A. Yes. 30

Q. The sub-manager told you that? A. Yes.

Q. With a cheque an alteration must be initialled as well as the cheque signed? A. Yes.

Q. The reason for initialling alterations to a cheque is so that it cannot be altered afterwards? A. Yes.

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No.17

Prabhudas Shivabhai Patel 16th October and 28th November 1962 Cross-examination continued

Q. Why did you not get the alteration on Exhibit J. (C.6) initialled? A. Because it was part of the original letter of hypothecation and they were in it.

Q. You were altering the letter 2nd Plaintiff had signed? A. Yes, because 2nd Plaintiff agreed the right to seize the machines and spares - that was cleared up and the matter explained to 1st Plaintiff, and that was why he signed.

Q. You were adding something to the letter Exhibit J. (C.6)? A. Yes. After confirming from the original letter.

Q. You added in ink to a typed letter? A.Yes.

Q. In such circumstances you did not think it necessary to get the alteration initialled? A. That is so, as I was only making it agree with the original letter I did not think it necessary to have it initialled.

Q. I put it to you that the addition in ink was not made before either 2nd or 1st Plaintiffs signed it? A. It was before 1st Plaintiff signed it.

Q. 3rd Plaintiff was there, why did you get him to sign it? A. Because I was told by the sub-manager that only one signature was necessary.

Q. You wanted merely to confirm that they had not been able to reduce the overdraft to Shs. 140,000/-? A. Yes.

Q. That was all the sub-manager wanted in having that letter signed? A. Yes and because they were going to make an arrangement with the creditors.

Q. You were only acting on the authority of the letter of hypothecation? A. I was acting on the instructions of the sub-manager.

Q. And you told Mr. M.F. Patel that you were acting under the letter of hypothecation? A. Mr. Patel asked me if I was acting under the letter of hypothecation and I said 'yes' I was acting on the instructions of the sub-manager.

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Defendant's Evidence

No.17

Prabhudas Shivabhai Patel 16th October and 28th November 1962 Cross-examination continued

Q. Was a copy of the letter Ex.J (C.6) handed to Plaintiffs? A. Mr. Scott would know, I am not aware of it.

Q. Were any documents signed in the shop on the 6th October? A. All I know is that when I was in the office of the sub-manager with the Plaintiffs, Mr.Nagesh came and told the sub-manager that the documents were signed.

Q. What did the sub-manager say to that?
A. He did not say anything. 10

Q. How long were you in that interview?
A. From about 11.30 a.m. to 12.30 p.m. and during that time I left the office for about 5 minutes.

Q. Was Mr.Nagesh there all the time. A. No. He just came in gave the information and went out.

Q. Did you make any notes of the conversation?
A. I did not.

Q. You rely on your memory? A. Yes. 20

Q. When did you first make a statement to the Bank's advocate? A. I signed a statement more than six months ago.

Q. Can you be more definite? A. March or April this year it might be.

Q. Yet you can remember the events of September, October 1960, though they were over two years ago? A. Yes, because they were very important to the Bank.

RE-EXAMINATION: NONE. 30

No.18

Nagesh Ramchandra Nagvertan 28th and 29th November 1962 Examination

NO.18

EVIDENCE OF NAGESH RAMCHANDRA NAGVERTAN

NAGESH RAMCHANDRA NAGVERTAN, sworn in English:-

I have been employed by Defendant Bank as a supervisor for about 8 years. I have been with the Bank for about 12 years.

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Defendant's Evidence

No.18

Nagesh Ramchandra Nagvertan 28th and 29th November 1962 Examination continued

I know the Plaintiffs in this case. As far as I can remember overdraft facilities were granted to the Plaintiffs to the extent of Shs. 140,000/-. The Plaintiffs came several times in September, 1960, asking for temporary increase of small amounts in excess of the limit, pending the arrival of funds. They approached me and asked me to see the sub-manager, this was near the end of September and on 29th September, 1960, a temporary increase of Shs.10,000/- was allowed provided the overdraft was signed reduced to the limit of Shs.140,000/- by 3rd October; and on condition that a further letter of hypothecation was given for this Shs. 10,000/-, and life policies were deposited.

The documents were given to the Plaintiffs on 29th September 1960. There were other letters of hypothecation and a letter depositing the life policies. I would know the security documents I have mentioned if I saw them. What happened was that the Plaintiffs saw the sub-manager and were granted the further facility; documents were prepared and supplemental letter of hypothecation; a fresh letter of guarantee for Shs. 150,000/- and a fresh letter of deposit for Shs. 150,000/- and a were prepared and given to Plaintiffs who took them away. They were never returned.

Our broker was told to collect the documents in the Bazaar. I told Mr. P. Patel and Mr. Pandya and they did not get them. On 6th October the sub-manager told me to collect the documents and if I did not get them to take a fresh set of documents with me - these are the ones, Exhibits G.1, 2 and 3. I went to Plaintiffs' shop with these fresh documents and 1st Plaintiff and his sons and they all signed the documents in my presence. I formally witnessed the signatures on Exhibit G.2. I initialled Exhibit G.1 and G.3, my initials are in red ink. I do not remember if I initialled Exhibit G.1 and 3 in the Plaintiffs' shop or in my office. Each partner signed the documents but they were not all there at the same time. I told the partners that these documents Exhibit G. 1, 2 and 3 were in substitution of the forms handed to them on 29th September, 1960, that the letter of hypothecation covered the stocks covered by the old letter of hypothecation, and then the overdraft

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Defendant's Evidence

No.18

Nagesh Ramchandra Nagvertan
28th and 29th November 1962
Examination continued

under this document was increased to Shs. 150,000/-. Similarly the letter of guarantee and the letter of deposit covered the increased amount of the overdraft facility of Shs.150,000/-. Each partner signed in my presence in their shop.

After the documents were signed I returned to the Bank. After some time I saw the sub-manager, Mr. Williamson. I went into his office and saw the senior partner 1st Plaintiff, 2nd and 3rd Plaintiffs, Mr.P.Patel. I do not remember others there except, that one gentleman was offering to give a guarantee and there was a discussion and I remained there. I do not remember when I arrived - I was there quite a long time. When the discussion was going on and after some time the gentleman, who was offering to guarantee, produced a document and he handed it to Mr.Williamson who read it.

Later I saw it, Exhibit H is the one. I saw this document in Mr. Williamson's office on the same day, 6th October, after the Plaintiffs had left. I am certain this Exhibit H is the document.

Q. It has been suggested one or more partners applied to you for authority to draw against up-country cheques. Can you remember anything of this? A. I had no authority to allow credit on uncleared up-country cheques, and none of the Plaintiffs approached me on this.

Q. On behalf of the Plaintiffs did you go and see the sub-manager about drawing against uncleared up-country cheques? A. No.

Adjourned to 10.30 a.m. tomorrow.

James Wicks J.

10.30 a.m. Thursday, 29th November, 1962.

Court resumes as before.

Witness reminded of his former oath for further examination.

On 29th September, 1960, Mr.Williamson approved an increase of overdraft of Shs.10,000/-; before that date Plaintiffs approached me

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Defendant's Evidence

No.18

Nagesh Ramchandra Nagvertan 28th and 29th November 1962 Examination continued

regarding increase of their overdraft. Sometime between 20th and 29th September. 1st and 2nd Plaintiffs visited me and said they wished to be allowed to draw cheques in excess of their overdraft against the arrival of certain funds. This matter I conveyed to Mr. Williamson and, not to embarrass the Plaintiffs, he did pass cheques in excess of the limit of Shs.140,000/-.

Exhibit L.M. and K. I did not handle
10 these, my handwriting is not on any of these and had I dealt with the signing my initials would be on them. I think that one of my assistants dealt with these documents.

CROSS-EXAMINATION:

Cross-examination

Q. Exhibit G.2. This is dated 6th October, 1960? A. Yes.

Q. It starts "In consideration of" etc.? A.Yes.

Q. On 6th October, 1960, you got the signatures of the Plaintiffs to these documents? A. Yes.

20 Q. The consideration was that immediate repayment would not be demanded in respect of the sums owing.

Court: Any consideration would appear to depend on interpretation of the document by the Court?

Nazareth: Yes.

Witness:

Q. On 5th October, 1960, the overdraft was Shs. 152,517/86? A. Yes. At close of business.

30 Q. When you asked Plaintiffs to sign Exhibit G.2. What did you say? A. That this document was to cover the increased overdraft facility up to a limit of Shs.150,000/- in substitution of the documents which had already been handed over to them on 29th September.

Q. Did you not tell them that the increased amount of Shs. 10,000/- could remain outstanding until 1st April, 1961? A. No.

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No.18

Nagesh Ramchandra Nagvertan
28th and 29th November 1962
Cross-examination continued

Q. That same afternoon the goods of the Plaintiffs were seized? A. Yes.

Q. Were you present? A. No.

Q. Did you go to the Plaintiffs' shop that afternoon? A. No.

Q. If another witness says you were there that afternoon, he would be lying? A. Yes. I was not there.

Q. Did you know the goods were going to be seized? A. Yes, I came to know of it at about 2.00 p.m. 10

Q. Were you present at the meeting in Mr.Williamson's office on 29th September when 1st and 2nd Plaintiffs, Mr. P. Patel and Mr. Damji were present? A. That was on 6th October, I believe.

Q. So it is untrue that the documents were handed over on 29th September in the presence of 1st and 2nd Plaintiffs, Mr. Damji and Mr. P. Patel? A. Only the Plaintiffs were present as far as I remember. 20

Q. So it is untrue that the others were there? A. I think so.

Q. You say yesterday that on 6th October you were present at the meeting in Mr.Williamson's office for quite a while? A. Yes.

Q. If Mr. P. Patel says you came in, remained only a short time and left, he was wrong? A. I may have come in, left and returned.

Q. Mr. P. Patel would know, same department? 30 A. I do not know, I did not take part in the conversation.

Q. Mr. P. Patel would have seen you? A. I do not know. I was at the back of the room.

Q. What time did you come in? A. About quarter to 12.

Q. You remained there for about an hour? A. As far as I can remember I remained until about quarter to one, when I went for lunch.

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No.18

Nagesh Ramchandra Nagvertan
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Cross-examination continued

Q. The meeting of 29th September, what happened at that meeting? A. The Plaintiffs asked for a temporary increase of their overdraft of Shs. 10,000/- until 3rd October.

Q. From 23rd September Plaintiffs' cheques were being honoured beyond the limit of Shs.140,000/-? A. Yes.

Q. So there was no need for a meeting - their cheques were being honoured? A. Not exactly.
10 Prior to the 29th September Plaintiffs approached me to see the sub-manager with a view to their cheques being met in excess of the limit of Shs. 140,000/- against anticipated funds. This request was passed on by me to the sub-manager and on that the sub-manager passed cheques in excess of Shs.140,000/-. He did not want to embarrass the Plaintiffs by returning the cheques, which he could have done, because the limit was Shs. 140,000/-.

20 Q. When did they come? A. Between 20th and 29th September; they came almost every day.

Q. Do you remember the day they first came? A. I cannot remember the exact date. I might see from the statement.

Q. Exhibit E. Was it before 23rd? A. I do not think they would have come to me before 23rd because they were within the limit.

Q. Now you have refreshed your memory, can you for certain say when they first came.
30 A. I cannot.

Q. If Plaintiffs say they came on 23rd September, might that be the case? A. It might be.

Q. You say they came almost every day? A. Yes.

Q. They could have come on 26th? A. Might have.

Q. Did they talk to you? A. Yes, sometimes to me, sometimes to Mr. P. Patel.

Q. How many meetings can you recollect between 20th and 29th September? A. About 4 or 5 times.

Q. When is the earliest do you say, they could
40 have made the request to draw against anticipated

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Nagesh Ramchandra Nagvertan
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Cross-examination continued

funds? A. I would say the day they first exceeded the limit, 23rd September.

Q. So you think that the request was first made to you on 23rd? A. Yes.

Q. Could they have seen you on 26th?
A. They might have.

Q. Did you discuss Plaintiffs' request with Mr. P. Patel? A. I had no connection with Mr. P. Patel; whatever I was asked I passed on to the sub-manager. 10

Q. You work in water-tight compartment?
A. Any request made to me must be decided by the sub-manager - I must see him.

Q. When did you anticipate the Plaintiffs' funds to arrive? A. In most of the cases they said the money would be coming in a day or two.

Q. Did the money come? Look at Exhibit E.
A. I see that the excess was more or less adjusted on 26th Sept.

Q. So the money came in a day or two? 20
A. Only in the first instance.

Q. The account continued to be over the limit on following days - did the money come in a day or two? A. It did not.

Q. When the money did not come in after 26th, what steps did you take? A. The sub-manager must have asked our broker to tell them to adjust the account.

Q. When? A. Between 26th and 29th.

Q. Any other steps apart from this bit of speculation on your part? A. I am not aware of any. 30

Q. Between 26th September and 6th October what steps were taken to get the account adjusted?
A. On 29th September there was an agreement for a temporary increase of overdraft of Shs.10,000/-.

Q. At that meeting on 29th September documents were handed over to Plaintiffs and the facility granted? A. Yes, on the condition that the

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Nagesh Ramchandra Nagvertan 28th and 29th November 1962 Cross-examination continued

documents were signed by all the partners and returned to the Bank immediately.

Q. And were they? A. No.

Q. What happened? A. Mr. P. Patel and Pandya went to the Bazaar and tried to get them.

Q. Did they report to you they had failed? A. This would not be for me, they would report to the sub-manager.

Q. You personally made no efforts to get the documents back? A. Not until 6th October.

Q. And took no interest before this? A. I was interested. I asked Mr. P. Patel and Pandya "have you got the documents"?

Q. Did they give you any reason why they had failed? A. I do not remember.

Q. Have you any recollection of what you said? A. As far as I remember I said "where are the documents, where are they?"

Q. And their reply? A. As far as I can remember they said they had tried to get the documents and had not got them.

Q. They both said that? A. As far as I remember.

Q. I put it to you no meeting took place on 29th September and no documents were handed over to the Plaintiffs? A. As far as I remember the documents were handed over to the Plaintiffs in the sub-manager's office on 29th September.

Q. As far as you remember? A. I am certain. The documents were handed over to Plaintiffs on 29th in the sub-manager's office and when they were not returned Mr. P. Patel and Pandya tried to get them and I went with fresh documents on 6th.

Q. It would have been a simple matter for those documents to have been endorsed and returned to the Bank on 30th September, 1st or 2nd October? A. Yes.

Q. On 6th October you experienced no difficulty

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Cross-examination continued

in getting the signatures of all the partners?
A. That is so.

Q. On 6th October how long were you in Plaintiffs' shop in the morning? A. About an hour.

Q. You took documents for signatures - did you fill them up at the Bank or in the shop?
A. They were all filled up before I left the Bank.

Q. Who filled them up? A. A superintendent in the overdraft department. I got the forms from the store. 10

Q. Did you fill in anything at the shop?
A. As far as I remember I did not.

Q. Look at the documents Exhibits G.1, 2 and 3. Do any of these documents have any of your writing on them? A. No, except as a witness on Exhibit G.2.

Q. Apart from that, none of the handwriting is yours? A. That is so.

Q. Your initials - you do not remember if they were put there at Plaintiffs' shop or the Bank? 20
A. That is so.

Q. Where were the documents signed? A. On the first floor.

Q. Did you go to the shop alone? A. Yes.

Q. Mr. Pandya was already at the shop? A.Yes.

Q. Was Mr. Pandya in the office upstairs when the documents were being executed?
A. No I do not think so.

Q. Anyone else? A. Auditor was waiting there, I think. 30

Q. Do you know who he was? A. No.

Q. Mr. Pandya took no interest in the signing?
A. I do not think so.

Q. Did Mr. Pandya come up? A. He may have come up and gone down.

Q. Did all the Plaintiffs sign together? A.No.

Q. In fact some of them had to be sent for?
A. Yes.

Q. During this one hour some persons, known to you, came to the shop? A. I was on the first floor. I may have gone down.

Q. Did anyone you knew come to the shop?
A. I do not remember.

Q. You know Shankilal - did he come to the shop? A. I know him - he may have come - I do not remember.

Q. Did you talk to him? A. No.

Q. Did he come to the first floor? A. I do not remember.

Q. Surely you can remember if he came up? A. I cannot remember. I may have met him in the Bazaar.

Q. You have a recollection that he came to the shop? A. I have a recollection that he met me that day.

Q. Where according to your recollection did you meet him? A. I do not remember - it may have been outside - it may have been inside the shop.

Q. I put it to you, he came upstairs? A. I do not remember.

Q. Can you say he did not come up or are you not prepared to commit yourself? A. I am not prepared to commit myself.

Q. Are you prepared to commit yourself that he did come into the shop? A. No.

Q. Mr. Pandya was sitting in the shop all the time you were there? A. I could not see him from upstairs.

Q. Have you any recollection of Mr. Pandya coming upstairs whilst you were there?
A. I think so.

Q. How long can you remember he was upstairs?

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Cross-examination continued

A. Probably for 2 or 3 minutes.

Q. He came up only once? A. I do not recollect how many times he came up.

Q. I put it to you, Mr.P.Patel was in the shop whilst you were there? A. I do not recollect. I do not think he came up there at all.

Q. Will you swear he did not come? A. As far as I remember, he was not there at all.

Q. I put it to you that at the meeting on 6th October, Mr. P. Patel and you promised the Plaintiffs that the increased amount of Shs. 10,000/- would be available up to 30th April, 1961? A. In the first place I could never agree to such a thing without the authority of the sub-manager. I have no authority to grant coverage facilities - that is the job of the sub-manager. Secondly, the increase of Shs. 10,000/- was guarantees only until 3rd October, 1960. (10)

Q. Were you aware that the original overdraft was guaranteed up to 30th April, 1961? A. That was the date when the facility came up for renewal. (20)

Q. On 6th October did you make any kind of request to Mr. Pandya? A. The only thing that was told to him was, that he was asked to collect the documents when he went to the Bazaar.

Q. When you entered the shop on 6th October, to whom did you speak first? A. I do not remember, three partners were there and Mr. Pandya. (30)

Q. What was the first thing you said to the Plaintiffs? A. I cannot remember.

Q. Did you make any request? A. I do not remember, I only remember I went with the documents.

Q. What did you say? A. I told them I came with the documents, which were a replacement of the documents given on 29th September, and they were about the increase of the overdraft.

Q. And they signed? A. I went upstairs and the documents were signed. (40)

Q. By the three partners who were there? A. Yes.

Q. Any discussion about increased facilities?
A. There might have been but I do not remember, that would be for the sub-manager.

Q. You made no protest over the delay in returning the other documents? A. I do not remember.

Q. Did you ask them what had happened to those documents? A. I might have.

Q. Can you remember asking that? A. No, but I must have made a reference as to what happened
10 over those old documents. I cannot remember exactly what I asked them.

Q. Can you remember any answer made by them regarding the old documents? A. I do not remember.

Q. Mr. Shantilal had an overdraft with the Bank at that time? A. I cannot remember, they used to have facilities.

Q. Was Mr. Pandya in the shop until you left it?
A. I think so.

Q. What was he doing in the shop? A. I think
20 he was just sitting there talking. I did not see what he was doing from where I was on the first floor.

Q. Do you know why he was there? A. I have no idea.

RE-EXAMINATION:

Re-examination

Q. Exhibit E. About 23rd September was the beginning of the increase over Shs.140,000/-?
A. Yes.

Q. You think that it is possible that on that
30 date the request was first made to you? A.Yes.

Q. You say that after 26th the money did not come in. What sort of money was to come in?
A. Partly from trading and there was something about a contract, and the City Council and a cheque coming.

Q. Was it a special case? A. Oh yes, and the money was to come about 1st October and the facility was given until 3rd October.

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No.18

Nagesh Ramchandra Nagvertan
28th and 29th November 1962
Re-examination continued

Q. You were asked, when you went with the new documents, if you made enquiries regarding the others. Will you explain the circumstances which led you to go on 6th October with the new documents? A. The documents were not returned on the day they were handed to them; the account was not adjusted on 3rd October, and the account being in excess of the limit we had to report the documentary position and the state of the account to our head office. The sub-manager told me to take fresh documents on 6th October. 10

LINDSAY: That concludes the evidence for the defence.

Adjourned to 2.15 p.m.

James Wicks J.

2.15 p.m. Court resumes as before.

No.19

Notes of closing address of Counsel for Defendant 29th November and 3rd December 1962

NO.19

NOTES OF CLOSING ADDRESS OF COUNSEL FOR DEFENDANT ON 29TH NOVEMBER AND 3RD DECEMBER 1962. 20

Lindsay: Address.

Evidence. Difference between that of Plaintiffs and Defendant on material facts. Admit that in one respect in defence Defendants wrong. Para.8(10) concede that at time when Bank decided to seize goods Bank not aware that Defendants 3 months in arrear with their rent. Plaintiffs did not call Dharamshi 1st Plaintiff. (In Court all the time). As far as Plaintiffs' 30 allegations are concerned he could have supported most of these allegations. According to Plaintiffs no meetings on 29th September and Williamson said Dharamshi there on 29th September, could expect Dharamshi be called on this.

Plaint Para.4. 2nd Plaintiff says Bank touting. Defendants say introduction on Plaintiffs' behalf.

Plaint Para.5. Says loan for specific

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No.19

Notes of closing address of Counsel for Defendant 29th November and 3rd December 1962 continued

amounts against property and stock. Defendants say one loan plot and goods seemed to cover full amount of overdraft.

Plaint Para.5. Not to seize goods before 30th April 1961. Letter Exhibit C.1. Defendant's evidence does not support Banking practice. Exhibit K. "Agree to confirm to the rules". Warning letters. 2nd Plaintiff concedes.

10 Para.6 of Plaint. Serious allegation to make against a Bank. 2nd Plaintiff's evidence. Nagesh nothing to do with execution of document. Braganza filled up documents.

Para.8. Bare statement of fact. In fact completed in ordinary course of business.

Para.10. Allegation of facts relating to 6th October, 1960. Exhibit B. says Shs.10,000/- to be repaid on 8th October. Abundant evidence that on 29th September overdraft facility temporarily 20 increased until 3rd October. Plaintiffs allowed to overdraw because special funds on the way. New documents required for few days for without these Bank unsecured in respect of Shs.10,000/-. Evidence of Williamson reliable, cross-examination confused, events which took place on 6th October, as if took place on 29th September, apart from this Williamson's evidence straight forward and patently true. Not taken to events in office on 6th October, taken alright to re-issue on 6th October.

30 Para.12. Plaint. Fraud of the Plaintiffs - no evidence in support, reprehensible to allege fraud.

Para.13. Plaint. Again fraud alleged. Exhibit C.7. formal request to repay, also offer to allow Plaintiffs to sell stocks.

Para.14. Plaint. Again fraud alleged.

Para.10 of defence. Plaintiffs letter to Defendant initiated the matter - Exhibit C.8.

Para.16 of Plaint. All goods seized not in-
40 cluded in letter of hypothecation. No evidence.

Reply to defence.

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Para.2.

Amendment to reply. Exhibit B. Page 2. Further increase of Shs.3,000/- to 8th October.

Events 29th September, 6th October. Say Para.7 of defence correctly state the facts. Letter Exhibit H. Bank no alternative but to act. Wise not to disclose action. Bank had to act without notice otherwise other creditors would be preferred. Evidence of Williamson corroborated, to be preferred to uncorroborated evidence of 2nd Plaintiff. Here 1st Plaintiff did not give evidence, important. 10

Exhibit C.6 (Exhibit J. copy). 1st Plaintiff still not called to rebut.

30th April, 1961. Overdraft not reduced then Shs. 20,000/- over limit.

Adjourned to 10.30 a.m. Monday, 3rd December, 1962.

James Wicks J.

10.30 a.m. Monday, 3rd December, 1962. 20

Court resumes as before.

Lindsay: Address continued.

Submission by advocate for Defendant.

1. Submission on the evidence was made last Thursday 29th November, 1962. The material facts upon which the Defendant bases its defence and which were clearly established by admissible evidence are summarised follows :-

(a) On or about 4th April, 1960, the Defendant agreed to grant the Plaintiffs trading as Dharamshi Vallabhji & Brothers overdraft facilities up to Shs.140,000/- and to secure the repayment of the overdraft the Plaintiffs' plot L.R.209/2490/10 was charged (Exhibit H. 1 and 2) to the Defendant for the amount of Shs.140,000/-, and the Plaintiff's stock in trade consisting of "piece goods, ready made clothes, 30

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fancy goods, tailoring materials, sewing machines, and their spare parts, trade fittings and fixtures (together with other goods and chattels specifically mentioned in the letter (believed to be Exhibit 1(2) for identification) of hypothecation dated 9.5.60) were hypothecated to the Defendant for the amount of Shs. 140,000/-.

(Certain other (Exhibit N. (letter of deposit dated 23.4.60.) Exhibit M. continuing guarantee dated 23.4.60) security documents were also executed by the Plaintiffs which are not material the claims made by the Plaintiffs against the Defendant). The details of the said letter of hypothecation dated 5th May,1960 were filled in before the Plaintiffs signed by all the partners.

(b) A partnership account application dated 4th April, 1960 (Exhibit "K") was similarly signed by all the Plaintiffs requesting the Defendant to open a current account, and all partners agreed to confirm to the rules (Exhibit "S") governing current accounts at the Defendant's Bank. The second Plaintiff personally knew that (in accordance with these rules) the Bank had reserved the right to close the account if it was not operated satisfactorily, and if the overdraft limit authorised from time to time was exceeded.

(c) On the 13th May, 1960 the Defendant wrote to the Plaintiffs (Exhibit C.1) confirming that the Bank had established an overdraft facility in their account with the Defendant to the extent of Shs.140,000/- until 30th April, 1961. In the same letter it was pointed out that as security for the overdraft the title deeds of the plot had been received by the Defendant and that the Defendant also held a letter of hypothecation over the stocks of the Plaintiffs.

(d) Between 17th June, 1960 and 12th August, 1960 the Plaintiffs slightly exceeded the limit of Shs.140,000/- (Exhibit "E") some thirty eight times and on three occasions were warned to bring the amount of the overdraft within the agreed limit.

(e) On or about 21st September the Defendant

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returned certain cheques "effects not cleared". (Exhibit "T" Constituents Record Card) On or about 22nd September the Plaintiffs made informal representations through Nagesh and others to allow the overdraft to exceed Shs. 140,000/- as special funds of some Shs.10,000/- were expected within a day or so. The sub-manager Mr. Williamson, as a "special arrangement" allowed the limit to be exceeded against anticipated arrival of the special funds. 10

(f) Since by 29th September these special funds had not arrived the second Plaintiff was required to attend the office of the sub-manager. Mr. Williamson drew the second Plaintiff's attention to the unsatisfactory state of the account (Shs. 151,777/62 at close of business on that day) and required the Plaintiffs to reduce the overdraft to Shs.140,000/- by the 3rd October. He further required the Plaintiffs to execute fresh security documents to cover the 20 temporary authorised limit of Shs. 150,000/-. These documents were handed to the second Plaintiff for execution by himself and the other partners.

(g) Repeated attempts were made to obtain the return of these documents without success - and so on 6.10.1960 fresh security documents were prepared and Nagesh obtained their execution (Supplementary Letter of Hypothecation dated 6.10.60 Exh.G.1. Continuing Guarantee 30 dated 6.10.60 Exh.G.2. Letters of Deposit dated 6.10.60 Exh.G.3) at the shop of the Plaintiffs that morning.

(h) Between the 29th September 1960 and the 6th October, 1960 the state of the overdraft was as follows :-

(Exhibit "E")

(30.9.60	Shs. 150,454/32	) Limit authorised	
(1.10.60	151,341/80	Shs. 150,000/-	
(3.10.60	153,240/66		40
(4.10.60	152,826/66		
(5.10.60	152,897/91	Limit authorised	
(6.10.60	154,934/41	Shs. 140,000/-	

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(i) At a meeting late in the morning of 6th October, 1960 at the Bank; the 1st and 2nd Plaintiffs with Mr. Damji, endeavoured to persuade Mr.Williamson to allow them to exceed the authorised limit of Shs. 140,000/- by (in effect) Shs.15,000/-. The Plaintiffs stated that they were unable to reduce the overdraft to Shs.140,000/-. Mr.Williamson refused. During the meeting the Plaintiffs produced a draft (Exhibit "H") circular letter which they were contemplating sending to creditors. The circular indicated that the Plaintiffs were unable to pay their unsecured creditors immediately. Mr.Williamson took alarm, and after the meeting was over decided to seize that afternoon the goods of the Plaintiffs, hypothecated to the Bank which were in jeopardy. This was done.

(j) during the afternoon of 6.10.60 at the shop, Mr. Smith and Mr. P.S. Patel obtained the signatures of the 2nd Plaintiff and the first Plaintiff to a document dated 6.10.1960 which reads as follows :-

"The Manager,
National & Grindlays Bank Ltd.,
Nairobi.

Dear Sir,

With reference to the letter of hypothecation executed by us on 9th of May, 1960, we hereby authorise you to take over our stocks (sewing machines and spares) as we regret we are not in a position to reduce our overdraft as promised.

Signed 1st Plaintiff
2nd Plaintiff.

(Believed to be Exhibit 1.2. for identification)

The 2nd Plaintiff signed first after it had been explained to him what he was signing. The 2nd Plaintiff later objected to the removal of the sewing machines and spares. It was confirmed that the sewing machines and spares were included in the description of the goods hypothecated, and the words were (unnecessarily) added to the document, and after the letter and addition had been explained to the 1st Plaintiff, he also signed it.

(k) (Exhibit C.7) On the 8th October, 1960 the

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Bank wrote formally to the Plaintiffs enquiring how they proposed to repay the overdraft of Shs.154,658/41 and what steps were being taken to sell the stocks seized by the Bank.

(l) The Plaintiffs ultimately sold their plot 209 and Shs.145,491/50 was credited to the current account on 17th May,1961. (Exhibit "E") The current account was standing at Shs.161,767/- overdrawn immediately prior to the payment in of these proceeds. 10

(m) The goods seized by the Bank were sold in December, 1961.

2. Submission on the Law.

SUBMISSION ON THE LAW:

PART 1 - RE RIGHT OF BANK (a) to seize the goods

(b) to require repayment of overdraft.

The Plaintiffs through their advocates have raised a number of points of law, the relevance of some of which having regard to the material facts are more than doubtful. 20

From the plaint and from the opening address of Queen's Counsel for the Plaintiffs, it seems the following points have been raised for the Court's consideration and therefore in respect of which the defence is required to make its submission in defence.

1. The Defendant committed some fundamental breach of the terms of the agreements made between the parties by 30

   (a) seizing the goods hypothecated to the Bank on 6.10.1960.

   (b) requiring the Plaintiffs verbally on 6.10.1960 and in writing on 8.10.60 to repay and admitted overdraft of some Shs.154,000/-.

2. The alleged fundamental breach is that the Bank, by the terms of its letter (Exhibit "Cl") dated 13th May 1960, undertook (a)

not to call in the overdraft of Shs. 140,000/- until 30.4.1961, (b) not to seize the stock in trade hypothecated to the Bank until the same date.

The letter (Exhibit "Cl") of 13th May 1960 confirmed the arrangements made with the Bank namely that the Plaintiffs have been afforded overdraft facilities until 30th April 1960 and the plot and goods had been charged and hypothe-
10 cated respectively to the Bank to secure that overdraft.

The 30th April 1960 is NOT stated to be the date upon which the overdraft was to be repaid, and there is little doubt that if the account had remained satisfactory, credit facilities would have been renewed when the matter was reviewed on or after that date.

Furthermore the letter does NOT state that no demand for repayment would be made until
20 that date.

Exhb. "K" The Plaintiffs had already signed the partnership account application agreeing to abide by by rules governing current accounts and the second Plaintiff admitted in evidence that he knew that if (a) the account was not conducted satisfactorily and/or (b) the authorised limit of the overdraft was exceeded the account would be closed. But even if the second Plaintiff, who was the business partner, had not so known
30 the overdraft in law remained payable on demand,

The Plaintiff refers to a number of old cases namely Brighty v. Norton, Toms v. Wilson. Massey v. Sladen, none of which are Banking cases, and in every case are concerned with express stipulations in documents requiring a demand of some sort for payment to be made before goods were seized. In so far as those cases may have been cited in connection with the Bank's rights under the terms of the letters of hypothecation
40 (Believed to be Exhibits J(1) and J(2) see below, the Bank had an express right to seize without any notice or demand.

To interpret:

(i) The letter (Exhibit "Cl") of the 13th May

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1960 as over-riding and rendering inoperative until 30th April 1960 the rights and obligations of

(ii) the terms of the partnership account (Exhibit "K") application dated 4th April 1960 governing the condition upon which the current account was to operate, and

(iii) the terms of the letter (Believed to be Exhibit J(2) of 13th of May 1960.

would be contrary to the accepted canons of interpretation of documents, and in the context devoid of common sense and logic. Such an interpretation could never have been so contemplated by either party. Thus the reference by Plaintiffs Counsel to cases relating to a fundamental breach of an agreement., e.g. Yeoman Credit Co., 1961 2 All E.R., Kar Sales v. Wallis 1956 2 All E.R., Cap Poles 1921 P. at 470, are not applicable to the facts and documents in our case. In our case each document read with the other two results in no inconsistency whatsoever. Each remains fully operative for the purposes which were contemplated by the parties. The credit facilities would, it was hoped by both parties, remain in force until 30th April 1961 when they would be reviewed. But should the account be unsatisfactorily conducted and/or the authorised limit exceeded in a manner which would give the Bank reason to suppose that it could not be reduced to within the authorised limit, and/or the danger arose to the Bank's security over the stock in trade, (the terms upon which the Bank held security over the stock-in-trade are related to protection of their security), then it is submitted both parties agreed as indicated by the terms of each document, the Bank would forthwith exercise its rights and

(a) seize the goods and/or

(b) call in the overdraft as circumstances dictated.

The evidence in Court had established beyond doubt that the Plaintiff knew and appreciated all the essential terms of each of the documents referred to above, (i), (ii), (iii). Thus in the proven circumstances, the Bank by seizing the

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goods and by calling in the overdraft, acted strictly in accordance with their contractual rights. The Court will no doubt appreciate already that this suit against the Defendant is an attempt to repudiate contractual obligations; it is a form of litigation which in the interests of the sanctity of contracts should be discouraged in no uncertain terms.

As for the reference to 27 HALSBURYS LAWS OF
10 ENGLAND 3rd Edition, p.200 para.338 (b) - the passage relates to the terms of a formal legal mortgage deed that expressly precludes the right of repayment before a specified date. We are not here concerned with the express terms of a mortgage deed - the general law relating to an agreement for an overdraft is stated in Grant on Banking, Vol.7 page 95:

"Where a Banker has agreed to allow his customers to overdraw for a specified amount, he cannot
20 refuse to honour cheques within the limit of that overdraft if such cheques have been drawn and put in circulation before the customer has received any notice that the limit is to be withdrawn."

The authority from which this proposition is drawn is the dictum of Herschell L.C. in Rouse v. Bradford Banking Company 1894 A.C. 586 at p.596 (here cite). There is an admitted doubt whether there is a right to sue to recover amount of overdraft promised until a certain date. (See Hart
30 p.615) but this is not a question of suing but taking prompt action to protect the Bank's security. SHELDON PRACTICE & LAW OF BANKERS 8th Edn. p.323.

At page 95-96 GRANT states,

"The mere fact that a banker has permitted his customer to overdraw as a favour, raises no implied agreement that he will continue to do so. It is for the consideration on each occasion whether he will honour an overdraft or not."

40 The authority for this proposition is Ritchie v. Clydesdale Bank (1886) 13.Sc. sess. Cas (4th Scr) 866. Unfortunately the SCOTTISH LAW REPORTS are not to be found in the Supreme Court Library, but it is an authority which Mayers (J) followed recently in .... unreported. The above

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proposition disposes of any further argument by Counsel for the Plaintiffs that because the Plaintiffs had been allowed on occasion to exceed the limit authorised, the Bank was under any obligation to allow the account to run on over the excess.

At p.189 Grant states, "Although a Banker is at any time at liberty to close the account by notice to the client, the Banker continues bound to honour cheques drawn by customer before receipt of the notice closing the account." 10

Grant p. 190 note M.

The facts of Berry v. Halifax Commercial Banking Co. (1901) 1 Ch. 188 193 (quote) are pertinent.

The customer wrote to the Bank saying he'd executed a deed of assignment for the benefit of his creditors. In fact this served the relationship of banker and customer and amounted to the closing of an account. In our case the customers (Plaintiffs) admitted on 6.10.60 that they could not reduce to within the authorised limits exceeded by some Shs.15,000/- since 3rd October, and admitted that they were contemplating seeking from the ordinary creditors a forebearance to sue and some scheme of arrangement. 20

The joint affect of this clearly justified the action taken by the Bank - seizure of goods - and independent right - and request to make arrangements to repay the sums advanced. By the terms of the letter of hypothecation (under para. 5) the Plaintiffs covenanted to keep the goods from being distrained for rent (it subsequently transpired they owed three months rent) or from being taken or attached under any execution, and (under para. 7) the proceeds of sale of any of the goods were to be credited in reduction of the overdraft, and the Bank had the right to take possession of the goods at any time. 30 40

The reference made by Plaintiffs' Counsel to SHELDON on Banking page 323 (here cite) is correct against its appropriate context. A reasonable notice was in fact given to the

Plaintiffs to bring the overdraft within the authorised limits. In fact notice was verbally given on 29th September to reduce within authorised limit, and when on the 6th October the Plaintiffs admitted the overdraft could not be brought within the limit, no further notice was strictly necessary to terminate the arrangement made with the account, although given in writing on the 8th of October 1960. As to the seizure of goods, if notice before seizure had been given, it is submitted there is little or no doubt that the goods would have disappeared thereby depriving the Defendant Bank of its security of part thereof. Having regard to the financial difficulties of the Plaintiffs which had been increasing well before the 29th September, the Defendants were bound to act and seize the goods once it knew that the Plaintiffs were experiencing difficulties over paying their ordinary creditors. Terms of letters of hypothecation devised so that notice not required before seizure.

PART 11 - RE HYPOTHECATION

The second main line of argument put forward by Plaintiffs' Counsel is that both letters of hypothecation dated 9th May 1960 and 6th October 1960 are null and void by virtue of the provisions of the Chattels Transfer Ordinance. To the knowledge of the Defendant Counsel, this is the third case within the last few months in which the Courts have been asked to entertain actions by traders who have borrowed money from the Bank whereby they seek to plead the provisions of the Chattels Transfer Ordinance in order to avoid their contractual obligations made with the lenders.

It is submitted:

FIRST SUBMISSION

1. The Plaintiffs may not sustain an action under the ordinance;

SECOND SUBMISSION

2. Under S.115 of the Indian Evidence Act the Plaintiffs are estopped from pleading the invalidity of their own contract made with the Defendant.

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The above two submissions would have been taken as preliminary points of law to dispose of the whole action, if it had not been for the other main contention of the Plaintiffs that the Bank had been in fundamental breach of some agreement between the Plaintiffs and the Defendant about which submissions have already been made. As regards 1 above, the Plaintiffs being the makers or grantors of these letters of hypothecation, are not persons who are entitled to succeed under the provisions of the Ordinance, not being one of the persons mentioned in Sections 13 and 14. Cap.281 Vol.4 p.3534 (Quote S.13, 14, 19, 22). S.13 only void in respect of three classes of persons. Defendant not one. S.14 not applicable in this case.

In S.C.C.C. 668/62 B.L. Gandhi (Plaintiffs) v. National & Grindlays Bank (Defendants) Mr. Justice Mayers on 13.6.62 delivered a ruling in an application for a grant of an interim injunction restraining the Defendant Bank from seizing certain chattels. In argument before Mr. Justice Mayers, Counsel pointed out that chattels mortgage were enforceable as between grantor and grantee, whether such documents were registered or not. The Ordinance itself does not purport to create rights and liabilities as between the two parties of a contract. The rights and liabilities as between parties to a contract are not affected by any failure to register if registration were to be necessary. The authority for that is Rulia Ram v. Karsan Murji & Co. (1947) 14 E.A.C.A.1. (Cite.) Mayers J. ruling above. At page 2 (middle) ... "S.13 of the Chattels "Transfer Ordinance provides that failure to register a "chattels transfer should render it void as against three specified persons, the Official "Receiver or Trustee in Bankruptcy of the per- "son in whose estate the chattels are comprised, "the assignee for the benefit of the creditors "of such person, or any person seizing the chattels in execution of the process of the "Court. The specification of these three "persons must in accordance with the rule "expressio unius exclusio alterius be construed "as implying that non-registration does not "render the chattels transfer void as against "the grantor. S.14 of the Ordinance provides

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"in the absence of notice no unregistered
"instrument should be valid as against a bona
"fide purchaser. Here again there is no
"reference to its not being valid against the
"grantor.

"S.19 renders an instrument which is subject to
"some defeasance, condition or declaration of
"trust, not expressed in the body thereof, void
"as against the persons mentioned in Section 13
10 "and 14. S.22 of the Ordinance provides for
"the form of the instrument and one of the
"grounds of the alleged invalidity of this
"instrument is that there is a defect in the
"attestation clause.

"Section 22 of the Ordinance is in the following
"terms: Every instrument under this Ordin-
"ance may be in the form No.4 and the first
"schedule hereto or to the like effect." The
"form in the schedule provides for the specifica-
20 "tion of the attesting witness. This section
"must, however, be contrasted with S.9 of the
Bills of Sale Act 1882, which is in the follow-
"ing terms:

"A Bill of Sale made or given by way of security
"shall be void unless made in accordance with
"the form in the schedule".

"A note to this section in Read upon Bills of
"Sale Act at page 179 is in the following terms:

"The section is intended to make void absolutely
30 "and not merely against all but the grantor,
"every bill of sale given by way of security for
the payment of money unless made in accordance
"with the form in the Schedule".

"in the absence of any specific provision making
"a chattels transfer void as against the grantor
"(I can find none in the Ordinance), it seems to
"me therefore that defects in the form of the
"bill are probably not sufficient to render it
"void as against the grantor." It would be
40 observed that Mr. Justice Mayers was not consid-
ering whether the grantor had any right of
action under the provisions of the Ordinance,
he was concentrating upon whether he could find
any section under the Ordinance that would make
the chattels transfer void against the grantor.

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In a later action S.C.C. 914/62 Govindji Mulji Dodhia (Plaintiff) vs. National & Grindlays Bank Ltd. (Defendant) Mr. Justice Webber delivered a rather similar ruling dated 20th July 1962. (Quote page 2 halfway down)

"If the Chattels Transfer Ordinance does apply to letters of hypothecation, there is an absence "of any specified provision of the Ordinance "making such a transfer void as against the "grantor". (In the earlier part of his ruling, he inclined to the view while expressing no final opinion, that letters of hypothecation were not registrable, and he cited cases there as Ex parte Slee in North Western Bank and In Re Hamilton Young & Co. in support. At this stage in my submission, these cases will not be referred to.)

Here again in this latter case, it was no part of the case for the Defendant Bank that the grantor may not plead the provisions of the Ordinance on the grounds that the Plaintiffs is not a person entitled to benefit under the Ordinance, and to do so as author of the document would be to commit a fraud upon the Bank (Estopped).

It may be convenient at this stage to deal with opposing Counsel's argument that the letters of hypothecation are inadmissible under S.68 of the Indian Evidence Act. Opposing Counsel in arguing that under S.68 the letters of hypothecation are not admissible, is putting the cart before the horse. Assuming for the moment that quite apart from any documents, the Defendant Bank, by seizing the goods did not thereby acquire special property in the goods analogous under the common law to the goods being pledged to secure the debtors' total indebtedness - assuming this for the moment (see third submission post), the Plaintiffs would first have to establish:

(1) they have a right as makers and grantors of the letters of hypothecation to assert under the Chattels Transfer Ordinance that the letter of hypothecation are void for lack of registration:

(2) the second hurdle is as already submitted

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that the Plaintiffs are estopped by their own acts from pleading the Ordinance. If they were to succeed on both these points they would then have to satisfy the Court that

(3) the letters were registrable instruments, If they succeed in convincing the Court that these letters are registrable instruments, they would then have to convince the Court that

(iv) the effect of not having these letters registered and not having them attested, was to render them inadmissible in evidence and/or invalid.

Having regard to the wording of the provisions of the Chattels Transfer Ordinance and to the principle in Govindji Popatlal v. Nathoo Vizenji (1962) 3.W.L.R. p.374, and to the fact that there is no dispute that the Plaintiffs executed the letters of hypothecation, it seems unlikely that the Court would reject the letters as inadmissible under S.68 of the Indian Evidence Act. S.68 deals only with mode of proof of instruments required by law to be attested is attested. Since the Plaintiffs will be unable to establish the first three above mentioned points, it is therefore unnecessary for the Court to go further into the matter as to their inadmissibility under S.68 of the Indian Evidence Act.

Refer to Independent Automatic Sales Ltd. vs. Knowles Foster (1962) 1. W.L.R. p.976 and cite. Analogy S.13(1) Chattels Transfer Ordinance. It was held that the Plaintiff Company could not sustain an action for any relief founded on failure to register under S.95 of the Companies Act 1948 because that section did not void the charges against the company.

Adjourned to 2.15 p.m.

James Wicks J.

2.15 p.m. Court resumes as before.

Lindsay. Address.

It is submitted that by analogy the Plaintiffs

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cannot sustain an action for any relief founded on a failure to register under the provisions of the Chattels Transfer Ordinance because not only is there no section which voids the instrument if registerable as against the Plaintiffs, but the Plaintiffs are not entitled to any relief thereunder.

The primary object of the Ordinance would appear therefore to be to protect lenders, i.e. the Bank in this case, against claims by third parties and in respect of chattels remaining in the possession of the borrowers, and it is arguable that the obligation to register lies upon the lender since registration protects his title against third parties. On the other hand, the provisions of our Kenya Chattels Transfer Ordinance is largely a re-statement, although in a very different form, of the principles embedded in the Bills of Sale Act 1878.

In Charlesworth v. Mills (1892) A.C. 231, 235, it was pointed out that the object of the 1878 Act was to prevent false credit being given to people who were allowed to remain in possession of goods after parting with the ownership thereof See also Madell v. Thomas (1891) 1 Q.B. 233. It can be safely assumed that both objects were envisaged when the Kenya Chattels Transfer Ordinance was enacted. It would therefore seem following the ordinary principle that the borrower is required to pay the costs of registration of a document issued as a security for advance of money, the obligation to register such a document lies with the borrower. Further, in accordance with the object of preventing the borrower from obtaining false credit from other lenders, it can be argued with equal strength that it is the borrower's duty to register the letters of hypothecation. How then can the Plaintiffs successfully plead that having through their own default failed to register a document (which incidentally as it relates to "future" goods cannot be brought within the scope and machinery of registration under the Chattels Transfer Ordinance) as a grounds for repudiating liability. No person should be allowed to benefit by his own act of misfeasance.

Opposing Counsel will no doubt argue that

the purpose for which the Sales of Goods Act 1882 was enacted was one of the purposes ---- was to protect borrowers against avaricious lenders of money, and this accounts for the introduction of S.9 in the 1882 Act which renders null and void any document that is not in the prescribed form. As Mr. Justice Mayers pointed out, this provision is not to be found in our Kenya Chattels Transfer Ordinance, and it is submitted that the reason is that it was never contemplated that one of the purposes of our Chattels Transfer Ordinance was to relieve a borrower of his liability to the lender.

SECOND SUBMISSION

Turning now to the second submission at page 8 the grounds upon which it was submitted that the Plaintiffs are estopped from pleading the invalidity of their own contracts, namely the letter of hypothecation is that by signing these documents they gave the bank to believe they intended to honour the terms of such documents and acting upon such belief the Bank made the advances of money to the Plaintiffs. Section 115 of the Indian Evidence Act says "When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he, nor his representative, shall be allowed, in any suit or proceeding between such person or his representative, to deny the truth of that thing." For the Plaintiffs now to raise the allegation that the documents are invalid "inter partes" is nothing more than an attempt to commit a fraud on the Defendant Bank.

The Chattels Transfer Ordinance is merely concerned with the rights of third parties of which the Plaintiffs are not one and whether registered or not, the letters of hypothecation remain contracts enforceable in Common Law giving inter partes the right conferred by them and, of course, the obligations imposed by them, so the question before the Court is what are the rights conferred and the obligations imposed by the documents inter partes. Such rights and obligations it is submitted are not in dispute. The advances were received, the partners signed

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the two letters of hypothecation and well knew and well understood what they were signing. The Chattels Transfer Ordinance was never intended to deprive persons of goods or validly created securities over goods. Furthermore, before the ordinance operates the goods have to remain in the apparent possession of the grantor of the instrument.

Muskham Finance Ltd. v. Howard & Another. Times 1st December, 1962. 10

THIRD SUBMISSION

(3) By taking possession of the goods with the consent of the Plaintiffs, the Bank became secured creditors with a title to retain the goods as security for repayment of the overdraft, and a title good not only against the Grantor, but goods against the whole world irrespective of the consideration of the terms of the letters. Opposing Counsel has taken exception to the admissibility of this letter (Exhibit i 2 for identification) of consent dated 6th October. There are no grounds upon which he could possibly object to its admissibility. The document was signed by both Plaintiffs and it was admitted that it was so signed. The amendment in manuscript on the document of the words "sewing machines and spares" was a perfectly innocent insertion and even if it had been a fraudulent insertion, that would not have been a ground for keeping it out of evidence, but a matter of comment. The document is direct evidence of the circumstances in which the goods were handed over and the purpose for which the goods were handed over to the Defendant. 20 30

It was originally pleaded that the signatures of the first and second Plaintiffs were obtained by duress, but no evidence was adduced nor could it have been, to show that there was any duress. It is apparently no longer the contention of the Plaintiffs that the documents were obtained by duress, but that both partners signed it not fully understanding its contents. Bearing in mind the proved background against which the documents was signed, with the goods being removed from the plaintiffs shop to the Bank's premises, it is beyond 40

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Notes of closing address of Counsel for Defendant 29th November and 3rd December 1962 continued

doubt that both plaintiffs knew exactly what they were about in signing it. It was an authority given to the Bank to take immediate delivery of their goods as the Plaintiffs were unable to repay their overdraft. With the coming of the goods into the physical possession of the Bank, the Bank acquired a "special property" in the goods seized analogous to a pledge, and by virtue of such possession became secured creditors, cite GRANT, page 360, on the meaning of "pledge". Page 363 GRANT, in connection with the meaning of "hypothecation". Following passage: "Contract whereby a person . . . . . agrees to give another security over goods .... without giving possession". Until possession is given intended pledges has at Common Law only right of action on the contract, or at most a licence to take possession and has no interest in the goods. Donald v. Suckling (1886) L.R. 1. Q.B. at page 613. It is observed in passing that until possession is given the intended pledge has an equitable right in respect of the goods and further in an agreement for value to hypothecate goods to be acquired or to come into existence in the future, there also arises an equitable right provided the goods are sufficiently defined. Holroyd v. Marshall (1882), Tailby v. Official Receiver (1888), 13th Appeal 523, Joseph v. Lyons (1884) Hallas v. Robinson (1885) 15 Q.B.D. 288.

PAGET ON BANKING 5th Edition p.396, Madras & Official Receiver v. Mercantile Bank of India Ltd. (1935) A.C. 53. GRANT at page 369 "A document which does not constitute the title to goods and which is not intended to, and does not come into operation until the possession of goods, has actually been transferred by an independent transaction is not a bill of sale merely because it may regulate the right of the person getting possession to sell or otherwise deal with the goods in order to repay himself money advances. Example, a delivery of goods in pledge accompanied by a document regarding the transaction and regulating the right of the pledgee. Ex Parte Hubbard (1886) 17, Q.B.D. 690: Charlesworth v. Mills (1892) A.C. Ex parte Close 14 Q.B.D. p. 386. London & Yorkshire Bank v. White (1895) 11 T.L.R. 570. cf. Ex Parte Parsons 16 Q.B.D. relied on by opposing

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Notes of closing address of Counsel for Defendant 29th November and 3rd December 1962 continued

Counsel. The claimant was the third party viz. the trustee in Bankruptcy, and there was, in fact, no immediate transfer of possession, and it was S.9 of the 1882 Act (which Kenya has not) which rendered document void - S.7 to which case referred is also of the 1882 Act (which Kenya has not).

Events in our case moved beyond any question of interpretation of the validity of documents once the goods were possessed by the Bank with the consent of the Plaintiffs. The Ordinance strikes at documents and not transactions. North Central Wagon Company v. Manchester Rail Company (1887) 35 Ch. D. 191. Newlove v. Shrewsbury (1888) 21. Q.B.D. 41. In our case the validity of the letters of hypothecation could only properly arise for consideration in the following circumstances:

1. If there had been a third party claiming title to the goods.

2. The claimant's had been one of the persons mentioned in Section 13 of the Ordinance or had been a bona fide purchaser without notice of the goods under Section 40, AND

3. The goods had remained in the possession of the grantor.

FOURTH SUBMISSION.

The letters, whether registerable or not, as between the parties to the suit, a re-enforceable contract as Mayers J. and Webber J. have correctly pointed out in the rulings quoted earlier in this submission. There is no provision in the Ordinance rendering letters, if registerable, void against the grantor. Apart from the red herring of registration, it has never been in dispute that interpartes, the Bank had the right to seize and the right to sell in the term of the said letters and such rights imposed upon the Plaintiffs contractual obligations to allow them to seize and to sell. In the latter connection the evidence is that the Bank gave the Plaintiffs opportunities to dispose of the goods in stages at the best possible prices in reduction of the overdraft.

It is emphasized that the Ordinance does not deprive persons of validly created securities over goods.

FIFTH SUBMISSION

On the basis that none of the first four submissions is sufficient to dismiss the action with costs against the Plaintiffs, the fifth submission is that the letters of hypothecation are not registrable under the
10 Ordinance on two main grounds:

(a) The purpose for which such letters are created and the manner in which they remain operative, leads to the conclusion that they fall outside the scope and the machinery of the provisions of the Ordinance.

(b) If, on the contrary, they come within the scope of the Ordinance and come within the general definition of an "instrument"
20 and in particular fall within (f) of Section 2 of the Ordinance, then it is submitted they are exempt under (h) of the same section of the Ordinance being: "documents used in the ordinary course of business as their "proof of control of chattels" or "authorizing.......by delivery (of the document) the possessor of such document to receive the chattels thereby represented."

30 Under Section 2, UNLESS THE CONTEXT OTHERWISE REQUIRES Chattels mean any movable property that can be completely transferred by delivery. This the definition of chattels can be subject to cases where the context requires a different construction. The letters do not purport to charge any specific chattels identifiable by description in a schedule as envisaged by Section 17, nor is the stock in trade goods within Section 20 which refers to (a) stack, wool and
40 crops, (b) fixtures, plant or trade machinery where the same are used in, or attached to, or brought upon any place, in substitution for any of the like nature described in or on the Schedule to the instrument. These exceptions referred to in Section 20 above quoted, include

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Notes of closing address of Counsel for Defendant 29th November and 3rd December 1962 continued

the accurring or changing element of such "chattels". Section 2, chattels .... include stock and the natural increase of stock as hereinafter mentioned. (See Section 24 and 25) and the crops, (Section 28 and 29) and wool (Section 31, 32 and 33). The Ordinance is silent about fluctuating and future goods of merchandize and if such goods have to be described it is difficult to envisage how in practice the Bank could comply with Section 17 and 18 of the Ordinance, that is to say, to list an inventory of the chattels; in fact the Court could not. The whole purpose of the letter of hypothecation is to enable the borrower to use the goods hypothecated in the ordinary course of business to sell and buy in, to buy in and buy, sell and so on, keeping goods in circulation. It is only by the ordinary turnover of the business, the buying and selling of goods, that the Bank can hope to expect monies advances will be repaid. Once the Bank seizes the goods the whole purpose of the document to enable the borrower to trade, disappears and once the Bank has seized, then as already submitted, the Bank acquires a special property in the goods, a security of quite a different nature than the one envisaged by the terms of the letter of hypothecation.

The first conclusion the court is asked to draw is that such a document which creates a floating acquitable charge over fluctuating movables of merchandise is outside the scope of the Ordinance since the "context otherwise requires" when one relates the purpose of the document to the provision of the Ordinance as a whole. Further, future acquired goods and merchandise in respect of which the Bank acquires a sound equitable charge are not capable to present delivery and removal. See Branton v. Griffiths (1877) 36 L.T. 4 sub-section 5. In this case Cockburn C.J. in considering the meaning of the words "capable of complete transfer by delivery" interpreted such words to mean under the old Bills of Sale Act 1854 as "intended to refer only to goods capable of present delivery of removal." He said that the subject matter of the Act is "goods which are capable of present delivery and removed" The entire stock in trade as fluctuating from day to day can be capable of present delivery

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Notes of closing address of Counsel for Defendant 29th November and 3rd December 1962 continued

of removal at any one point of time, that is to say, on seizure, but incapable of present delivery or removal if the purpose of the document is to create a floating equitable charge on stock in trade to be retained by the Borrower for use in his business is to be achieved. Once the stock in trade is seized the trader goes out of business and the purpose for which the document is created disappears. The floating charge ceases to float and the goods, by actual seizure, as has already been submitted, become pledged to the Bank. In any event, once again it is repeated that if this were to be an instrument that has to be registered it would only be void in favour of the persons mentioned under Section 13 and only then if the conditions contained therein were fulfilled.

Finally, if letters of hypothecation have to be brought within the scope of the Ordinance, it is conceded that they fall within the definition of the word "instrument" being any way a document there to secure the payment of money or the performance of some obligation and probably come under (f) "any agreement whether intended to be followed by the execution of any other instrument or not, by which a right in equity of any chattels or to any charge of security thereon or thereover is conferred. GRANT 371 It is where physical possession is not given to complete Common Law pledge that the question as to whether a document employed to complete the pledge by passing to the pledge the possession of the goods is a bill of sale arises. Dublin Distillery 1914 A.C. 823. Letters of hypothacation by a warehouseman to a bank to secure a loan with an undertaking to sell the goods and pay the proceeds to the bank, or on demand deliver the goods to the bank, is within the exception (Re Slee exp. North Western Bank 1872) similarly letters given by a trader to its bank charging wool at a bleachers or in the traders warehouse awaiting shipment is excepted. (Re Hamilton Young & Co. 1905 2 K.B.772). Also within the exception under (h) was a letter of trust given by a consignee of goods who pledges bills of lading with the bank on obtaining the bills from the bank to enable him to obtain and sell the goods. Re David Allister Ltd. 1922 2. Ch. 211. The question whether a document

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Notes of closing address of Counsel for Defendant 29th November and 3rd December 1962 continued

depending on its terms or its purpose is one which is in the ordinary course of business and will come within the exception (h) of the Ordinance, depends on the facts of each case but it is submitted for reasons already given that it is unnecessary for the Court in this case to consider whether such letters are registerable or not. Finally, it is no wish of the Bank to be exempted from the registering of these letters of hypothecation if indeed they could be registered. It is submitted that there is no particular reason why the Ordinance should not be amended so as to enable small traders to charge under the amended Ordinance their fluctuating stock in trade while remaining in business. If provision were to be made in the Ordinance, I have no doubt that it would be satisfactory both to the trader and to the Banks. Until such amendment of legislation is carried through a doubt will always remain as to the rights of third parties mentioned in Sections 13 and 14 in competition with the rights of the banks under their letters of hypothecation, but the fact that third parties may have doubt as to the rights of the banks competing with themselves, is no possible reason or excuse for the institution of this action brought as it is by the grantor of the instrument in an attempt to repudiate his contractual liabilities to the Bank.

It is requested the claim be dismissed with costs at the higher scale and with a certificate for two Counsel.

Adjourned to 10.30 a.m. tomorrow.

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Notes of closing address of Counsel for Plaintiffs 4th and 5th December 1962

10.30 a.m. Tuesday 4th December, 1962.

Appearances as before.

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NOTES OF CLOSING ADDRESS OF COUNSEL FOR PLAINTIFFS ON 4TH AND 5TH DECEMBER 1962.

Nazareth addresses.

Action. For wrongfully seizing goods under a letter of hypothecation which is challenged. Say not the Plaintiff who is attempting to repudiate their contract it is the Defendant's who attempt to repudiate theirs. It is for the Defendant to establish the validity of the letter of hypothecation.

Letter of Hypothecation. Inadmissible in evidence as attesting witness cannot be called and invalid because not attested as required by law.

S.15 Chattels Transfer Ordinance read in conjunction S.68 Indian Evidence Act. SARKAR 9th Edition. Proviso does not apply to Kenya.

S.15. Intention of legislature was that an unattested instrument is invalid and unenforcable in law. R. v. Local Board of worksop (1864) 34 L.J.M.C. 220; Liverpool Borough Bank v. Turner (1861) 30 L.J. Ch. 379; Dale Case (1881) 6 Q.B.D. 376, Para.2 of headnote, p.378 also 454 line 11. Ex Parte Van Sandau (1846) 41 E.R. 763 at 765, held that warrant not sealed was invalid. Shamu Patter Case 39 I.A. 218. Hira Bibi v. Ram Hari 52 I.A. 362. Invalid in spite of his admission. MONIR, LAW OF EVIDENCE 4th Edition p.432/3, bottom p.433. Provisions are for protection of creditors. Ford v. Kettle (1882) 9 Q.B.D. 139, 144. Rose v. Watson (1893) 2 Q.B. 92. If not attested not valid, if attested but not registered only invalid as against certain persons set out in S.14 of Chattels Transfer Ordinance.

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Notes of closing address of Counsel for Plaintiffs 4th and 5th December 1962 continued

Whether letter of hypothecation is an "instrument" within S.15 of Chattels Transfer Ordinance? Say falls within Ch. (e) of S.2 "licenced to take possession of chattels as security for a debt." If not within (e) falls under (f).

Re. Townsend, ex parte Parsons (1886) 16 Q.B.D. p.332.

Re. Hardwick, ex parte Hubbard (1886) 17 Q.B.D. p.696. S.2 (h) "ordinary course of business". Tenant v. Howatson (1888) 13 A.C. 489 at 494. 4th line from top. Gandhi v. N. & G. Bank c.c. 668 of 662 (unreported) attestation not in point at all. matter does not decide issues in case. p.3 "probably" Dodhia v. N. & G.B. c.c.914 of 1962 (unreported) p.2. Independent Automatic Sales Ltd. v. Knowles Foster (1962) W.L.R. 974. Popatlal's case. No objection taken in Supreme Court so taken as properly approved in Privy Council. Here objection taken right at the start. Estoppel. Not pleaded. Must be pleaded. Say no grounds for estoppel here. Do not even know what estoppel is being relied on. HALSBURY Vol.15 3rd Edn.p.176 348. No attestation document invalid.

Adjourned to 2.15 p.m.

James Wicks J.

2.15 p.m. Court resumes as before.

Nazareth addresses.

No estoppel against a statute. Defendant seized Plaintiff's goods in breach of their agreement. Letters gave facility until 30th April, 1961. Record p.51/2 Mr. William. No recollection. V.J. Amin p.53/4 rules of evidence - cannot say explained. Nothing to contradict evidence of 2nd Plaintiff. p.11 and 12. Nagesh did not take part. 2nd Plaintiff's evidence confirmed by documentary evidence. Exhibit C.1 confirmed C.14. Bank's reply 14A. Money cannot be recalled until time expires, 30th April 1961. SHELDON, PRACTICE AND LAW OF BANKING, 8th Edition 323. If the money is not due, goods cannot be seized.

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Notes of closing address of Counsel for Plaintiffs 4th and 5th December 1962 continued

If letter of hypothecation held admissible Col.10 of letter not applicable as an express agreement to the contrary in Exhibit C.I. Where an express arrangement is in conflict with a printed document the former prevails HALSBURY 3rd Edn. Vol.11. p.415, S671. 2nd Edn. Vol.7 p.331 S.416. Glyn v. Marghetson (1893) A.C. 351 at p.354.

10 If repayable on demand Bank's seizure wrongful because seized without warning and without reasonable time being given to repay. Fact that fresh security documents executed on the morning of 6th October shows no demand for payment was made. Say no interview took place on 29th September. Say no demand made on that date. If took place demanded only that excess over Shs.140,000/- be repaid. So no demand made for repayment on or before 6th October '60. First demand made on 8th October, 1960 and that
20 was 2 days after seizure. HALSBURY 3rd Edn. Vol.27. p.200 S.338. Brighty v. Norton (1862) 122 E.R. 116 at p.118. Tome v. Wilson (1863) 12 E.R. 524 at p.529 Blackburn J. Massey v. Sladen (1868) 4 Exch. 13.

Could the goods be seized at any time. Depends on validity of letter of hypothecation. Any provision that goods can be seized at any time not reasonable. Must be considered in relation due carrying on of a business. STROUD
30 5th Edn. Vol.3 p.2216. Nature of hypothecation. Distinction to pledge. Cannot convert hypothecation to pledge at will. Yeoman Crédit Ltd. v. Apps (1961) 2 A.E.R. 281, p.287 H. p.288 D. Karsales (Harrow) Ltd. v. Wallis (1956) 2 A.E.R. 866 at p.868 H. Sensible business transaction - what Bank did was not in accord with a sensible business transaction. Banks reliance on Exhibit C.6. First letter only signed by two out of five partners. LINDLEY ON
40 BANKING 11th Edn.183 p.184. Act not expressly authorised by other partners. Partners who signed can only commit themselves, not their copartners. Here at least three partners entitled to claim damages for trespass.

Document altered in material respect after signed by partners. Not allowed to rely on a document if you materially tamper with it whilst in your custody. HALSBURY 3rd Edn. V.11 p.367 S.599.

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Notes of closing address of Counsel for Plaintiffs 4th and 5th December 1962 continued

Facts. 1; Original does not bear any initials - banks always insist on signatures to alterations. 2. Carbon copy does not show alteration. 3. Nature of the document was misrepresented to the Plaintiffs. Why only two signatures obtained when other documents signed by all partners on morning of the same day. Conflict in the evidence relating to signing of document. Scott, evidence p.89, says he handed Exhibit 6 to 2nd Plaintiff. Pandya, evidence p.102. P. Patel handed to 2nd Plaintiff p.104. Only persons present were 2nd Plaintiff, Mr. P. Patel and you - inference Scott not there. No one in his right senses would sign a document like Exhibit C. unless something imposed on him. P.Patel could not pay the overdraft. Muskham Finance Ltd. v. Howard Times as December 1962 in Plaintiffs' favour. Here say nature of document represented to the Plaintiffs.

When was letter signed ? Fact for finding. Before seizure commenced or during the course of the seizure.

Adjourned to 10.30 a.m. tomorrow.

James Wicks J.

10.30 a.m. Wednesday 5th December, 1962.

Court resumes as before.

Nazareth addresses.

Claim that pledge was created by letter of 6th October 1960.

Say no substance. Cannot rent by itself. A pledge is a contract. HALSBURY 3rd Edn. V. 29 p.211 S.391. p.213 S.399. To be effective there must be a contract at the time, unless proof of a contract cannot rely on it, not pleaded, no consideration. If seizure cannot be justified on letter of hypothecation cannot be justified at all.

Main defence based on alleged breaches.

Defence based on misunderstanding of legal position. Facts. Events of morning of 6th

October a planned operation to get security for amount over Shs. 140,000/-.

Defence distress led to decision to seize - no basis in facts and show weakness of defences.

Notice to creditors - issue on facts. Defendants say handed over on 6th October. Plaintiffs say handed over on 10th October. Not effective until later in month, 25th Oct. Say seizure caused letter to be written not letter led to seizure.

Breaches. Defendants say that allowing overdraft to go over limit was breach as was drawing against uncleared up-country cheques. HALSBURY 3rd Edn. V.2 p.166 S.311. Relation between banker and customer p.227 S.425. Mc.William Re 49 and 50. Bank willingly went over amount, as there were special arrangements. Bank not bound to honour drawings against up-country cheques. Rouse v. Bradford Banking Co. Not relevant - concerned failure to honour cheques.

Rules of Bank. Not given to Plaintiffs. Plaintiffs cannot rely on rules of which Plaintiffs have no knowledge.

If account not operated properly still could not call in money - only remedy would be to close the account in the sense of not allowing customer to draw cheques. No relation between closing an account and repayment of an overdraft. Further closing account no letters to signatories under letter of hypothecation.

Facts. Middle September, 1960, 7 cheques dishonoured. 2nd Plaintiff says temporary overdraft arranged of Shs.5,000/- to 8th October. Later Shs. 5,000/- arranged and then Shs. 3,000/-, all repayable by 8th October. Say all this supported by account. Record p.19. Exhibit G.2.

Alleged meeting of 29th September Williamson, Record p.63. Nagesh present in office. P.76. Quite different account. After adjournment - Williamson attempts to rehabilitate himself. P.87. Alleged meeting on 29th

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Notes of closing address of Counsel for Plaintiffs 4th and 5th December 1962 continued

September does not fit in anywhere in the case. Plaintiffs' account of September 23rd, September 26th and October 3rd fits in with account, and confirms that increases had been authorised. Wording of documents signed by Plaintiffs on 6th October contradict that the documents were post facts. P.97 Pandya says never went to Plaintiffs' premises before 6th October contradicts Williamson.

Contradiction between Williamson and Pandya's evidence shows Williamson not telling the truth. Also Nagesh. Came in with documents and left according to Williamson. Nagesh says stayed until end of meeting except for two minutes. 10

1st Plaintiff not called. 2nd Plaintiff not cross-examined on what happened on morning of 6th October - not necessary to call 1st Plaintiff. ?? alleged meeting 29th September.

Adjourned to 2.15 p.m. 20

James Wicks J.

2.15 p.m. Court resumes as before.

Nazareth addresses.

Basis of signing documents on morning of 6th October was that extra Shs.10,000/- would be given on same terms as former loan.

As regards balance of Shs.10,000/- Bank unsecured up to morning of 6th October. Say project of getting new documents executed was with seizure in mind immediately they were signed. Say a planned seizure. 30

SUMMARY OF THE PLAINTIFFS' CASE.

1. The point to be now decided is whether Bank's seizure of goods on 6th October, 1960, is wrongful.

11. 1) The Bank has seized the goods in reliance on a Letter of Hypothecation (Ex. Id.1).

2) This document, admitted *de bene esse*, is inadmissible because S.15 of Chattels Transfer Ordinance requires it to be attested 40

and S.68 of Indian Evidence Act provides it cannot be "used as evidence" unless attesting witness is called.

(a) No attesting witness called. Therefore letter of hypothecation inadmissible.

3) This document is wholly invalid under S.15 of Chattels Transfer Ordinance.

4) This document is clearly an "instrument" under Clause (e) or, if not Clause (e), then Clause (f) of definition in S.2 of Chattels Transfer Ordinance and is not excluded by Clause (h).

5) If above submission upheld and document held invalid or inadmissible, the issue of liability must be decided in Plaintiff's favour.

111. So far as Bank rests its case on Ex.C.6, this affords no defence.

1) Defendant's Counsel has relied on it so little that in his final address he referred to the seizure as having been effected "with the acquiescence, if not with the consent of the Plaintiffs."

2) As it has been materially altered after it was signed by Plaintiffs 1 and 2, while it was in Defendant's custody, it cannot in law be relied upon by the Defendant.

3) Patel's evidence of what he said to Plaintiffs when he obtained their signature, that it was to confirm an alleged statement made that morning at the Bank that Plaintiffs were unable to reduce the overdraft confirms Plaintiff's evidence and shows that it was represented not to be a licence or authority to seize goods. The letter, having been obtained by misrepresentation, does not bind the Plaintiffs.

4) If it is looked upon as an authority or licence to seize the Plaintiffs' goods, it is signed by only Plaintiffs 1 and 2 and they had clearly no implied authority to authorise or allow the Bank to seize all the goods and close

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Notes of closing address of Counsel for Plaintiffs 4th and 5th December 1962 continued

down the business, and therefore the seizure is wrongful, at least as against the other 3 Plaintiffs, so far as this point of the defence is concerned.

5) There was no consideration whatever for the grant of this licence or authority to seize.

6) It cannot be considered a Pledge (Which is a contract) and defendants must stand or fall on their letter of hypothecation. 10

IV. If Court holds that Ex. Id.1 is admissible and is valid, it still affords no defence to suit for wrongful seizure :-

1) The loan to Plaintiffs was not repayable until 30th April 1961 and a seizure before that date to secure repayment of sums not yet due was wrongful.

2) So far as letter of hypothecation purports to give right to seize goods at any time, this is a provision on a printed form that has no application and is not part of the agreement, as it conflicts with the agreement to grant a loan up to 30th April 1961 and is against the fundamental basis of the contract that the Plaintiffs must have possession of their goods to carry on the business for which the loan was obtained, and at any rate so long as there was no breach of the terms of the letter of hypothecation, which entitled the Defendants to seize. 20 30

(i) No such breach of any term of the letter of hypothecation has been proved - it is not even alleged in relation to letter of hypothecation.

3) So far as the defence is based on alleged breaches, it is entirely misconceived:

(i) The alleged breaches are drawing of cheques above authorised amount of overdraft or against cheques before clearance, and these are not breaches, since it was an agreed or voluntary act on Bank's part to honour cheques above the originally authorised limit; 40

(ii) The alleged breaches are of Bank's Rules of Business, of which a copy was never handed to Plaintiffs.

(iii) The alleged breaches would only entitle the Bank to close the Plaintiff's account i.e. to refuse to honour any further cheques (if this could be done lawfully, having regard to the agreement for an overdraft or loan up to 30th April 1961), but such closing of the Plaintiffs' account would not entitle Bank to claim repayment of the loan before 30th April, 1961 or to seize goods because they were not paid before that date.

V. Re Estoppel: This late-conceived and desperate defence is a mere cockshy and entirely without substance :-

(a) Not pleaded

(b) None of the 3 elements of estoppel made out

(c) Can have no possible application to a defence of invalidity for lack of attestation as there can be no estoppel against statute.

VI. Conclusion: 1) Ask Court to find that this calculated and heartless seizure of Plaintiff's goods on 6th October, 1960 was wholly wrongful and that Defendants are liable in damages.

2) This big and powerful Bank may feel that it can do what it pleases with the small trader and close down their business at its choice. Court should show very plainly that it cannot succeed in getting away with this wholly wrongful operation.

Brief Summary of the submissions made by J.M. Nazareth, Esq., Q.C., Counsel for the Plaintiffs.

Plaintiffs' case is for damages for unlawful seizure of goods under a letter of Hypothecation (L/H) which is challenged.

It is not the Plaintiffs who have repudiated the contract (as the defence has submitted) but the Defendants.

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Notes of closing address of Counsel for Plaintiffs 4th and 5th December 1962 continued

1. ATTESTATION

If the Defendants wish to succeed, they must both show and prove the L/H upon which they rely. This L/H has been admitted de bene esse. The Plaintiffs submit that the document is inadmissible as evidence as it requires to be attested and the attesting witness has not been called. The Plaintiffs also submit that the document is invalid and completely inoperative because it is not attested as required by law. See: Sec.15 Chattel Transfer Ordinance and Sec.68, Indian Evidence Act (Sarkar on Evidence, 9th Edition Page 962. The proviso to Sec.68 does not apply to Kenya as that particular proviso was passed in 1926).

Assuming for the moment that the L/H is an INSTRUMENT under the Chattels Transfer Ordinance (see infra) Sec.15 says 'shall' and Sec.68 says 'it shall not ...' and requires the document to be proved in a prescribed manner.

If one is relying on a document which cannot be proved, the Court cannot look at it nor act on it and accordingly, those who rely on the document cannot get home.

This point alone is sufficient to dispose of the case in the Plaintiffs' favour. The Court cannot look at or admit the document.

What is the effect of Sec.15? Does it make the L/H invalid against only certain classes of persons or is the instrument wholly invalid?

The Plaintiffs' case is based on non-attestation and not non-registration.

Sec.15 says nothing as to what is to happen if the instrument is not attested. Decided cases on the Bills of Sale Acts in England show that the intention of the Legislature was that an unattested document was to be rendered wholly void and inoperative.

See: R. vs. Local Board of Worksop (1864) 34 L.J.M.C. 220, a case where want of mere Seal was held to be fatal.

ALSO: Liverpool Borough Bank vs. Turner (1861) 30 L.J.Ch.379 Transfer not in accordance with

the Statutory form, invalid. This case is cited for the reason that although the earlier Statute expressly provided for the consequences of non-compliance, later statute omitted that particular provision; nevertheless, it was held that the same result followed despite the absence of express provision.

Also: Dale Case (1881) 6 Q.B.D. 376: There is a long headnote but for our purposes, the 2nd paragraph on page 378 is enough, and see also per James, L.J. at page 454, line 11 (it may seem...) Also: Ex Parte Van Sandau (1846) 41 E.R. 763: see at page 765: Held, that a warrant not sealed was invalid.

Also refers to two Indian Cases on Sec.59 of the Transfer of property Act.

Shamu Petter Case 39 L.A. 218: For want of attestation, a document cannot operate as a Charge.

And: Hira Bibi vs. Ram Hari 52 I.A. 362: Held that the section which required attestation is not a mere rule of evidence but a rule of law. Defendants therefore cannot rely on Sec.70 of the Indian Evidence Act.

Also a passage from Monir on Evidence 4th Ed. at pp 433/4 cited starting from the bottom of page 433; ("A document required.....") In the present case, Sec.15 of the C.T.O. says that an instrument SHALL be attested. Having regard to the object and policy of the C.T.O., it is a provision for the protection of creditors. One can envisage a situation where a person in financial difficulties executes an instrument on the eve of his bankruptcy and pretends that the instrument was executed a long time ago. This would be a fraud on the creditors. If these persons can execute an instrument without attestation, there is a possibility of a fraud on the creditors who are not able to levy execution in time and will be deferred to claims of other persons party to the fraud. When the goods are taken away on the eve of the event, then even persons under Sec.13 are defeated as the goods become the subject matter of a pledge See: Ford v. Kettle (1882) 9 Q.B.D. 139 at 144 per Jessel M.R. ("I feel the force of Mr. Reede's ......) and the head-note.

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Attestation is important as it helps to test the genuineness of the document. When statute requires that a document shall be attested, the attesting witness should state his residence and occupation. This is not to be treated as an idle formality.

The C.T.O. says that if a document is not registered certain consequences follow. If the document is attested but not registered, the document is rendered invalid against certain persons; but if the document is not attested at all, then it is wholly invalid. There is a serious danger otherwise of collusive documents being put forward: the genuineness of which cannot be established, resulting in fraud on genuine creditors.

On the strength of the above arguments it is therefore submitted:

1. The document (L/H) is inadmissible as evidence because of Sec.68 of the Evidence Act and cannot therefore be looked at, &

2. The document is invalid for want of attestation under Sec.15 of the C.T.O. and consequently cannot be relied upon by the Defendants.

11. WHETHER L/H AN "INSTRUMENT" WITHIN C.T.O.: Is Exhb-Id. 1 an 'Instrument' within the definition of Sec.2 of the C.T.O.? It is submitted that the L/H falls within Sec.2 Clause (e) of the C.T.O. as being"......... authorities or licence to take possession of Chattels as security for any debt." L/H is a licence to take possession of chattels hypothecated. Further, it is submitted that the definition of an instrument under Sec.2 Clause (f) also applies to the L/H under consideration. L/H therefore falls under S.2 (e) and if not, then under S.2(f).

See: Re Townsend, ex parte Parsons (1886) 16 Q.B.D. 532 as explained in Re Hardwich ex parte Hubbard (1886) 17 Q.B.D. 690 at p.696.

Counsel for defence conceded in his final address that if the L/H was registrable, it fell under S.2(e), but further said that it came popping out again under S.2 exception (h)

as being a transaction 'in the ordinary course of business'. Sir William was unable to point out which words in exception (h) applied in the instant case. It is submitted that exception (h) has no application here at all. A transaction like the present one cannot be regarded as being in the ordinary course of business: See: Tenant vs. Howatson (1888) 13 app. Cas. 489 at p.494 (P.C.) line 5 ("Though it is not easy .....")

It is clear from an examination of S.2 of the C.T.O. that the L/H under consideration is clearly an 'Instrument'. Accordingly S.15 operates and S.68 of the Indian Evidence Act makes it inadmissible as evidence.

Counsel for the Defendants spent a great deal of time on the question of registration. Se.13, 14 etc. have no relevance whatsoever to the present case. Counsel for the Defendants had referred to Rulia Ram vs. Karsan Murji (1947) 14 E.A.C.A.I. This case does not deal with the point at issue. It has nothing to do with attestation. Attestation did not arise in that case. It dealt with a wholly different matter.

B.L. Gandhi vs. National & Grindlays Bank Limited S.C.C.C. 668 of 1962. This case does not assist the Defendants at all. S.15 is not referred to in that case and it is important to observe that that is a ruling on an application for an interlocutory injunction. In such applications, one does not decide upon the issues involved but only on whether it is desirable to grant an injunction. I believe the instrument in that case was probably attests and registered. See page 3 of the Ruling - last paragraph: "...Probably not sufficient ....", "......conclusion of his Ruling ......" One does not go into the merits of the case in interlocutory applications.

(Counsel for defence: Not suggesting that the Ruling of Mayers J. binding on the Court).

In interlocutory applications it is only necessary to make out a prima facie case. The same arguments go for the Ruling of Webber J. See: Page 2 line 12 of the Ruling. The Ruling did not decide on matters finally.

The defence also greatly relies on Independent

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Automatic Sales Limited vs. Knowles & Foster (1962) 3 All E.A. 27. See S.95(1) of Companies Act, 1948. This Section sets out the consequences of non-registration. The case is therefore not of the slightest assistance to the Defendants' case. S.95(1) of the Companies Act, 1948 make unregistered instruments void against the liquidator, but the instrument is not void as between the parties. S.95(1) says in terms to what extent the transaction is void and to what extent it is not. S.95(1) is wholly different from S.15 of the C.T.O. which does not set out the consequences of non-attestation. This is for the Court to decide. The case is helpful to the Plaintiffs because Buckley J. holds that the transaction creates an equitable charge and consequently this brings the L/H within the definition of an instrument under S.2(f) of the C.T.O.

See: Page 19 of Defendant's written submission, lines 5-7. The extract from Grant on Banking, page 369, deals with a wholly different situation; there the security was created by the actual deposit of goods or by documents of title. But in the instant case, the security was created by the execution of a document (L/H).

See: Page 22 of Defendant's written submissions: Definition of 'Chattels'. This definition enlarges upon the ordinary definition of chattels. Certain goods for the purposes of the C.T.O. regarded as chattels, e.g. wool and sheep and growing crops etc. Here there is a security on something which no one could deny to be chattels, e.g. piece goods, clothing etc.

The Plaintiffs' submission is that the L/H is clearly an instrument within S.2 of the C.T.O. it requires therefore to be attested by S.15 of the C.T.O. and cannot be used in evidence by virtue of S.68 of the Indian Evidence Act.

See: Govindji Popatlal vs. Nathoo Vasandji (1962) 3 W.L.R. 374 @ 379 (P.C.) : Defence counsel also placed reliance on this case. In that case, the situation was completely different from the present case. In the Supreme Court, the

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mortgage was admitted, practically by consent, without any objection. The case then went to the Court of Appeal. Mr. Mandavia argued that the mortgage was inadmissible as S.68 of the Indian Evidence Act was not complied with. The Court of Appeal dismissed the appeal but indicated that S.68 was mandatory. In the Privy Counsel, Mr. J.M. Nazareth Q.C. said the Court of Appeal was wrong on the issue of S.68.
10 Document in that case regarded as properly proved as no objection was taken to it in the lower Court. In this case, we have taken objection right from the beginning, and therefore the Govindji Popatlal case has no relevance.

If the L/H is held to be inadmissible, then the issue of liability must be decided in the Plaintiffs favour. Defendants would then fail in their reliance on the L/H.

111. ESTOPPEL. Defendants have not pleaded
20 estoppel. (Sir William submits not necessary to plead estoppel in Kenya). Nazareth differs and quotes Bullen & Leake.) There can be no estoppel against a Statute: See: 15 Halsbury's laws of England 3rd Edn. 176, para.345. The Court should therefore overrule this desperate last minute defence of Estoppel.

IV. LIABILITY UNDER BREACH OF CONTRACT: If the Court is against the submissions I have made and were to hold that the L/H is valid, I would
30 submit that the Defendants seized the Plaintiff's goods in breach of their agreement and therefore liable in damages.

Agreement was made in April, 1960 between the Plaintiffs and the Defendant Bank under which the Defendants agreed to lend to the Plaintiffs up to Shs.140,000/- and the repayment of the amount so lent could not be required by the Bank until 30th April, 1961.

It is sheer nonsense to suggest that repayment
40 could be at any time. If so, business transactions would be absurdities.

The Defendant's argument is that Plaintiffs were in breach of the Banking Rules and the Defendants were justified to seize - this argument has no substance.

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I will take the agreed terms of the loan or the overdraft facility: At the time of agreement, Mr. McCraig McWilliam was the manager. He remembers nothing as to any conversation having taken place between him and the Plaintiffs (see judge's notes, pages 51-2).

As regards Bulakhidas Amin, the person who handled the transaction, he says he explained or agreed nothing himself: (See: Judge's notes, page 53. He gave no definite evidence that he explained the terms of the L/H to Plaintiffs. There is nothing to contradict the evidence of the 2nd Plaintiff. It is not true therefore to say that 2nd Plaintiff's evidence is not confirmed. Nagesh could not have confirmed, because he says he did not take part in the proceedings. 2nd Plaintiff's evidence: (See Judge's notes pp.11-12). Very clear agreement that the loan was to be for a year. There is no evidence of a denial on this particular issue. This evidence of the 2nd Plaintiff is confirmed by documentary evidence: See Exh.C1 (letter dated 9th May, 1960 from defendants to Plaintiffs). This is not a posthumous letter (as suggested by the defence) but a part of the original agreement under which a loan was granted for a year. C1 says this and nothing else.

C.14: Position is confirmed by Exh. C14 (letter dated 16.11.60) See: Para.2. It is absolutely clear from that that the overdraft facility was to remain outstanding until 30.4.61. Any other interpretation on that letter e.g. the argument of the loan subject to review, is nonsense, as review would be automatic after the expiry of the loan period.

The Bank was amply secured, so there was nothing strange in fixing a loan for a fixed period. The trader would have no security if he were to be called upon to repay at any time.

See: Sheldon, Practice, and Law of Banking, 8th Edn. p.323 ("If however the bank.......") If you thus cannot sue for the money advanced, you can neither seize the goods as the money is not due.

V. CLAUSE 10 OF LETTER OF HYPOTHECATION: If

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the letter of hypothecation is admissible and valid (which the Plaintiffs strenuously contend it is not), then I would comment on clause 10 of L/H. This says that money is repayable on demand. This printed provision cannot prevail against an express agreement that money will not be re-payable until 30th April, 1961. You cannot have on the one hand money payable on demand at any time and at the same time have it repayable on a fixed date; this is inconsistent. See: 11 Halsbury's Laws of England 3rd Ed. Page 415, para.671. When a date for re-payment is fixed, special words must prevail over the general words. See also: 7 Halsbury's Laws of England, 2nd Edn. 331, para.460, and Glyn vs. Marghetson (1893) A.C. at pp.354-5.

C 1 was sent to confirm the agreement reached. Plaintiffs pressed for that letter to be sent to avoid precisely the situation that arose. If the agreement was for the loan to remain in force until 30th April, 1961, the Bank's seizure was unlawful.

Even if the loan was repayable on demand (and the Plaintiffs contend that it was not), the Bank's seizure of the goods was still wrongful because no reasonable notice or time to repay was given. The Bank's witnesses made it clear that it was a planned surprise raid on the shop. Fresh documents having been executed on the same day increasing the amount from 140,000/- to 150,000/- clearly proves that no previous demand for repayment was made. There is no evidence of any letter having been sent before 6th October, 1960.

VI. 29TH SEPTEMBER, (1960): It is submitted that no interview took place on that date as the Defendants suggest, and no demand for repayment was made. Even if your Lordship were to hold that an interview on that date did take place, the only demand was for the excess - no demand was made for the whole amount. The only demand for the whole amount was on the 8th October, 1960 - two days after the seizure.

VII. REASONABLE TIME FOR REPAYMENT OF OVERDRAFT: Reasonable time must be given for payment even if amount repayable on demand. See: 27 Halsbury's Laws of England, 3rd Edn. p.200. Without

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demand of any sort, the Bank just seized the goods. See: Brighty vs. Norton (1862) 122 E.R. 116 at p. 118, and also: Toms vs. Wilson (1863) 122 E.R. 524, head-note; per Blackburn J. at 529 ("I am of the same opinion......"); and per William J. at p.531. See also: Massey vs. Sladen (1868) L.R. 4 Exch. 13. If money was payable on demand, the Bank had to allow reasonable time and could not seize before that time. 10

VIII. FUNDAMENTAL BASIS OF THE CONTRACT: The Defendants contend that they could seize the goods at any time, as the L/H so provides. If the L/H is invalid, and inadmissible, that will be the end of the matter. If it is admissible it is submitted that any provision contained in the L/H that the Plaintiffs' goods could be seized at any time is to disregard the fundamental basis of the transaction; for this loan was raised to carry on the business of the 20 Plaintiffs and consistent with that one could not have the right of immediate seizure. The basis of a transaction of hypothecation is that the goods remain in the possession of the debtor until there is default or breach which entitles the Bank to seize the goods, see: Stroud's Judicial Dictionary, 3rd Edn. Vol. 111 page 2216, where hypothecation is defined. The basis of the transaction is that neither possession nor property given - only a right to 30 seize. If hypothecation can be turned into a pledge at any time at one's own sweet will, it is going against the whole basis of hypothecation.

See: Yeoman Credit Limited vs. Apps (1961) 2 All E.R. 281; per Holroyd Pearce, L.J. at p.287 H, and at p.288 D quoting Denning and Parker L.J. respectively. The Defendants did exactly similar in removing the goods.
See also: Karsales (Harrow) Ltd. vs. Wallis 40 (1956) 2 All E.R. at p.868.

The interpretation I have placed on the contract is the very thing which was contemplated by the parties, is, that the Plaintiffs were entitled to have the loan up to 30.4.61. Only then it becomes a sensible business transaction. If the borrower does not have a date for repayment, he does not know when repayment would be demanded.

The Bank can then behave very oppressively.

IX. Exh.C.6. DATED 6TH OCTOBER, 1960: There are several answers to this letter upon which the Defendants rely heavily.

1. The letter was only signed by two out of the five Plaintiffs. It is fallacious to say that the two partners have implied authority to grant a licence to seize the goods. The implied authority is in respect of carrying on the business, not to close it down arbitrarily. See: Lindley on Partnership 11th Edn. Pages 183/4 ("The consequences ......") This act was not expressly authorised by the other threepartners and accordingly the two partners who signed could only commit themselves, and not the others. The Defendants could not use C6 as justifying trespass as far as the other three partners are concerned, who are entitled to claim damages.

2. C 6 has been tampered with by the Defendants after it was signed by the two partners. It cannot be relied upon for that reason. It does not matter whether the alteration is innocent or fraudulent but whether it is material. See: 11 Halsbury's Laws of England 3rd Edn. page 367, para.599. C 6 is materially altered after execution without the consent of the Plaintiffs. This is clear from the fact that the original does not bear any initials on the document. Bank clerks are used to the practice of having alterations initialled. Also shown by the fact that the carbon copy (Exhibit 3) does not show the alterations.

Non est factum:

3. Most important however is that the nature of the document was misrepresented to the Plaintiffs. Why is it that only two signatures were obtained to this document of importance when only that morning all the partners had signed a number of documents? I am asking Your Lordship to believe the evidence of Keshavji, the 2nd Plaintiff, that he thought that he was signing a document in connection with documents signed ealier in the morning.

See evidence of Scott (Judge's notes p.89), and Pandya's evidence (Judge's notes p.102 and 104)

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which means Scott was not there. And see Nagesh's evidence: he said he was not in the shop in the afternoon.

No one in his right senses would sign a document like C 6 without inducement or misrepresentation.

See: Prabhudas Patel's evidence: P. Patel represents to the 2nd Plaintiff that C6 merely confirmed that Plaintiffs could not repay the overdraft and that C 6 was merely a confirmation of what was stated by the Plaintiffs at the earlier meeting.

Muscha Finance vs. Howard & Another (1962) The Times 3rd December. This case is in our favour. If a person signing a document did not know the nature of the document, he is not bound by it. Plaintiffs did not know the nature of the document they were signing. It was misrepresented to them that C 6 was a confirmation of what they had said at the earlier meeting. If C 6 was a prior authority, it was misrepresented; if signed after seizure, there was a trespass. (Nazareth refers to Sir William's final address in which he said that the seizure was with Plaintiffs acquiescence, if not their consent, and emphasises the phrase "acquiescence, if not consent").

4. I now come to the Defendant's submission that Exhibit C 6 created a pledge, or alternatively by the seizure of the goods, a pledge was created. There is no room for such a contention; it is completely groundless. So far as C 6 rests on the L/H it rests on its admissibility and validity. In so far as it is a submission that C 6 rests on its own legs, and not on the L/H there must be a contract of pledge. Pledge is contract: See Stroud's Judicial Dictionary, Vol.3, 3rd Edn. page 2216; 29 Halsbury's Laws of England, 3rd Edn. page 211, para 391; and page 213, para.399, and therefore unless a contract can be established, there is no valid pledge. There is no pleading or allegation of any such contract. There is no consideration for any such contract. If it is suggested that a contract was made, what were its terms? C 6 therefore cannot rest on its own legs. It is inconsistent with the

events of 6th October, 1960 to hold that there was such a contract. Bank went to the shop with lorries and men with the intent of seizing the goods, not with intent to make a contract. When the same morning the five partners signed fresh documents, how can it be argued that a fresh contract took place in the afternoon? Therefore the licence is C 6 rests on the L/H and stands or falls with the L/H. This is my
10 answer to the Defendants' submission that a pledge was created by C 6.

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Pages 12 and 13 of the Defendants' written submissions: (lower half of the page read out). I have dealt with these arguments already and they cannot be accepted. They are based on a complete misconception of the law and our case. The letter of hypothecation is invalid because of S.15 of the C.T.O. and not because of non-registration.

20 X. DISTRESS: Para.8(4) of the defence. This defence was abandoned after it became manifest that it could not be supported after our evidence (i.e., that of the 2nd Plaintiff, Mr.Bakrania, the advocate, and the Court bailiff). This defence was abandoned at the last minute; it is not like the Plaintiffs' amendments of their pleadings which were well before the case. The Bank officials knew that the distress was after seizure but they took this defence hoping to get
30 away with it. This goes to credibility and the Court should take note of it. It goes to show what the Bank is capable of to make out its alleged case.

XI. EXHIBIT H: There is no evidence that notice was given to any creditors on or before the 6th October. The Bank gave evidence to the effect that Exhibit H was produced on the 6th October. It is submitted that this is wrong. Keshavji says this document was produced on the 10th
40 October, which was after the receipt of Exhibit C 7 (letter from Bank dated the 8th October,1960). It will be shown that Williamson, the sub-manager, is an untruthful witness, but even if the Defendants' evidence regarding the meeting of the 6th be accepted, this letter (Exhibit H) was merely a draft, not having gone out from the Plaintiffs to anyone except the Bank. If the Bank relies on it as an act of Bankruptcy, the N. Bank is in a

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difficult position; title would then vest in the Official Receiver, not in the Bank. The Bank was not justified in seizing the goods. The Bank says that it was only this letter that induced them to seize goods. This is quite inexplicable. This supports my contention that the seizure was a planned operation conceived in advance. Plaintiffs were induced to sign fresh documents and then the Bank seized the goods. The actual letter sent to creditors was on the 25th October, 1960, sent by Messrs.Shah, Gautama, Maini & Patel. The seizure of the goods caused the letter to be sent to the creditors and not vice versa. It is submitted for the defence that the seizure was a result of Exhibit H therefore fails.

XII. PLAINTIFFS' ALLEGED BREACHES ON 38 OCCASIONS: This was the main defence of the Defendants at the outset and if not abandoned, is now very weak. The case is based on alleged breaches. This is based on a complete misunderstanding of the legal position arising on the overdraft. The seizure of goods was a carefully planned operation. The Plaintiffs were induced to execute fresh documents on the morning of the 6th so as to secure the excess over Shs. 140,000/- (which had been lent by cheques being honoured) by converting the excess up to Shs. 10,000/00 to a long-term loan and as soon as the documents were signed, the goods were seized by the Bank in the afternoon. This defence of alleged breaches is difficult to follow in view of Mr. McWilliams' evidence. The evidence betrays a complete misconception of the relations between banker and customer: See 2 Halsbury's Laws of England, 3rd Edn. page 166, para. 311, and page 227 para.425. If there is no prior agreement, the Bank is entitled to refuse to honour the cheques in excess of the credit, or if the account is running at an overdraft, then beyond the agreed limit of the overdraft. See: Mc Williams' evidence (judge's notes pp.49/50). So far as cheques up to the limit of Shs. 140,000/00 were presented, the Bank had to honour these because of their agreement with the Plaintiffs. But beyond that the Bank

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was not bound to honour these cheques unless there was a special agreement. The 2nd Plaintiff gave evidence of agreed increases of Shs. 5,000/00 on 23rd September 1960 and Shs. 5,000/00 on 26th September, 1960 and the 3rd Plaintiff gave evidence of an increase of Shs. 3,000/00 on the 3rd October, 1960.
If the Plaintiffs drew against uncleared up-country cheques and the Bank honoured these
10 cheques it did so voluntarily or by agreement. Thus Plaintiffs' cheques in excess, it is submitted, were not breaches of any agreement. See: McWilliams' evidence (judge's notes pages 50/51).
Thus all payments of the cheques by the Bank were the Bank's own voluntary acts. It is therefore sbsurd to suggest that every time the overdraft was exceeded, there was a breach.
The Defendants cited Rouse v. Bradford Banking
20 Co. (1894) A.C. at p.596. This case has nothing to do with the present case. The question at issue in that case was the failure of the Bank to honour cheques. We are not complaining of any failure to honour cheques but of the seizure of the goods. In the case cited, there was no agreement to give a fixed time for the repayment of the overdraft unlike in our case where the time given was 30th April,1961.

XIII. THE BANKING RULES: There is a great deal
30 of confusion between the right of the Bank to close an account and an alleged right to seize the goods, under the L/H. No copy of the Banking Rules was given to the Plaintiffs. The Plaintiffs admit knowledge of some practice. But this does not bind them with the Banking Rules which they did not read. Even if the Rules are binding on the Plaintiffs (which is denied), the Bank is only entitled to close the account. This means that if the account is in
40 credit, the customer's credit balance will be paid back to him; but if the account is in debit, the Bank is not entitled to call that in if that would infringe any agreement. They would have to show that there was a breach of a term of the L/H before demand for repayment and seizure can be made. There is no justification for equating the right to close the account with the right to demand the immediate payment of the loan or to seize the goods.

50 XIV. GENERAL COMMENTS ON EVIDENCE: I would

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confidently submit that the Plaintiffs' version of what happened between 21st September and 6th October should be believed.
On 21st September, several cheques of the Plaintiffs were dishonoured marked 'effects not cleared'. So on 23rd September, 2nd Plaintiff arranged with Mr. Prabhudas Patel a temporary loan of Shs. 5,000/00 up to 8th October, 1960. 2nd Plaintiff says he arranged a further loan of Shs. 5,000/00 with Prabhudas Patel on 26th September also up to 8th October. Then the 3rd Plaintiff arranged a further loan of Shs. 3,000/00 with Nagesh on 3rd October, repayable also on the 8th October. This is consistent with the state of Plaintiffs' account, showing like excesses over authorised overdraft limit. See 2nd Plaintiff's cross-examination (judge's notes p.19). The kinds of suggestions there are incomprehensible. Plaintiffs say that on 6th October, 1960 it was agreed that Shs. 10,000/00 of the Shs.13,000/00 extra loan was to be converted into a long term loan. Plaintiffs were induced to sign further documents. Exhibit G.2 (Guarantee) was in consideration for extra time being given to the Plaintiffs for the repayment of the loan.

The Defendants' evidence rings false; on the face of it it is improbable. The Defendants' witnesses contradicted each other and also themselves.
In the first place, the meeting on the 29th September, 1960 we say never took place. See: Williamson's evidence (Judge's notes pages 63, 76, 77 and 78). After adjournment, Mr.Williamson attempts to rehabilitate himself in re-examination. In so doing he turns a tragedy into a farce. He contradicts in re-examination his evidence in cross-examination. Mr.Williamson could not have been telling the truth if he contradicts himself so completely.
After 23.9.60, the overdraft rises over Shs. 140,000/00. On 21.10.60, there had been dishonoured cheques. This shows there must have been some arrangement. After 26.9.60 the overdraft further rises above Shs. 145,000/00; that shows some further arrangement took place on 26.9.60. Similarly on 3rd October 1960, the overdraft rose to 153,000/-. This shows the truth in the Plaintiffs' story.

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The story put forward by the Bank that the Plaintiffs were expecting funds is wholly improbable. There is not a single written protest, no written evidence at all and no action was taken until 6.10.60. Then among fresh documents is G 2 the consideration for which is extra time; this is quite inconsistent with the Bank's story.
Mr. Williamson said he sent Pandya to the Plaintiffs' shop almost every day after 29.9.60. Pandya said in his examination-in-chief that he never went to the Plaintiffs' shop before 6.10.60.

According to the 2nd Plaintiff only he went with Dhanji to the Bank. Mr. Williamson says, that two Plaintiffs were present at the meeting. Nagesh says three Plaintiffs were present. According to Prabhudas Patel, Nagesh just come in to deliver the documents. Nagesh himself says he remained there for a long time. He noticed that there was considerable discussion.

When the Plaintiffs signed a number of documents on the 6th October, why should they produce Exhibit H the same day to the Bank? In my submission, Exhibit H came into existence only after seizure of goods. This seizure placed the Plaintiffs into such a difficult position. Exhibit H was only produced after Bank's letter to Plaintiffs dated 8.10.60. There is no evidence of any distress or any other action against the Plaintiffs before seizure. They had been carrying on business in the same premises for years without any distress or any other action.

Pandya's evidence (Judge's notes page 98); Here you have a complete ignorance of what happened. He heard nothing, said nothing, did nothing.

My answer to the Defendants' comment that the 1st Plaintiff was not called is that he 2nd Plaintiff was not cross-examined about what haphened in the morning of the 6th October. In those circumstances there was no necessity to call the 1st Plaintiff since the 2nd Plaintiff's account of what happened in the morning of the 6th October was not challenged in cross- examination.

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See Nagesh's cross-examination: So little interest is shown in the documents alleged to have been given to the Plaintiffs on the 29th September. There is no letter from the Bank, no visit from Pandya, little interest shown by Prabhudas Patel. All this leads to the conclusion that no documents were given on 29.9.60.

Nagesh did not pledge his oath that Prabhudas Patel was not there in the Plaintiffs' shop in the morning (6th October). He was otherwise cock sure. The Defendants' tactics were that no two witnesses were present at the same time so that they could not contradict each other.

The 2nd Plaintiff was not cross-examined as to his evidence that Prabhudas Patel was present on the morning of the 6th October. Much stress is laid by the Plaintiffs on this. See 2nd Plaintiff's evidence (Judge's notes pages 13/14). The Court should accept the 2nd Plaintiff's version of P. Patel's visit in the morning of the 6th October, otherwise other events like the signing of fresh documents including Exhibit G.2 are inexplicable. There is a big gap between the 2nd Plaintiff's evidence (given on 4th October, 1962) and Pandya's and Nagesh's evidence. Patel gave evidence on the 16th October, 1962. Williamson's evidence was on the 11th October, when ground was cut from under his feet regarding the 38 alleged breaches and the excess in the overdraft.

The Bank was unsecured to the extent of Shs. 10,000/00 until 6.10.60. The fresh documents were signed, insurance policies obtained and the Bank was in a stronger position then to seize the goods.

The Bank's witnesses are contradicting each other (e.g. P. Patel and Nagesh) and are not therefore telling the truth.

Pandya, apparently, was keeping watch as he was doing nothing. If Exhibit H was the cause of the seizure, why was Pandya there all the time keeping watch? The 2nd Plaintiff was called to the Bank to keep him off his guard, - not to make the Plaintiffs suspicious of the Bank's motives.

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Notes of closing address of Counsel for Plaintiffs 4th and 5th December 1962 continued

The evidence which I have analysed destroys the Defendants' submission that the Plaintiffs' allegation of fraud was lighthearted. The action of the Bank was not carried out in the manner shown by the evidence but in a wholly different manner. The Plaintiffs were induced to sign fresh documents on the morning of the 6th October with promise of time to pay (Exhibit G 2) and therefore the allegation of fraud is not light-hearted.

There is no allegation of an act of bankruptcy on the Plaintiffs' part either in the pleadings or in the evidence. The Bank seized goods because they had fears that the Plaintiffs were in difficulties. But the Plaintiffs difficulties were as a result of the seizure and not vice versa.

SIGNING OF L/H IN BLANK:
See 2nd Plaintiff's evidence (Judge's notes pages 12 and 13) Branganza remembers distinctly receiving instructions from one Nobby Rodrigues. The Bank produced no witness as to the actual date of the execution of the documents or before whom they were executed. The Defendants' failure to call witnesses before whom the documents were executed confirms the Plaintiffs story. One would expect the L/H to be signed the same day on which the account was opened. It is strange that Nobby Rodrigues, a man having no connection with the case, should give instructions. Nobby Rodrigues was not called as a witness.

AMENDMENTS IN THE PLAINTIFFS' PLEADINGS:
These amendments were made long before the case came up for hearing, and notice of these amendments was given to the Defendants long before the case opened. It is not like changing ones story in the witness box as was the case with Mr. Williamson. There is nothing to conflict with the 2nd Plaintiff's evidence.

Mr. Nazareth reads out typed summary submitted to the Judge.

Drawn and filed by:
A.S.G.Kassam,
Advocate,
Sheikh Building,
Victoria Street,
NAIROBI.

I certify that the above summary has been abstracted from the notes of Mr.Nazareth's submissions made by myself and my assistant,Mr. Aziz Mohamed, Barrister-at Law.

(Sgd.) A.S.G. Kassam,
Advocate for the Plaintiffs.
DATE: 21st Dec.1962.

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No.21

Notes of Reply by Counsel for Defendant 5th December 1962

NO.21

NOTES OF REPLY BY COUNSEL FOR DEFENDANT ON 5TH DECEMBER 1962.

Lindsay in reply.

Dealt with in reply 4(iii)

1. Argument that signing of document Exhibit C 6 by two partners only binding against them. Partnership Ordinance. Partnership Ordinance Cap.284 Sec.7. Sec.8. In this case two partners were the senior ones in business on their own evidence. 10

2. Hira Bibi v. Ram Hari, 52 I.A.362. Application of S.68 of Indian Evidence Act must be read with Chattels Transfer Ordinance. Say S.68 not applicable. Popitlal v. Vasandji (1962) W.L.R.374 at 379 inconsistency between S.68 and Ordinance latter prevails. Say provisions of Chattels Transfer Ord. as a whole enhances protection of borrower. 20

C.A.V.

James Wicks
Judge.

No.22

Judge's Note of attendance when Judgment delivered 31st May 1963.

NO.22

JUDGE'S NOTES OF ATTENDANCE WHEN JUDGMENT DELIVERED

10.10 a.m. Friday 31st May, 1963.

Kassam for the Plaintiffs.

Lindsay for the Defendants. 30

Judgment read.

Lindsay requests certificate for two Counsel.

Kassam: I have no objection and ask for a certificate for leading Counsel.

Lindsay: No objection.

Ruling: Case fit for two Counsel, Defendants; and leading Counsel, Plaintiffs.

James Wicks.
Judge.

In the Supreme Court of Kenya at Nairobi

No.23

Judgment of The Honourable Mr. Justice Wicks

31st May 1963

No. 23

JUDGMENT OF THE HONOURABLE MR. JUSTICE WICKS

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI

CIVIL CASE NO: 1516 OF 1961

1. DHARAMSHI VALLABJJI
2. KESHAVJI DHARAMSHI
3. BACHULAL DHARAMSHI
4. MORARJI DHARAMSHI
5. RAGHAVJI DHARAMSHI .... PLAINTIFFS

10 t/a DHARAMSHI VALLABHJI & BROS.

Versus

NATIONAL AND GRINDLAYS BANK LTD. .... DEFENDANT

JUDGMENT

The Plaintiffs in this case are Indian merchants carrying on business in Nairobi. Up to 4th April, 1960, the plaintiffs were customers of the Standard Bank of South Africa and they claim that on that day the defendants, through their broker, induced the plaintiffs to close their account with the Standard 20 Bank and open an account with the defendant bank the inducement being the promise of greater overdraft facilities of Shs.140,000/- and better banking facilities than the Plaintiffs enjoyed with the Standard Bank. The Plaintiffs duly closed their account with the Standard Bank and the defendants agreed to advance to the Plaintiffs, up to 30th April, 1961, Shs.95,000/- on the security of a property in Ngara Road, Nairobi, and Shs.45,000/- on the security of the plaintiffs' shop goods. The Plaintiffs claim 30 that it was a fundamental condition of the contract that the defendants would not enforce their security until 30th April, 1961, unless the plaintiffs were guilty of some breach of their obligations under the contract. In pursuance of the agreement the Plaintiffs executed and delivered to the defendants an equitable mortgage over the Ngara Road property and what purported to be a letter of hypothecation over the Plaintiffs' shop goods. The Plaintiffs say that the letter of hypothecation was in blank and they were 40 not given a copy of it. The Plaintiffs claim that some time prior to 27th September, 1960, the defendants agreed to allow the plaintiffs to increase their

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overdraft by Shs.10,000/- to Shs.150,000/-, and on or about 3rd October, 1960, agreed to allow them to draw cheques against certain up-country cheques paid into the plaintiffs' account with the defendants. The plaintiffs executed a fresh equitable mortgage relating to the Ngara Road property, a fresh letter of hypothecation in respect of the increased overdraft facility of Shs.150,000/- and gave four life insurance policies as additional security. These fresh documents were executed on 6th October, 1960, and on the same day the defendants in breach of their obligations and in fraud of the plaintiffs, came to the plaintiffs' premises with a large number of men and motor lorries, trespassed into the plaintiffs' premises and seized and removed the plaintiffs' goods and chattels including chattels not included in the letter of hypothecation. The plaintiffs further claim that the defendants in breach of a condition of the contract and in fraud of the plaintiffs on 8th October, 1960, demanded immediate repayment of the whole loan and required the plaintiffs to arrange for the sale of the plaintiffs' goods and again in fraud of the plaintiffs, on 24th October, 1960, the defendants caused damage to the plaintiffs' credit and reputation by writing to Messrs. Jesang Popat & Co., to whom the plaintiffs had given an option on the Ngara Road property that they, the defendants, would sell the Ngara Road property after 15th December, 1960, if the plaintiffs failed to repay the loan by that date. The plaintiffs say that by reason of the defendant's wrongful acts they suffered loss of profits and damage and had to close down their shop and suffered loss of profits and after the defendants' letter of 24th October, 1960, were forced by reason of the defendants' wrongful acts to hold a meeting of their creditors and to enter into deed of arrangement with them on 15th November, 1960. It is claimed that neither of the letters of hypothecation were valid, and that a letter dated 6th October, 1960, was obtained by the defendants under duress after the defendants had seized the plaintiffs' goods and removed some of them from the premises and that the Plaintiffs who signed this letter did not understand or read English nor were the contents explained to them. It is seen in respect of the three basic issues, the plaintiffs claim that the defendants acted fraudently, and in respect of another issue the plaintiffs claim that the defendants exercised duress against the plaintiffs in order to obtain signature on a document, and knowing of the plaintiffs' ignorance of the language in which the document was written, failed to translate and explain

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its contents to them.

The defendants deny that they induced the plaintiffs to transfer their account to their Bank and say that the Plaintiffs requested the defendants to open an account with them, that the defendants granted the plaintiffs overdraft facilities of She.140,000/-, that the overdraft was repayable on demand but would not be allowed to continue beyond 30th April, 1961, and by way of security the plaintiffs agreed to execute an equitable mortgage over the Ngara Road property and a letter of hypothecation over their shop goods. The account was opened, the overdraft facility granted and the security documents executed. The defendants do not deny that the overdraft facility was increased to Shs.150,000/-, but put in issue the facts and circumstances leading to this. They say, that on about 27th September, 1960, the overdraft exceeded the maximum allowed of Shs.140,000/- by Shs.8,868/43 and on 29th September, 1960, it was agreed that, in consideration of the defendants agreeing to increase the overdraft from Shs.140,000/- to Shs.150,000/- until 3rd October, 1960, the plaintiffs would execute similar security documents to those already executed, but to secure the sum of Shs.150,000/-, assign to the defendants certain life insurance policies and reduce their overdraft to Shs.140,000/- on 3rd October, 1960. The defendants say that on 3rd October, 1960, the overdraft amounted to Shs. 153,240/66 and on 6th October, 1960, it amounted to Shs.154,934/4 and on that day the plaintiffs returned the new security documents duly executed, and later on the same day informed the defendants that they could not pay the overdraft and that they had given notice, or were about to give notice, to their creditors that they were about to suspend payments, permitted the landlord of their shop premises to levy a distress against the hypothecated goods and executed a letter authorising the defendants to take immediate possession of the hypothecated goods. On the second, third and fourth of these events occurring, and the letter having been executed, the defendants seized the plaintiffs' shop goods. As regards the letter dated 24th October, 1960, addressed to Messrs.Jesang Popat and Company complained of, the defendants say that what happened was that the plaintiffs wrote the defendants a letter stating that they, the plaintiffs, had granted Messrs. Jesang Popat and Company an option on the Ngara Road property for three months, this was

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followed by Messrs. Jesang Popat and Company informing the defendants by letter of their option and the defendants reply, the letter complained of, was merely an undertaking given by the defendants that they would not take action to dispose of the property until the option expired. In fact the plot was sold in about May, 1961, for a net amount of Shs.145,991/50, and this sum was paid to the defendants and placed against the plaintiffs' overdraft. The defendants finally say that the balance still outstanding on the overdraft is Shs.63,069/54 and if it is found that they acted wrongly in seizing the plaintiffs' shop goods, they seek to set this sum off against any damage awarded. 10

This is but a short summary of the pleadings and I have not attempted to cover all the issues raised. It was agreed between the parties that the only issues before the Court at this stage was that of liability, that is, were the plaintiffs' goods seized lawfully or not? If the answer to this is 'yes' then the action will be dismissed. If the answer is 'no' then there will be further hearings for the purpose of assessing special and general damages and for determining the issues on the set off. 20

The plaintiffs claim that the letters of hypothecation relied on by the defendants are invalid, the signatures thereon not having been witnessed as is required by law. It is an agreed fact that the signatures on the letters of hypothecation are not attested, and if the plaintiffs are correct in their assertions, (and the determination of this depends on the interpretation of the law in relation to a fact which is not in dispute), a simple finding on this would dispose of all the issues relating to the letters of hypothecation and it would not be necessary to refer in detail either to the pleadings or the evidence relating to these issues. However, the determination of other issues, such as whether or not the defendants agreed to increase the overdraft facility from Shs.140,000/- to Shs.150,000/- up to 3rd October, 1960, 8th October, 1960 or to 30th April, 1961, whether or not the defendants agreed to allow the plaintiffs to draw cheques against uncleared up-country cheques whether or not the plaintiffs announced their intention of suspending payment to their creditors on 6th October, 1960, whether or not the letter of the same date purported to have been signed by two of the partners of the plaintiffs, is a valid letter, whether or not the 30 40

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defendants acted fraudently on the three occasions alleged, or any of them, or were guilty of the duress alleged by the plaintiffs, to mention only a few of them, depends on an assessment of the credibility of witnesses and it is necessary to consider the whole of the evidence of the witnesses, with the result that there must be a proper understanding of all the matters to which the witnesses refer and their evidence thereon even though, as I have said, certain issues cease to be relevant on the determination of one point of law in favour of the plaintiffs.

Turning now to the evidence, it is not disputed that the transaction between the parties had their initiation early in 1960. The evidence of Mr. Keshavji Dharamshi, the 2nd plaintiff, is that at about the beginning of January, 1960, Mr. V. J. Amin, a broker employed by the defendants, mentioned to the plaintiffs that they, the plaintiffs, had an account with the Standard Bank and suggested it to be transferred to the defendants Bank. At the time the Plaintiffs had overdraft facilities of Sh.95,000/- with the Standard Bank secured on the Ngara Road property, that after negotiation Mr. Amin said on 3rd April, 1960, his Bank would grant to the plaintiffs overdraft facilities of Shs.140,000/- made up of Shs.95,000/- secured on the Ngara Road property and Shs.45,000/- secured by a hypothecation of the plaintiffs' shop goods. The plaintiffs agreed to this and on the following day Mr. Amin came to the plaintiffs' shop and asked Mr. Keshavji to go to the defendant Bank at 9.30 a.m. Mr. Keshavji thereupon asked Mr. Amin on what conditions his Bank was making the loan of Shs.140,000/- and Mr. Amin said his bank was giving the plaintiffs the overdraft facilities for one year. Mr. Amin took Mr. Keshavji to see the sub-manager of the defendants bank and explained the position to the sub-manager, that the bank would not claim back the money for one year. The sub-manager agreed to the proposal and 30th April, 1961, was the date fixed for the repayment. The sub-manager agreed to advance Shs.95,000/- on the security of the Ngara Road property and Shs.45,000/- on the shop goods, a total of Shs.140,000/-. Mr. Keshavji was asked to sign a document of that day, he thinks it was one only, it was a printed form and nothing was written on it when he signed it, it was not read over to him nor did he read it. Mr. Keshavji said that Mr. R.N. Nagesh, an official of the defendants bank, asked him to sign the form, saying it was in connection

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with banking rules, was a hypothecation form and he Mr. Nagesh, would fill in the blanks on the form later on, and the bank had to give Mr. Keshavji a letter, which he would receive later on and that was for repayment of the overdraft on 30th April, 1961. At times Mr. Keshavji said "we", on other occasions he employed the personal pronoun and then said that the only other partner present was Mr. Dharamshi Vallabhji, his father and the 1st plaintiff, from this it seems that Mr. Dharamshi was present with Mr. Keshavji at the defendants bank on the morning of 4th April, 1960, but it is not clear whether or not Mr. Dharamshi was present at all or any of the other meetings. In cross examination it was put to Mr. Keshavji that Mr. Amin would say that he and Mr. Dharamshi were introduced to him, Mr. Amin by one Mr. K.F.Shah, a director of Shah Nemchand Fulchand & Co. After an evasive answer Mr. Keshavji denied this, he also denied that he, or his partner, asked Mr. Amin to negotiate with the defendants for the purpose of opening an account. Mr. Keshavji confirmed that he had said that the security that was given was the Ngara Road property to secure Shs.95,000/- and the plaintiffs' shop goods were to be hypothecated to secure the balance, but after saying he did not understand English well and had signed documents in English that were in blank which were not read over to him, he agreed that both the Ngara Road property and the plaintiffs' shop goods were given as security, jointly, for the overdraft, then he confirmed this agreement that he knew that the equitable charge on the Ngara Road property had been given to secure the whole amount of the overdraft. Mr. Keshavji said that of the five partners of the plaintiffs firm, he and his father, Mr. Dharamshi, were the most active, and he was his father's right hand man. Although Mr. Dharamshi was stated positively to have been present at some meetings and possibly at others, and it was conceded that he was the guiding hand of the plaintiffs firm, he did not give evidence, even though he was in Court.

The evidence of Mr. Amin was that he was introduced to the plaintiffs by one Mr. K. F. Shah, a director of Shah Nemchand Fulchand Ltd., that he Mr. Amin, saw Mr. Dharamshi and Mr. Keshavji and asked them what their proposals were. The reply was that the plaintiffs needed an ovdrdraft to the extent of Shs.140,000/- against the security then held by the Standard Bank. Mr. Amin told the plaintiffs that the security was not enough and they, the plaintiffs, should agree to give additional security of stock,

machinery etc. or insurance policies if any including machines. The Plaintiffs agreed to give security of property, goods and stock, including machines and Mr. Amin then took both Mr. Dharamshi and Mr. Keshavji to see Mr. J.M. McWilliam, the then sub-manager of the defendants bank, who agreed to the proposal in principle. It was agreed that the security was not to be apportioned and each security was to be against the full amount of the overdraft. Mr. Amin did not discuss the time for which the overdraft would last nor did either Mr. Dharamshi or Mr. Keshavji ask him. In cross-examination Mr. Amin said that he was definite that Mr. K.F.Shah introduced him to Mr. Dharamshi, and for the purpose of introduction Mr. K.F.Shah took him, Mr. Amin to plaintiffs' shop and, although he knew the plaintiffs well, it was not his practice to approach people even though he knew them well, on their banking, if he knew they were customers of another bank.

I have referred to the evidence of Mr. Keshavji that on 4th April, 1960, he signed a printed form, that nothing was written on it and that Mr. Nagesh said he would fill in the blanks on the form later on. Later Mr. Keshavji said that the writing on the equitable charge was filled in when he signed it, it was not disputed that this was signed on a date later than 4th April, 1960, so it appears to be fairly certain that the document referred to by Mr. Keshavji is the letter of hypothecation. The evidence of Mr. D. Braganza, who is employed by the defendants, is that he filled in the handwriting on this letter of hypothecation, and when he did so he is sure that the signatures were not then on it, that he had never filled up a letter of hypothecation after it had been signed. Mr. Nagesh denied knowing anything about the letter of hypothecation saying that his handwriting was not on it and, had he dealt with the signing, his initials would be on it, and they were not.

In the pleadings, the plaintiffs claim that it was agreed between the parties that the overdraft contracted for on 4th April, 1960, would not be called in before 30th April, 1961. The defendants deny that the overdraft was to extend to 30th April, 1961, in any event, but contend that it was repayable upon demand and was not to continue beyond 30th April, 1961. There are two issues, first whether or not the defendants agreed to grant the plaintiffs overdraft facilities of Shs.140,000/-, later increased to Shs.150,000/- until 30th April, 1961, unless the

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plaintiffs were guilty of some breach of their obligations under the contract, and secondly, whether or not there was a condition that the plaintiffs conduct the account in a proper manner, the defendants having the right to close the account and call in the overdraft should they not do so. The second issue falls to be determined only if the answer to the first is in the negative as far as these issues are concerned the plaintiffs rely, in part, on the first paragraph of a letter sent by the defendants to the plaintiffs and dated 13th May, 1960: 10

> "with reference to your call on us, we confirm having established an overdraft facility in your account with us to the extent of Shs.140,000/- until 30th April, 1961".

I have already referred to the evidence of Mr. Keshavji and Mr. Amin on this point. It is not disputed that Mr. McWilliam was the sub-manager referred to by Mr. Keshavji, and Mr. McWilliam's evidence was that on 4th April, 1960, he reached agreement with 20 the plaintiff for the defendants Bank to grant an overdraft up to Shs.140,000/- up to 30th April, 1961 provided the account was conducted properly, that if it was not so conducted he would regard the overdraft as being immediately repayable. This evidence conflicts with that of Mr. Keshavji who did not specify the breaches referred to in the plaint, which would entitle the defendants to call in the overdraft before 30th April, 1961, but said that the overdraft could not be called in by the defendants before 30th April, 30 1961, in any event. However, Mr. McWilliam said in cross-examination that it was a long time ago, and he could not say for certain, but he would say that almost certainly he did not take physical part in opening the account with the plaintiffs nor could he recollect having any conversation with the plaintiffs; finally he said that it was not he who explained the terms and conditions governing the opening of the account to any of the plaintiffs. In cross-examination Mr. Williamson, the present sub-manager of the 40 defendant bank, said that the agreed time of the overdraft was to 30th April, 1961, provided the account was conducted to the defendants' satisfaction, and if the account was not properly conducted the bank could demand immediate repayment even though the overdraft had been granted to a particular date and that date had not arrived, that in fact the date stated on the letter dated 13th May, 1960, was an agreed date on

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which the facility was to be reviewed. Mr.Williamson went further and said that the defendants were entitled to demand repayment of the overdraft at any time even though the account was conducted satisfactorily, that every overdraft was repayable on demand. Mr. Keshavji himself in cross-examination at first agreed that one of the rules of the defendants bank was that they reserved the right to close the account if it is not being conducted in a proper manner. Later Mr. Keshavji denied knowing this, but reminded of the previous evidence, he said that his firm were granted an overdraft of Shs.140,000/- and if they went over this limit it was agreed he could go and see one of the brokers and if the broker arranges then the plaintiffs could continue the overdraft.

Turning now to the issue whether or not the plaintiffs account with the defendants was conducted satisfactorily it is not disputed that the defendants exceeded the limit of Shs.140,000/- on a considerable number of occasions between 17th June and 12 August, 1960, and as a result three letters were sent by the defendants to the plaintiffs, they were:

<u>17th June, 1960</u>

"We have to advise that after paying your cheque No.TE 09958, favouring Barclays Bank (D.C.O.), for Shs.3,000/-, your account as at the close of business yesterday was overdrawn to the extent of Shs.142,978/13, i.e. Shs.2,978/13 in excess of the limit. We shall be glad, therefore, if you will adjust the account at your early convenience and in future please work within the authorised limit."

<u>28th July, 1960</u>

"We have to advise that your account as at the close of business yesterday was overdrawn to the extent of Shs.141,862/51, i.e. Shs.1,862/51 in excess of the limit, and we shall be glad if you will send us a remittance to adjust it."

<u>12th August,1960</u>.

"We have to advise that your account as at the close of business yesterday was overdrawn to the extent of Shs.142,013/- i.e. Shs.2,013/- in excess of the limit, and we shall be glad if you will send us a remittance to adjust it at your early convenience."

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It is also not disputed that on 21st September, 1960, the plaintiffs having paid in cheques to the value of Shs.11,630/-, which were not cleared, the defendants returned to the payee seven of the plaintiffs' cheques to a total amount of Shs.10,200/- marked "effects not cleared". The evidence of Mr. Patel was that on 21st September, 1960, the seven cheques having been returned, he went and saw Mr. Keshavji and enquired of him no provision had been made for these cheques causing them to be returned, 10 and Mr. Keshavji replied that this would never happen again, and Mr. Patel advised Mr. Keshavji that to keep a satisfactory account the plaintiffs must keep within the limit of their overdraft. From this point of time there is a conflict in the evidence, which relates to, the issue as to whether or not the plaintiffs conducted their account with the defendants satisfactorily. It is broadly this, the plaintiffs say that the overdraft facility was increased in amount on certain dates and permission was given to 20 draw against uncleared cheques (uncleared effects) with the result that any drawings within these limits and facility could not be considered to result in the account not being conducted satisfactorily. The defendants concede that the overdraft facility was increased but say that this was agreed on a different date and no authority was given to draw against uncleared effects, that as a result the plaintiffs exceeded the limit of their overdraft and did this under circumstances which resulted in their account 30 not being conducted in a satisfactory manner. I do not propose to attempt to state and observe on all the evidence on this conflict, for the evidence went into a mass of detail on particular figures. I propose to refer only to salient aspects of the evidence which conflicts. The evidence of Mr.Keshavji is that on 23rd September, 1960, he saw Mr. Patel and asked to grant an additional overdraft facility of Shs.5,000/- for 15 days, that is until 8th October, 1960, and Mr. Patel agreed to this. On 26th 40 September, 1960, Mr. Keshavji again saw Mr. Patel and asked him to grant a further overdraft facility of Shs.5,000/- repayable on 8th October, 1960, and again Mr. Patel agreed to this, that is the facility was increased by a total of Shs.10,000/- to Shs.150,000/- until 8th October, 1960, further that Mr. Bachulal Dharamshi, the 3rd plaintiff, obtained a further overdraft facility of Shs.3,000/- from the defendants that early on 6th October, 1960, Mr. Patel came to the plaintiff's shop and discussed the additional loan

of Shs.13,000/- and said that, if the plaintiffs could give additional security, the defendants would increase the plaintiff's overdraft facility from Shs.140,000/- to Shs.150,000/- repayable on 30th April, 1961. This meant that the plaintiffs had to repay Shs.3,000/- overdraft on 8th October, 1960, that all of this was agreed, that Mr. Patel was alone and said he would return in about an hour with other persons. He left and returned in about an hour with about four other persons, one was Mr. Pandya, another Mr. Nagesh and another a man, whom Mr. Keshavji did not know, who had a beard. Mr.Keshavji signed two documents produced by Mr. Patel and handed over four insurance policies. Mr. Patel said that the further Shs.10,000/- was to be repaid on 30th April, 1961, together with the other loan and the Shs.3,000/- was to be repaid on 8th October, 1960. In cross-examination it was put to Mr. Keshavji that Mr. Patel, being a broker, had no authority to authorise an increase in overdraft, Mr. Keshavji's reply was that Mr. Patel went into a neighbouring office returned and said, "Yes", your extra overdraft of Shs.5,000/- over the limit of Shs.140,000/- is approved". After some prevarication Mr. Keshavji conceded that a broker had no independent authority to approve an overdraft, or an increase of overdraft and when a broker conveys that information it is only in circumstances, when the sub-manager has authorised it, saying, "the broker went and saw someone, I presume the sub-manager". Regarding uncleared up-country cheques Mr. Keshavji said that the plaintiffs were allowed to draw against such cheques but Mr. Patel stopped this facility on 26th September, 1960, then on the same day Mr. Patel said that the plaintiffs could draw against uncleared up-country cheques. Also in cross-examination it was put to Mr. Keshavji that, after repeated requests for their return, Mr. Nagesh brought fresh security documents to the plaintiff's shop on 8th October, 1960, and these were executed by him and his partners. Mr. Keshavji agreed that this was so and added that Mr. Nagesh handed over the document to him,Mr.Keshavji. Mr. Keshavji denied that he was handed fresh security documents on 29th September, 1960, but Mr. Keshavji's volunteered observation appears to conflict with his own evidence that it was Mr. Patel who handed over the security documents, and it agrees with the defendant's contention that it was Mr. Nagesh who took the security documents to the plaintiffs' shop on 6th October, 1960. The evidence of Mr. Bachulal,

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the partner who kept the books of the plaintiff firm, was that he had authority to draw up to Shs.150,000/- and on 3rd October, 1960, he went to the defendants Bank, saw Mr. Nagesh, and told him that three cheques had been issued which would result in the overdraft being Shs.2,700/- over the limit. Mr. Nagesh agreed that this was alright and Shs.3,000/- would have to be paid before 8th October, 1960. In cross-examination Mr. Bachulal said that Mr. Nagesh did not go and see anyone between the request being made and it being granted. The evidence of Mr. Patel is that he was not approached by any of the plaintiffs' partners for the purpose of obtaining an increase in the amount of their overdraft until the evening of 3rd October,1960, when Mr. Keshavji asked for an additional facility of Shs.3,000/- and Mr. Patel replied that he, Mr.Keshavji, would have to see the sub-manager about the facility as he, Mr. Patel had no authority in this regard. In cross-examination it was put to Mr. Patel that on 23rd September, 1960, Mr. Dharamshi and Mr. Keshavji asked for a temporary loan of Shs.5,000/- and on 26th September, 1960, Mr. Patel was approached either by Dharamshi or Mr. Keshavji, or both, for a further loan. Mr. Patel denied that either approach was made but it seems to be relevant that as far as the approach alleged to have taken place on 26th is concerned, if, as is one of the possible alternatives indicated by the terms of the question, Mr. Dharamshi alone made the approach on that day then, Mr. Dharamshi not having given evidence, the plaintiffs have adduced no direct evidence of the allegation. The evidence of Mr.Nagesh is that Mr. Dharamshi and Mr. Keshavji came to the defendants bank almost every day between about 23rd and 29th September, 1960, asking for temporary increase of small amounts in excess of the limits of their over-draft pending the arrival of certain funds, Mr. Nagesh conveyed these requests to Mr. Williamson and, so as not to embarrass the plaintiffs, Mr. Williamson did pass cheques in excess of the limit of Shs.140,000/-. Towards the end of September, 1960, the plaintiffs approached Mr. Nagesh asking to see the sub-manager and on 29th September, 1960, a temporary increase of Shs.10,000/- was authorised provided the overdraft was reduced to the limit of Shs.140,000/- by 3rd October, 1960, and provided fresh security documents in the total amount of Shs.150,000/- were executed and certain life policies were deposited. These documents were prepared, the plaintiffs took them away but they were never returned. On 6th October, 1960, Mr. Williamson told Mr. Nagesh to collect these documents

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and, if he did not get them, to take a fresh set of documents. Mr. Nagesh took fresh set of documents to the plaintiffs' shop and there each of the partners signed them in his presence, having been told by Mr. Nagesh that they were in substitution for the forms handed to them on 29th September, 1960. Mr. Nagesh returned to the defendants bank and after some time went into Mr. Williamson's office, there he saw Mr. Dharamshi, Mr. Keshavji, Mr. Bachulal, Mr. Patel and a gentleman who was offering to give Mr. Williamson a guarantee. Mr. Nagesh handed over the signed security documents. Mr. Nagesh denied that he had been approached by the plaintiffs for authority to draw against uncleared up-country cheques, saying he had no authority to allow this, nor did he see Mr. Williamson regarding this on behalf of the plaintiffs. In cross-examination Mr. Nagesh denied that he told the plaintiffs that the increased amount of Shs.10,000/- could remain outstanding until 30th April, 1961. It will be remembered that Mr. Keshavji's evidence was that on the evening of 6th October, 1960, Mr. Patel came to the plaintiffs' shop, agreed on increase of the overdraft facility to Shs.150,000/-, left and returned in about an hour with about four other persons including Mr. Pandya and Mr. Nagesh, and Mr. Keshavji signed two documents produced by Mr. Patel. It is seen that the version of what happened given by Mr. Nagesh is quite different, and his evidence is borne out by that of Mr. Pandya. Mr. Keshavji's version was not put to either Mr. Pandya or Mr. Nagesh, - the lengthy and detailed cross-examination of these witnesses appearing to be on the basis of accepting their evidence generally, but checking, cross-checking, and re-checking details for consistency. The evidence of Mr. Williamson was that some time between 23rd and 27th September, 1960, it was nearer 23rd, either Mr. Patel or Mr. Nagesh (Mr. Nagesh said it was he) came to him and said that the plaintiffs were expecting certain funds in very near future and would Mr. Williamson allow the plaintiffs to draw against these anticipated funds. It is not disputed that on 23rd September, 1960, the plaintiffs' overdraft stood at about Shs.140,000/-. Mr. Williamson said he was informed that the anticipated funds were about Shs.10,000/-. Mr. Williamson agreed and his evidence was that if the limit of the overdraft had been increased fresh security documents for the new limit would have been necessary, but said that as the funds were expected immediately, it was not considered

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necessary to have fresh documents executed, nor did the defendants want to increase the amount of their existing facility of Shs.140,000/-. As a result Mr. Williamson allowed the overdraft to go to Shs.151,777/62. On 29th September, 1960, Mr. Williamson said he had become dissatisfied with the account, the four or five days had elapsed for the receipt of the anticipated funds, which was considered sufficient and those funds had not arrived. As a result Mr. Williamson asked that a representative of the plaintiffs call on him. Mr. Keshavji came, and Mr. Nagesh was present in Mr. Williamson's office. Mr. Williamson told Mr.Keshavji that he was dissatisfied that the promised funds had not been received. Mr. Keshavji replied that the promised funds would be received at any moment, and agreed to an increased overdraft limit of Shs.150,000/- on the distinct understanding that the additional security documents required would be executed and returned to the defendants immediately, Mr. Keshavji was then given the necessary security documents for signature. It was agreed that the increase from Shs.140,000/- to Shs.150,000/- was to be allowed to continue until 3rd October, 1960, which meant that the plaintiffs were to have in all about 10 days in which to receive the immediate funds which they expected. Mr. Keshavji assured Mr. Williamson that the business was doing well, and promised to give Mr. Williamson, as soon as it could be prepared, a statement of the plaintiffs' affairs, that is a statement of sundry creditors and debtors. By 3rd October, 1960, the overdraft had not been reduced to Shs.140,000/- and was in fact Shs.153,240/66. Further the defendants had not received back the completed security documents. Between the 29th Sept. and 5th Oct.1960 strenuous and repeated attempts were made to obtain the return of the security documents without success, so on the morning of the 6th Oct. 1960 Mr. Nagesh was sent with fresh security documents, which were similar to those handed to Mr. Keshavji on 29th September, 1960, and Mr. Williamson received the completed security documents back at about 11.00 a.m. Mr. Williamson also had requested, on the morning of 6th October, 1960, that the partners of the plaintiff call upon him to discuss their account. As a result Mr. Dharamshi and Mr. Keshavji called and they were accompanied by a Mr. Dhanji Verjee, who was not a partner of the firm. During the meeting Mr. Nagesh brought in the completed security documents and Mr. Patel was present most of the time. Mr. Williamson expressed his displeasure that the plaintiffs' account

was still in excess of the authorised limit of Shs. 140,000/- and asked Mr. Dharamshi and Mr.Keshavji if they had brought with them their statement of affairs which they had agreed to provide at the meeting of 29th September, 1960. The reply was that they had not brought the statement of affairs nor were they in a position to reduce the overdraft to the approved limit of Shs.140,000/-. Mr. Dharamshi and Mr. Keshavji then asked Mr.Williamson to grant a further facility of Shs.5,000/- on a temporary basis and Mr. Verjee said he was prepared to guarantee this amount of Shs.5,000/-. Mr.Williamson refused this request and said that as no satisfactory explanation had been given of the failure to supply a statement of affairs, or of the non receipt of the anticipated funds, the overdraft must be reduced immediately to Shs.140,000/-. Further discussion then took place during which Mr. Verjee handed to Mr. Williamson a draft copy of a circular letter which he said the plaintiff intended despatch to their creditors. The draft circular letter is:

" RE: MESSRS. DHARAMSHI VALLABHJI & BROS.

We, the undersigned Messrs. Dharamshi Vallabhji & Bros., admit that we have to pay the amount shown against your name in the schedule written hereunder; but due to acute financial crises prevailing in the market, we regret to inform you that we are not in a position to pay the amount due to you at a time.

We, therefore, propose to pay the amount due to you in equal twelve instalments, and will pay the first instalment...............and thereafter instalments will be paid on the .... of each succeeding calendar month until payment in full. We agree that should we fail to pay the instalments du to you on its due date, the whole of the amount then remaining unpaid and due shall become due and payable immediately and you will be at liberty to take legal proceedings against us.

You will, sir, notice that we wish to pay the amount due to you in full but what we want is twelve month's time to pay the same, and to avoid costs of legal proceedings. We, therefore, humbly request you to accept our above offer and signify your approval thereto by signing your signature against your name.

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" Thanking you in anticipation.

Yours faithfully,

To. 11. S.No:	Name of Creditor.	Amount due to Creditors The Creditors.	Signature.

Mr. Williamson said he read this draft circular letter and expressed surprise that the plaintiffs should contemplate such action as they were at the same time getting the bank's indulgence on credits, and getting an increase of their overdraft, further he, Mr. Williamson, said he had been assured that the firm were doing satisfactory business. After further conversation and a repeated request that the plaintiffs reduce their overdraft immediately to Shs.140,000/- the meeting terminated.

Pausing here, the evidence relating to the draft circular letter said by Mr. Williamson to have been produced by Mr. Verjee can conveniently be considered. Mr. Keshavji denied that the draft circular letter was handed to Mr. Williamson on 6th October, 1960. In cross-examination it was put to Mr. Keshavji that at the interview at the defendants' bank during the warning of 6th October, 1960, he Mr. Keshavji, told Mr. Williamson that the plaintiffs were not in a position to reduce their overdraft and asked that it be extended, that when Mr. Williamson refused to do this Mr. Keshavji's relative offered to guarantee the additional amount of Shs.5,000/- asked for, that on Mr. Williamson refusing to accept this guarantee and demanding that the overdraft be reduced to the agreed amount of Shs.140,000/- Mr. Verjee disclosed that the plaintiff was trying to make arrangement with their creditors and then produced the draft circular letter. Mr. Keshavji denied that the conversation was in these terms, but he did agree that he went to Mr.Williamson's office on 6th October, 1960, at Mr. Williamson's request, and added that his relative accompanied him. The evidence of both Mr. Patel and Mr. Nagesh was that the draft circular letter was produced to Mr. Williamson in his office on the morning of 5th October, 1960. In cross-examination it was put to Mr.Williamson that the draft circular letter was not given to him on 6th October, 1960, Mr. Williamson insisted it was and observed that it was a peculiar letter to place before a banker when one is asking for an advance. Mr.Nazareth, who appeared for the plaintiffs, put it to Mr.Williamson

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that no one would be mad enough to bring such a document to a banker on the day fresh security documents were executed, and Mr. Williamson replied that that was what alarmed him. In cross-examination it was put by Mr. Nazareth to Mr. Amin that a letter of hypothecation was not a good security and Mr. Amin replied that he did not know, he was not a lawyer, but according to his knowledge it is security, that it was difficult to say whether or not it is an
10 attractive security. Then in cross-examination Mr. Nazareth put it to Mr. Williamson that the reason he gave no warning to the plaintiffs that the defendants were intending to seize the goods was because, he had done so, he expected the goods to be removed and Mr. Williamson agreed, further Mr. Williamson agreed that a letter of hypothecation was effective only if the defendants seized the goods before a creditor commits an act of bankruptcy. There was a note of incredulity and wonder in Mr.
20 Nazareth's voice during much of this aspect of the case, and, with only a slight knowledge of law, that is easy to understand, for it is not disputed that the defendants had lent a large sum of money partly on the security of shop goods, secured by an unregistered document, in circumstances where, and there is no suggestion that it was intended in this case, the goods disappear from the shop in a matter of hours, or the landlord by distress, or creditors by execution, could obtain priority over
30 the defendants; and this with interest at 6½% per annum. Indeed the plaintiffs own showing the security appears to be a fit one for a money-lender or credit finance firm at the interest rates customary with such lenders, that is taking into consideration the risk. However, that may be, and such considerations are no concern of the Court, the gravemen of Mr. Nazareth's observation that 'surely no one would be mad enough to bring a document such as Exh.H to a banker on the day security documents were executed',
40 and the evidence I have referred to, is this: 'By this document you tell your creditors you are unable to pay them, you beg them not to take legal proceedings to recover their money'.

Surely any businessman would know, seeing this letter that there's many a slip twixt cup and lip, and some creditors receiving the letter, who perhaps had no intention of bringing an action before they received it would do so on receiving it, resulting in judgment decrees and execution, that the landlord will

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levy a distress for any rent due, and, to say the least of it, Shs.20/= in the £ was unlikely.' In common sense is Mr. Williamson to be believed that such a draft letter was shown to him on 6th October, 1960, before he formed an intention to seize the plaintiffs' goods? The answer to this appears to be given by Mr. Keshavji himself. Sir William Lindsay, who appeared for the defendants, had cross-examination of Mr. Keshavji regarding the draft letter and Mr. Keshavji's evidence was that he took it to the defendants on 10th October, 1960. Later Mr. Keshavji was asked why he had taken the draft letter to the bank, and he replied that on 8th October, 1960, he received a letter from the bank (this letter asked the plaintiffs to arrange to pay off the overdraft which then stood at Shs. 154,658/41 and asked the plaintiffs to advise the defendants what steps were being taken to sell the stocks held by the defendants). Then also with a note of wonder, perhaps actuated by the same consideration of a lawyer as was Mr. Nazareth, Sir William asked Mr. Keshavji what possible reason there could be to take the draft circular letter to the bank, and Mr. Keshavji made the surprising reply that he took it to see whether, if it was signed, the bank would release the goods. Surely if it was in the minds of the plaintiffs that the defendants would release the goods on the letter being signed, after seizing them, it would follow that it would be in the plaintiff's mind that the production of the letter and a suggestion of having it signed before the goods were seized, would be a persuasive argument to avoid seizure. That is, 'we will obtain our creditors' signature to the letter and then your security will no longer will be in danger.' Mr. Keshavji's answer, to put it no higher appears to be quite consistent with the defendants' evidence that the draft circular was given to Mr. Williamson on 6th October, 1960, before the goods were seized.

Returning to the issue as to whether or not the plaintiffs conducted their account with the defendants properly, Mr. Williamson confirmed certain of his evidence in cross-examination, but when questioned about the meeting of 29th September, 1960, said he did not hand the plaintiffs the new security documents, that somebody in the overdraft department did, that the documents were handed over in his, Mr.Williamson's presence, in his office and present at the time were Mr. Patel, Mr. Dharamshi, Mr. Keshavji and Mr. Verjee, that Mr. Verjee took part in the conversation and

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offered to guarantee a further overdraft of Shs. 5,000/- that this was additional over the Shs. 150,000/- that he, Mr. Williamson, expected the documents back on the same day or following day, did not receive them, and instructed Mr. Pandya to call at the plaintiffs' shop and get them, and such requests were made until the morning of 6th October, 1960. It will be remembered that Mr. Williamson had said that at the interview on 29th September, 1960, Mr. Kesnavji and Mr. Nagesh alone were in his office when the security documents were handed over. Apart from this evidence it seems to be clear that Mr. Verjee first became concerned with the matter on 6th October, 1960, that he came into plaintiffs' shop just after Mr. Nagesh had taken the signed security documents to the bank, had a discussion with Mr. Dharamshi and Mr. Keshavji and then accompanied them to the defendants' bank. It is the plaintiffs' case that the interview alleged by the defendants to have taken place between Mr. Keshavji and Mr. Williamson on 29th September, (when the overdraft facility is alleged to have been increased temporarily from Shs.140,000/- to Shs.150,000/-) never, in fact, took place, that the overdraft facility of Shs.140,000/- was increased by Shs.5,000/- on 23rd September, 1960, by a further Shs.5,000/- on 26th September, 1960, and by still a further Shs.3,000/- on 3rd October, 1960. In re-examination Mr. Williamson purported to correct himself and to restore the position but is he to be believed? I will return to this question later.

During the afternoon of 6th October, 1960, the plaintiffs are alleged to have signed a letter:

"The Manager,
National & Grindlays Bank Ltd.,
Nairobi.

Nairobi.
6th October,1960.

Dear Sir,

With reference to the letter of hypothecation executed by us on 9th May, 1960, we hereby authorise you to take over our stocks, sewing Machine and spares as we regret we are not in a position to reduce our overdraft.

Yours faithfully,

(sd) Dharamshi Vallabhji & Bros.

K.D.Vaghela.

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In their reply the plaintiffs say that the plaintiffs' signature to this letter was obtained by duress and that the plaintiffs' partners who signed the letter did not understand or read English and the contents were not explained to them. In the course of the hearing Mr. Nazareth pointed out the words in manuscript "Sewing machines and spare", said that the evidence would be that these words had been added after the document was signed, and submitted that as a result it was inadmissible. The evidence of Mr. Keshavji relating to this letter is that at about 2.30 p.m. on 6th October, 1960, Mr. Patel came to the Plaintiffs' shop with about 15 to 20 people and three lorries, that amongst these people were Mr. Pandya, Mr. Nagesh, a Mr. Nehta, a Mr. Modi and a European, who Mr. Keshavji said he thought was the manager of the defendants River Road branch, and this man had a small hand gun. Mr. Patel and his party closed the shop and started to remove the shop goods. Mr.Keshavji protested saying the plaintiffs had signed the documents that morning. Mr. Patel and his party would not listen to Mr. Keshavji. At about 3 p.m. the Court bailiff came with a distress warrant and by that time some of the goods had been removed. That at about this time Mr. Patel asked Mr. Keshavji to sign a paper. Mr. Keshavji said he could not read or speak English and he did not read the paper and Mr. Patel told him it was in connection with the papers he had signed that morning concerning the loan repayable on 30th April, 1961. Mr. Keshavji said that the letter was a paper already signed by the bank. The paper referred to appears to be the letter set out above and in cross-examination Mr. Keshavji agrees that he signed it, and stated that the other signature on it was that of his father Dharamshi, who signed first, and the manuscript words were added after the signature were obtained. In re-examination Mr. Keshavji and Mr. Dharamshi signed the letter first in his presence and his father did not understand English. The allegations are obtaining signature to a document by duress, obtaining signatures to a document knowing that the persons signing it have been misled as to its contents, and making an addition to a document after it has been signed. It being conceded by the party making these allegations that Mr. Dharamshi, one of the plaintiff partners, was concerned with the events which led up to the signing of the documents, and that he actually signed it, surely, Mr. Dharamshi's evidence was important. As I have said he did not give evidence though he was

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present in Court. The evidence of Mr. Patel was that, having been instructed by Mr. Williamson to seize the plaintiffs' stock, he went with Mr.Scott, who was in charge, and a party, to the plaintiffs' shop at about 2.30 p.m. on 8th October, 1960, that on arrival Mr. Scott presented the letter set out above to Mr. Dharamshi, Mr. Keshavji and Mr.Bachulal, who were all present, and said he had been instructed to take possession of the stock, and asked Mr. Keshavji to sign the letter. Mr. Keshavji asked why the letter was brought there and Mr. Patel explained to him in Gujarati language that the plaintiffs, having failed to reduce the overdraft to Shs.140,000/- the manager had instructed them to seize the stock, that the letter was confirmation of what Mr. Keshavji had told Mr. Williamson, and that was that the plaintiffs were unable to reduce their overdraft to Shs.140,000/-. Mr. Keshavji then signed the letter and Mr. Scott went to the back of the shop and started removing some sewing machines. Mr. Keshavji asked why the machines were being removed as he believed that they were not included in the hypothecation. Mr. Patel, with Mr. Keshavji's permission, telephoned the defendant bank to find out if the sewing machines and spare parts were included in the letter of hypothecation and, as a result of what he was told, Mr.Patel wrote in the words, "sewing machines and spares". As this seemed to be an alteration, Mr. Patel after explaining the contents of the letter, including the words that had been written in and the reason for doing this to Mr. Dharamshi, Mr. Dharamshi signed the letter. In his evidence, Mr. Scott spoke of seeing Mr. Keshavji signing the letter, but he appeared to have no knowledge of Mr. Dharamshi doing so, nor did he appear to be aware of the events which led up to Mr. Dharamshi signing it. Mr. Pandya's evidence was that he saw Mr. Keshavji sign the letter and in cross-examination he spoke of the question being raised as to the right to seize the sewing machines, the telephone call to the defendants bank, and Mr. Dharamshi signing the letter.

It will be seen from the plaintiffs' own case, quite apart from the defendants' version, that Mr. Dharamshi is said to have taken a considerable part, in some cases a leading part in the events, but he did not give evidence. Mr. Dharamshi was present in Court during the hearing. I cannot say that he was present all the time, but I was interested in observing his demeanour, and during the hearing never

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once failed to see him present. Mr. Keshavji's evidence was that his father did not read or speak English. On this I am unable to make a definite finding, but my observation was that he did appear to understand English and to be able to follow the proceedings, indeed he took a lively interest throughout. The result of Mr. Dharamshi not giving evidence is that there is virtually nothing against which to check Mr. Keshavji's evidence, and the Court is asked to believe that Mr. Dharamshi took the part in the transaction, Mr. Keshavji said he took, without having had the opportunity of having heard him. The Plaintiffs on their own showing have failed to call a witness who was one of the principal persons involved, and who was in a position to give a first hand account of many of the matters in controversy and who could have refuted on oath many of the allegations of the defendants. The plaintiffs have alleged fraud on the part of the defendants, also duress and sharp practice, and under all the circumstances of this case, I presume that, had Mr. Dharamshi given evidence, it would have been against the plaintiffs case and would have supported the defendants. Mr. Verjee is, it seems, a relative of Mr. Dharamshi and presumably within the Plaintiff's reach and again he was not called, even though he was a principal witness involved in the issue whether or not the interview between Mr. Williamson and Mr. Keshavji said to have taken place on 29th September, 1960, in fact, took place, and whether Mr. Williamson was confused or lying when he spoke of the events which are alleged to have taken place on 29th September and 6th October, 1960. Again I presume that had Mr. Verjee given evidence it would have been against the plaintiffs' case and would have supported that of the defendants. As far as the defendants are concerned they appear to have called every one of their employees (except a Mr. Rodrigues, who is said to have played but a small part, and has left the employ of the defendants bank), who either they or the plaintiff, was had any concern with the issues, and the plaintiffs have had the opportunity, which they exercised to the full, of testing in cross-examination, the evidence of these witnesses individually and one against the other.

I do not believe the evidence of Mr. Keshavji, quite apart from it lacking the confirmation and corroboration on important aspects which could be expected, that is the evidence of Mr. Dharamshi, Mr. Keshavji did not appear to be telling the truth during

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most of his evidence, particularly when he said he could not read English. He appeared to have no difficulty in doing so when letters written in the English language were handed to him when he was in the witness box. It seems that Mr. Dharamshi founded the business in Mombasa in 1919, and transferred it to Nairobi in 1922. The plaintiffs' trade as cloth merchants and tailors and have been in their premises in Bazaar Street, Nairobi, since 1939, and Mr. Keshavji worked for the firm for 20 years before becoming a partner in 1955. Mr. Keshavji says that the plaintiffs were over persuaded to transfer their account from the Standard Bank to the defendants bank, there was no element of compulsion, yet Mr. Keshavji says they signed bank forms in blank, and when their goods were in the course of being seized he and Mr. Dharamshi signed a letter which they could not read, and which was not read over to them. It is incredible that such simple trusting persons could have remained in the cloth and tailoring business for a period of over 40 years. From my observation I am satisfied that Mr. Keshavji is neither simple by nature nor trusting, his evidence makes this clear, further Mr. Dharamshi appeared to be a lively and alert old gentleman, I have mentioned that he took a lively interest in the proceedings, I also noticed that he was able to communicate with his counsel, a facility which he took advantage of on innumerable occasions, many of these being when the witnesses speaking in English, which was not translated, gave evidence that he, Mr. Dharamshi, did or did not take a particular part in certain events. As I say I do not believe Mr. Keshavji, and I place no reliance on his evidence. I have indicated the conflict in Mr. Williamson's evidence. I am satisfied and find that Mr.Williamson was confused and made an honest mistake when he said that Mr. Dharamshi, Mr. Keshavji, Mr. Verjee and Mr. Patel were present in his office on 29th September, 1960. As Mr. Williamson said on more than one occasion, the events had taken place over two years before, and I accept his explanation given in re-examination. I accept the evidence of the witness for the defence, there are minor discrepancies in their evidence but that they are is an indication of truth in a case where witnesses are speaking of events which had occurred over two years before and where, being subject to rigorous cross-examination, as happened on many occasions, they said they have forgotten, or did not know, and were then encouraged and pressed to try and remember, to say if it is possible so and so happened.

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I am satisfied and find that the plaintiffs did, in April, 1960, approach the defendants bank through Mr. K.F.Shah, that the letter of hypothecation was properly completed, before it was signed. As far as the terms of the overdraft are concerned and the meaning of the paragraph of the letter dated 13th May, 1960, which I have set out above, the evidence of the plaintiffs' witness is that Mr. McWilliam said that the defendants would not claim back the money for one year, and agreed the date of repayment as 30th April, 1961, and Mr. Nagesh, when he presented the security documents for signature, said the loan was for one year. As I have said, Mr. McWilliam's evidence was that he agreed with the plaintiffs that they have overdraft facilities of Shs.140,000/-, up to 30th April, 1961, provided the account was conducted properly and, if it was not conducted properly, he would regard the overdraft as being immediately repayable. Mr. Nagesh denied knowing anything about the original security documents, but asked in cross-examination if he was aware that the original overdraft was granted up to 30th April, 1961, Mr. Nagesh replied that that was the date on which the facility came up for renewal. In cross-examination it was put to Mr. Williamson that the agreed time of the overdraft was to 30th April, 1961, and Mr. Williamson agreed that that was so, provided the account was conducted to the defendants' satisfaction. Asked if, the account being conducted to the defendants' satisfaction, the plaintiffs could have up to 30th April, 1961, to repay it Mr.Williamson said that was not so, that the account would be subject to review on that date and, subject to agreement, could be extended. Asked whether the account being conducted satisfactorily, the defendants were bound to honour cheques up to 30th April, 1961, to the limit of Shs.140,000/-, Mr.Williamson replied, yes, provided the plaintiffs were not drawing against uncleared effects. Further in cross-examination Mr. Williamson said that every overdraft was repayable on demand in spite of the fact that it was granted to a particular period, that the stating of a date was not a date of repayment it was the date when the facility to be reviewed, that even if an account was conducted satisfactorily the defendants could call in the overdraft at any time and, if it was not paid at once, realise on securities given, I am not concerned with whether or not the evidence on this aspect of the case is directed to varying the words of a written document for the plaintiffs first led evidence directed to the meaning of the paragraph contained in the letter of

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13th May, 1960, set out above, further the plaintiffs put to the defendants' witnesses in cross examination the plaintiffs' version of the agreement and the meaning of that paragraph, and the defendants also put their version to their witnesses and made no objection to the cross-examination of their witnesses on the matter. I am satisfied and find that the agreement between the parties was that the plaintiffs be granted overdraft facilities of Shs.140,000/-, repayable on demand, that the facility was conditioned on the plaintiffs' conducting the account to the defendants' satisfaction and that the facility was to come up for review on 30th April, 1961, when it could be extended by agreement of the parties. I do not accept the evidence given on behalf of the plaintiffs that an additional facility of Shs.5,000/- was given on 23rd September, 1960, a further facility of Shs.5,000/- was given on 26th September, 1960, and yet a further facility of Shs.3,000/- was given on 3rd October, 1960. I accept the evidence of the defendants' witnesses that the only additional facility granted was one of a further Shs.10,000/- granted on 29th September, 1960, that this further facility was granted up to 3rd October, 1960, on which date the overdraft was to be reduced to the original sum of Shs.140,000/- and fresh security documents were given to Mr. Keshavji for signature on 29th September, 1960. There is one point which was not argued by the parties, but which I consider I should mention, going as it does to credit, and it is this - if the additional facility of Shs.10,000/- was given until 3rd October, 1960, did the defendants act properly in obtaining signed security documents three days after the additional facility had expired? In my view the defendants' action was justified, for the reasons that they were entitled to take such action as would put them in the same position had the plaintiffs not broken their promise, (that is to return the documents immediately), and that the plaintiffs should not be secured in a more favourable position by reason of having broken their promise than they would have been had they kept it. Further I am satisfied and find that the defendants had formed no intention of seizing the plaintiffs' shop goods before these security documents were signed. I am satisfied and find that the plaintiffs did exceed the limit of their overdraft of Shs. 140,000/- on a number of occasions between 17th June and 12th August, 1960, resulting in the defendants sending to the plaintiffs three letters which I have

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set out above regarding this, that on 21st September, 1960, the plaintiffs drew seven cheques to a total of about Shs.10,000/- against uncleared effects, that the defendants returned the cheques marked "effects not cleared" and on Mr. Patel remonstrating, Mr. Keshavji undertook that it would never happen again, and was warned specifically that to keep a satisfactory account the plaintiffs must keep within the limit of their overdraft, that three days later, on 24th September, 1960, the plaintiffs failed to comply with their promise and another cheque was returned by the defendants as the plaintiffs had not made provision for it. I am satisfied and find that Mr. Verjee did produce and hand to Mr. Williamson the draft letter relating to the plaintiffs' intention to call a meeting of creditors and that it was produced at the meeting in Mr. Williamson's office on the morning of 6th October, 1960. The last reason pleaded by the defendants in support of their contention that the plaintiffs failed to conduct their account in a satisfactory manner is that the plaintiffs permitted the landlord of their shop premises to bring a distress against the hypothecated goods. From the evidence of Mr. G.Bakarania, the advocate for the owner of the plaintiffs' premises, and Mr. S.A.V. Pirbhai, the Court Bailiff, it is clear that the distress was levied some three quarter of an hour after the defendant commenced removing the shop goods and that the landlord was actuated by seeing the shop goods being removed. The defendants do not contradict this evidence, and I find as a fact that the distress having been levied after the seizure of the goods had commenced and as a result of their removal this could not be a reason for the conclusion that the plaintiffs had failed to conduct their acoount in a satisfactory manner. In conclusion on these issues I find that it was a fundamental condition of the agreement between the parties, as a result of which the defendants granted the plaintiffs overdraft facilities, that the plaintiffs should conduct their account in a satisfactory manner and that on breach of such condition the overdraft was repayable, that in spite of repeated warnings given by the defendants, the plaintiffs did fail to conduct their account in a satisfactory manner, or to the defendants' satisfaction.

Regarding the events that took place on the afternoon of 6th October, I find that the defendants gave the plaintiffs no previous formal, oral or written notice of their intention to seize the plaintiffs' shop goods, but I am satisfied that the plaintiffs,

well knowing the manner in which they had conducted their account with the defendants and being aware of their unsuccessful attempts to obtain an increase in their overdraft facility and of the demand to reduce the overdraft to Shs.140,000/- which they had informed the defendants they were unable to do, must have known that the seizure was imminent. Indeed, the possibility of the seizure appeared to be common knowledge in the bazaar as is seen from the conduct of other creditors, one of whom called at the plaintiffs' shop at about quarter hour intervals. I am satisfied and find that the letter purporting to authorise the seizure of the plaintiffs' shop goods, which I have set out above, was signed voluntarily by Mr. Keshavji and by Mr. Dharamshi, both being aware of its contents and purport, and that they properly acted on behalf of the plaintiffs. I accept the evidence of the plaintiffs' witnesses as to the circumstances under which the words in manuscript were added, and I admit the letter as evidence.

The last two matters that remain to be considered on the issue of liability are, first, the plaintiffs' allegation that the defendants in breach of a term of their obligation, and in fraud of the plaintiffs caused damage to the plaintiffs' credit by writing Messrs. Jesang Popat and Co., to whom the plaintiffs had given an option on the Ngara Road property, that the defendants would sell the property after 15th December, 1960, if the plaintiffs did not repay the overdraft by that date, and that the defendants, in spite of repeated demands by the plaintiffs, failed to give the plaintiffs any inventory of the goods and chattels seized and removed. As far as the first matter is concerned, I am satisfied and find that the document of equitable charge was drawn up, executed and registered in a regular manner. I have already found that the overdraft was repayable on demand and that the plaintiffs failed to conduct their account satisfactorily. The call by the defendants' representatives at the plaintiffs' shop, the stating of the intention to seize the plaintiffs' goods, was, I find a clear and unambiguous demand for the repayment of the overdraft. Further it is not disputed that there was a formal demand, made by the defendants on the plaintiffs for repayment of the overdraft by a letter dated 8th October, 1960. This being so the defendants were, on 24th October, 1960, entitled to sell the Ngara Road property forthwith. The evidence is that an attempt was in fact, by or on behalf of

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the plaintiffs, to obtain a change of user in respect of the Ngara Road property to petrol-filling station, and the granting of the option to Messrs. Jesang Popat & Co., related to this. It is also clear from the evidence that the gravemen of the letter complained of and the correspondence was that the defendants agreed to assist the plaintiffs in obtaining a favourable price for the Ngara Road property by foregoing their right to sell that property forthwith, agreed to give the plaintiffs the advantage they sought, that is to 10 delay the sale until 15th December, 1960 and then instead of exercising their right of sale, which might well have been more profitable, accepted a purchaser produced by the plaintiffs. It is clear that there is nothing in the plaintiffs' allegation and I so find. As far as the second matter is concerned, I am satisfied and find that the defendants soon after the seizure, and on occasions thereafter requested the plaintiffs to assist them in making an inventory of the goods seized, and that the plaintiffs failed to 20 give that assistance. The goods consisted of cloth and sewing machines and their spares. As far as the cloth is concerned, it is common knowledge that this is a specialised trade, long experience being necessary to identify particular materials and their qualities, further the plaintiffs must have been familiar with the actual goods and each item of them. The defendants being bankers cannot be presumed to possess any such knowledge. It was never suggested that it was the duty of the defendants to employ an expert for the 30 purposes of making an inventory of the goods, nor do I consider it reasonable that they should have done this. If the plaintiffs themselves failed to assist the defendants in listing the goods, the exact descriptions, cost and quantity of each item of which they must have been well aware, I cannot see that they have any reasonable complaint. Indeed, the defendants appear to have been actuated by consideration for the plaintiffs' property throughout the whole of the transaction, and acted to enforce their security only 40 when there was no other alternative but to lose part of the money they had lent, besides these two aspects of the case, in the first of which the defendants positively assisted the plaintiffs and in the second of which they offered so to do, the defendants acted with great consideration on many occasions for instance by allowing the plaintiffs to exceed the amount of their overdraft so as not to damage their, the plaintiffs, credit, and even after the goods were seized being prepared to enter into an arrangement for 50

the release of the goods seized in consignment of Shs.10,000/- value, with no security other than a promise to pay the proceeds of the successive consignment into the plaintiffs' account when the goods had been sold.

Turning now to the question of the validity of the letters of hypothecation, it is not disputed that the signatures on them were not witnessed. Under the Chattels Transfer Ordinance Cap.281,
10 section 2 "Chattels" are defined in part to mean-

> " Any moveable property that can be completely transferred by delivery, and includes machinery, stock and the natural increase of stock as hereinafter mentioned, crops and wool."

Clearly shop goods, sewing machines and their spares are "Chattels". In the same section "instrument" is defined to mean -

> " Any instrument given to secure payment of money or the performance of some obligation and
> 20 includes any bill of sale, mortgage, lien, or any other document that transfers or purports to transfer the property in or right to possession of chattels, whether permanently or temporarily, whether absolutely or conditionally, and whether by way of sale, security, pledge, gift, settlement or lease, and also the following:-
>
> (a) inventories of chattels with receipt thereto attached;
>
> 30 (b) receipts for purchase-money of chattels;
>
> (c) other assurances of chattels;
>
> (d) declarations of trust without transfer;
>
> (e) powers of attorney, authorities or licences to take possession of chattels as security for any debt;
>
> (f) any agreement, whether intended to be followed by the execution of any other instrument or not, by which a right in equity to any chattels, or to any change
> 40 or security thereon or thereover, is conferred; ... "

The letter of hypothecation cannot be brought within

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the exceptions and already a letter of hypothecation is an "instrument". Section 15 of the Ordinance provides:

> "Sealing shall not be essential to the validity of any instrument; but every execution of an instrument shall be attested by at least one witness, who shall add to his signature his residence and occupation."

Sir William Lindsay refers me to the ruling of Mayers J., in the case of Bhavanlal Lalji Gandhi and others v. National and Grindlays Bank Ltd., C.C.668 of 1962 (unreported) as authority for the proposition that it is not open to a party to an "instrument" to attack its validity. If Bhavanlal's case is looked at it is seen that section 13 of the Ordinance was mentioned, section 14 also was in point. Section 13 provides for unregistered instruments to be void as against certain named persons, none of whom are the grantors. Again section 14 is specifically stated to protect a bona fide purchaser for value without notice and again nowhere is the grantor given any advantage. Section 15 is quite different, it is under a distinct heading " as to instruments generally" and its operation is quite unrestricted, this being so the only question is this, is the instrument attested in accordance with the provisions of the Ordinance? If not, the document is not valid. In this case the letters of hypothecation are not attested and must be rejected as evidence.

I have found that the overdraft was repayable on demand, that it was condition of the continuance of the facility that the Plaintiffs conduct their account properly and to the satisfaction of the defendants and that they failed so to do. The result of the interview between Mr. Keshavji Mr. Dharamshi and Mr. Williamson during the morning of 6th October, 1960 was that Mr. Williamson demanded that the plaintiffs at once reduce their overdraft to the agreed limit of Shs.140,000/- and Mr. Keshavji said that the plaintiffs were not able to do so. I find that this demand was reasonable and was made at a reasonable time, the plaintiffs had been granted additional overdraft facilities of Shs.10,000/- up to 3rd October, 1960 and on the 6th October, 1960 they were three days overdue in complying with the demand. The next question is did the defendants give the plaintiffs reasonable time in which to comply with the demand before they took action? The answer to this depends on fact and is

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related to the nature of the property sought to be seized. If the property is not easily realisable, is in the possession of the debtor, and he cannot easily divest himself of the possession and title then a period of days or even weeks might be reasonable. What is the position of shop goods. Mr. Nazareth put it to Mr. V.J.Amin in cross-examination that a letter of hypothecation is not a good security and to Mr. Williamson that the reason he seized the
10 shop goods without warning was because, had he given warning, he expected the goods to be removed and Mr. Williamson said he did. Mr. Amin replied that he did not know and Mr. Williamson's answer appears to answer the question put to Mr. Amin in the affirmative, and from the question it appears that the plaintiffs' real complaint in this action is that they were not given sufficient warning of the intended seizure and so were deprived of the opportunity of defeating the defendants by removing
20 the goods before the defendants arrived to seize them. I must make it clear that I do not suggest that this was in the minds of either Mr. Keshavji, Mr. Dharamshi or any of the plaintiffs when the defendants arrived at the plaintiffs' premises during the afternoon of the 6th October, 1960 or at any time during that afternoon. It is common sense that shop goods are security, whether evidenced by a valid letter of hypothecation or not, but only under circumstances where the time between notice and seizure is very
30 short. If the goods are machinery used in manufacture, that is one thing, it would not be reasonable business practice to remove such machinery from premises overnight and time to be reasonable might well be a period of days. Shop goods are quite different, the nature of the business is buying in quantity and selling in retail to the public. Normal business practice being that sale and removal of the goods sold from the premises often takes a matter of minutes for each transaction. By the nature of such a business a
40 trader can run down his stocks or remove them at very short notice in what appears to be the normal course of his business, but which is in fact an evasion to defeat his creditors. As I have said and I repeat it, I do not think it was in the minds of either Mr. Keshavji or Mr. Dharamshi, or any of the plaintiffs when the representatives of the defendants arrived at the plaintiffs' premises during the afternoon of 6th October, 1960, or at any time before the goods were removed by the defendants, that they intended to
50 defeat the defendants in any way. Far from it I am

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satisfied and find that the case was the opposite that when, at the interview between Mr. Williamson and the plaintiffs' partners Mr. Williamson demanded that the plaintiffs reduce their overdraft to Shs.140,000/-, and the plaintiffs said they could not, the plaintiffs well knew that the defendants would realise on the securities, that when the defendants arrived at the plaintiffs' premises and stated their intention of at once seizing the goods, by reason of the nature of the goods, the plaintiffs had been given reasonable notice 10 and then freely agreed to the defendants' seizing the goods.

Further, I am satisfied and find that, quite apart from the letters of hypothecation, the plaintiffs expressly agreed with the defendants that the latter should take possession of the goods, and this was evidenced in writing (Exhibit C.6)) that the plaintiffs, whilst the goods were being removed, questioned whether sewing machines and their spares came within the agreement just concluded and, being satisfied that 20 these goods did come within the agreement, this was made clear on the document and in pursuance of the agreement the remainder of the goods were seized.

I know of no law which provides that the giving of goods as security must, to be valid, be evidenced in writing or by a letter of hypothecation. If the agreement between the parties is that shop goods be security for an overdraft, the agreement still subsists, and is a valid one, eventhough a letter of hypothecation drawn up in pursuance of the agreement 30 proves to be invalid, the only result is that the letter of hypothecation cannot be employed as evidence of the agreement. I can see no reason why a party should not realise his security either as a result of an absence of objection to the seizure, agreement to the seizure, or in the case of an objection, by proof of the agreement even though that agreement is proved in a suit based on wrongful seizure.

It is common knowledge that merchants often honour their agreements irrespective of their enforce- 40 ability in a Court of law, and it seems that this is exactly what occurred in this case, that is the plaintiffs gave their shop goods as security for their overdraft facilities with the defendants, they were unable to meet their commitments with the defendants, the defendants considered that they were entitled to seize the plaintiffs' shop goods, whereupon the

plaintiffs freely honoured their agreement by agreeing to the defendants' seizure of those goods, and then allowing the seizure. On these facts the plaintiffs have no cause of action.

I am satisfied and find that the plaintiffs have failed utterly to substantiate any one of the three courses of fraudulent conduct alleged, that there was no duress as alleged (indeed Mr. Keshavji, the only witness for the plaintiffs on this aspect of 10 the case, conceded there had been none) and the letter (Exhibit C.6) was signed by Mr. Dharamshi and Mr. Keshavji voluntarily and with full knowledge of its contents and purport.

In the result, being satisfied that the plaintiffs' shop goods were seized and removed by the defendants in pursuance of an agreement freely and voluntarily entered into between the plaintiffs and the defendants, the finding on the issue of liability, that is "were the plaintiffs' shop goods lawfully 20 seized or not?" is yes. This being so the action must be dismissed.

Action dismissed with costs.

(Sgd) James Wicks.
JUDGE.

No.24

DECREE dated 31st May 1963

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI

CIVIL SUIT NO: 1516 OF 1961

DHARAMSHI VALLABHJI
KESHAVJI DHARAMSHI
BACHULAL DHARAMSHI
30 RAGHAVJI DHARAMSHI
all trading as
"DHARAMSHI VALLABHJI & BROTHERS" .... PLAINTIFFS

Versus

NATIONAL AND GRINDLAYS BANK LIMITED .... DEFENDANT

D E C R E E

CLAIM FOR:

(a) Damages, general and special;

In the Supreme Court of Kenya at Nairobi

No.24

Decree

31st May 1963 continued

(b) Interest at 8% per annum from the date of filing of this suit to date of judgment, and thereafter at the rate of 6% till payment in full;

(c) costs of this suit;

(d) Such further or other relief as to this Honourable Court may seem meet.

THIS SUIT coming on the 1st, 2nd, 3rd, 4th, 5th, 11th, 12th and 16th days of October, 1962, 28th and 29th December, 1962 for hearing, on the 31st day of May, 1963 for judgment, before the Honourable Mr. Justice Wicks, in the presence of Counsel for the Plaintiffs and Counsel for the Defendant, IT IS ORDERED:

1. That the Plaintiffs' suit be dismissed;

2. That the Plaintiffs do pay to the Defendant its costs of this suit of two Counsel to be taxed and certified by the Taxing Master of this Court.

GIVEN under my hand and the Seal of the Court at Nairobi this 31st day of May, 1963.

ISSUED on this 1st day of February 1964.

BY THE COURT

(sd) M.F.PATEL
DEPUTY REGISTRAR.
SUPREME COURT OF KENYA

I certify this is a true copy of the original.

Date 22.2.64

(sd) M.F.Patel.
Deputy Registrar
H.M.Supreme Court of Kenya.

In the Supreme Court of Kenya at Nairobi

No.25

Notice of Appeal

11th June 1963

No.25

NOTICE OF APPEAL dated 11th June 1963

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI

CIVIL SUIT NO: 1516 OF 1961

DHARAMSHI VALLABHJI)
KESHAVJI DHARAMSHI)
BACHULAL DHARAMSHI)
MARARJI DHARAMSHI)
RAGHAVJI DHARAMSHI all t/a)
10 "DHARAMSHI VALLABHJI & BROTHERS) .... PLAINTIFFS

versus

NATIONAL AND GRINDLAYS BANK LIMITED .... DEFENDANTS

NOTICE OF APPEAL

TAKE NOTICE that DHARAMSHI VALLABHJI, KESHAVJI DHARAMSHI, BACHULAL DHARAMSHI, MORARJI DHARAMSHI, RAGHAVJI DHARAMSHI the above-named plaintiffs, being dissatisfied with the decision of the Honourable Mr. Justice Wicks given herein at Nairobi on the 31st day of May, 1963, intend to appeal to the Court of Appeal 20 for Eastern Africa against the whole of the said decision.

DATED at Nairobi this 11th day of June, 1963.

A.S.G. KASSAM
ADVOCATE FOR THE PLAINTIFFS
(Intended Appellants)

TO:
The Registrar, Supreme Court of Kenya at Nairobi, and Messrs. Hamilton, Harrison and Mathews, Advocates, Nairobi.

30 The address for service of the Intended Appellants is care of A.S.G.KASSAM, Advocate, Sheikh Building, Victoria Street, 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. 40 In the event of non-compliance, the appellant may proceed ex-parte.

FILED the 11th day of June, 1963, at Nairobi.

DEPUTY REGISTRAR
SUPREME COURT OF KENYA
NAIROBI.

In the Supreme Court of Kenya at Nairobi

No.26

Notice of Address for Service

15th July 1963

No. 26

NOTICE OF ADDRESS FOR SERVICE dated 15th July 1963

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI

Civil Suit No. 1516 of 1961

DHARAMSHI VALLABHJI
KESHAVJI DHARAMSHI
BACHULAL DHARAMSHI
MORARJI DHARAMSHI and
RAGHAVJI DHARAMSHI all T/A "DHARAMSHI
VALLABHJI & BROTHERS" .... Plaintiffs 10

versus

NATIONAL & GRINDLAYS BANK LIMITED .... Defendants

NOTICE OF ADDRESS FOR SERVICE

TAKE NOTICE that the address for service of NATIONAL & GRINDLAYS BANK LIMITED, a Respondent served with Notice of Appeal herein is care of Messrs. Hamilton, Harrison & Mathews, Advocates, Esso House, Queensway, Private Bag, Nairobi.

Dated at Nairobi this 15th day of July, 1963.

HAMILTON HARRISON & MATHEWS, 20
Advocates for the Respondent above-named.

To the Registrar of the Supreme Court of Kenya at Nairobi; and

To A.S.G. Kassam, Esq., Advocate for the Intended Appellants, Sheikh Building, Victoria Street, Nairobi.

Filed this 15th day of July, 1963, at Nairobi.

Deputy Registrar.
SUPREME COURT OF KENYA.

Drawn and filed by:-

HAMILTON HARRISON & MATHEWS, 30
Advocates,
Esso House,
Queensway,
Nairobi.

Pmg.

In the Court of Appeal for Eastern Africa at Nairobi

No.27

Memorandum of Appeal

27th February 1964

No. 27

MEMORANDUM OF APPEAL dated 27th February 1964

IN THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

CIVIL APPEAL NO. 15 OF 1964

BETWEEN

DHARAMSHI VALLABHJI)
KESHAVJI DHARAMSHI)
BACHULAL DHARAMSHI) .... APPELLANTS
MORARJI DHARAMSHI)
10 RAGHAVJI DHARAMSHI)

and

NATIONAL & GRINDLAYS BANK LIMITED .... RESPONDENTS

(Appeal from the Judgment and Decree of Her Majesty's Supreme Court of Kenya at Nairobi (The Honourable Mr. Justice Wicks) dated the 31st May, 1963)

in

SUPREME COURT CIVIL CASE NO. 1516 of 1961

BETWEEN

DHARAMSHI VALLABHJI
20 KESHAVJI DHARAMSHI
BACHULAL DHARAMSHI
MORARJI DHARAMSHI
RAGHAVJI DHARAMSHI trading as
"DHARAMSHI VALLABHJI AND BROTHERS" .... PLAINTIFFS

and

NATIONAL & GRINDLAYS BANK LIMITED .... DEFENDANTS

MEMORANDUM OF APPEAL

DHARAMSHI VALLABHJI, KESHAVJI DHARAMSHI, BACHULAL DHARAMSHI, MORARJI DHARAMSHI and RAGHAVJI DHARAMSHI, 30 the Appellants above-named appeal to the Court of Appeal for Eastern Africa against the whole of the decision above-mentioned on the following grounds, namely:-

In the Court of Appeal for Eastern Africa at Nairobi

No.27

Memorandum of Appeal

27th February 1964 continued

1. The learned Judge, having held in the early part of his judgment, (when entering upon the consideration of his findings and holdings) that "a simple finding" on the question of the validity of the letters of hypothecation, "would dispose of all the issues relating to the letters of hypothecation and it would not be necessary to refer in detail either to the pleadings or the evidence relating to these issues", erred fundamentally in postponing his holding in favour of the Appellants on that issue (namely that the letters of hypothecation were void for lack of attestation) to a later part of his judgment and going on instead to consider other issues, when it should have been held by the learned Judge that the basic issue of liability must be decided in favour of the Appellants by reason of his holding in their favour on the issue of the letters of hypothecation, on one of which letters, that dated 9th May, 1960, the Respondents justification of the seizure and removal of the Appellants' goods had essentially been based.

2. The learned Judge erred in law in that, despite holding that the said letters of hypothecation were void for want of attestation, he nevertheless proceeded to decide in favour of the Respondents on the grounds that there was independent evidence of a hypothecation and that an agreement for hypothecation need not be in writing.

3. The learned Judge erred in failing to appreciate that, apart from the said two letters of hypothecation dated 9th May, 1960 and 6th October, 1960, no hypothecation had been pleaded by the Respondents or was in issue in the suit.

4. The learned Judge erred in finding (or implying) that there was any hypothecation apart from that purported to be effected by the said two letters of hypothecation. Such finding, if any, was unsupported by any evidence or was against the weight of evidence and contrary to law.

5. The learned Judge erred in holding that an agreement for hypothecation need not be in writing.

6.(i) The learned Judge erred in admitting in evidence and/or in relying upon the letter dated 6th October, 1960 and signed in the afternoon of 6th October, 1960 by the Appellants Dharamshi and Keshavji.

In the Court of Appeal for Eastern Africa at Nairobi

No.27

Memorandum of Appeal

27th February 1964 continued

(ii) The learned Judge erred in failing to appreciate that the said letter referred to in (i) above of this paragraph, purporting to constitute a licence to seize and remove the Appellants' goods was not given in the ordinary course of business and that it was an "instrument" within the meaning of that term as defined in sec.2 of the Chattel Transfer Act (Cap.28 of the Laws of Kenya) and was therefore inadmissible and void under sec.15 of that Act for lack of attestation.

(iii) The learned Judge erred in failing to give consideration to the fact that the said letter referred to in (i) above of this paragraph was not signed by any of the Appellants other than Dharamshi and Keshavji and that there was no evidence of any express authority given by the other three Appellants to the said Dharamshi or Keshavji to sign the said letter nor was such authority to be implied and he erred in failing to deal specifically with the issue as to authority raised in paragraph 4(iii) of the Reply to Defence.

(iv) The learned Judge erred in failing to hold that the said letter referred to in (i) above of this paragraph had been materially altered after one of the Appellants had signed it without the consent of such Appellant.

7. The learned Judge erred in his finding that Mr. McWilliam, the then sub-manager of the Respondent "reached agreement with the Appellants for the Respondents to grant an overdraft of up to Shs. 140,000/= up to 30th April, 1961 provided the account was conducted properly, that if it was not so conducted he would regard the overdraft as being immediately repayable". There was no evidence to support the finding as to any such proviso, or such finding in regard to the proviso was against the weight of evidence and contrary to law.

8. The learned Judge in all the circumstances of the case, and particularly having regard to the absence of challenge in cross-examination of the said Keshavji's evidence of certain parts thereof on which he said Dharamshi's evidence could be regarded as material, erred in attaching any weight or undue weight to the said Dharamshi not having been called as a witness.

In the Court of Appeal for Eastern Africa at Nairobi

No.27

Memorandum of Appeal

27th February 1964 continued

9. The learned Judge, (who delivered judgment more than five months after the close of evidence and of final addresses of counsel in the case) erred in putting himself into the position of a witness in regard to the said Dharamshi's appearing to understand English and to be able to follow the proceedings, as to his appearing to be a lively and alert old gentleman and as to his being able to communicate with his counsel etc. when, to the knowledge of both Mr. J. M. Nazareth, Q.C. and Mr. A. S. G. Kassam, the Appellants' Counsel, who had been wholly unable to communicate with him in English, the said Dharamshi had no knowledge of English as could enable him at all intelligently to understand or follow the proceedings.

10. The learned Judge erred in presuming that had the said Dharamshi given evidence it would have been against the Appellants' case or would have supported that of the Respondents.

11. The learned Judge erred in presuming that had Mr. Verjee given evidence it would have been against the Appellants' case or would have supported that of the Respondents.

12. The learned Judge erred in not believing the evidence of Mr. Keshavji and in wholly rejecting it.

13. The learned Judge's approach to the evidence of the parties was not balanced. While the learned Judge adopted an erroneous and unjustifiably prejudiced attitude in regard to the evidence of the said Keshavji (whose evidence disclosed no or no substantial contradictions) and in his approach to the said Dharamshi's part or lack of part in the trial, he unjustifiably disregarded the blatant contradictions in the evidence of Mr. Williamson, which contradictions were of such a nature as to be impossible to reconcile with "honest mistake" on his merely being confused, and the learned Judge erred in not rejecting the said Williamson's evidence.

14. The learned Judge erred in his finding that in April, 1960 the letter of hypothecation was properly completed before it was signed.

15. The learned Judge erred in his whole approach to the evidence in regard to the terms of the overdraft and the period for which it was agreed to be granted and to the evidence in regard to the letter of 13th May, 1960.

16. The learned Judge's findings "that the agreement between the parties was that the Plaintiffs be granted overdraft facilities of Shs.140,000/=, repayable on demand, that the facility was conditioned on the Plaintiffs conducting the account to the Defendants' satisfaction and that the facility was to come up for review on 30th April, 1961, when it could be extended by agreement of the parties" are unsupported by evidence or are against the weight of the evidence and contrary to law.

17. The learned Judge erred in not accepting the Appellants' evidence that an additional facility of Shs.5,000/= was given on 23rd September, 1960, a further facility of Shs.5,000/= was given on 26th September, 1960 and yet a further facility of Shs. 3,000/= was given on 3rd October, 1960, and in accepting the evidence of the Respondents' witnesses that "the only additional facility granted was one of a further Shs.10,000/= granted on 29th September, 1960, that this further facility was granted up to 3rd October, 1960, on which date the overdraft was to be reduced to the original sum of Shs.140,000/= and fresh security documents were given to Mr. Keshavji for signature on 29th September, 1960".

18. Even if the aforesaid findings were supported or justified by the evidence, the learned Judge erred in failing to appreciate that any overdrawing on their bank account by the Appellants above the agreed limit amounted in law and in fact (as confirmed by the evidence of Mr. McWilliams) to no more than a voluntary loan by the Respondents to the Appellants above such agreed limit, that such voluntary loan above the agreed limit could not in law or in fact amount to any improper conduct of their account by the Appellants and that it did not and could not in law or in fact operate to entitle the Respondents to require payment of the overdraft or to seize and remove the Appellants' goods before the expiry of the agreed period for which the overdraft was granted, namely up to 30th April 1961.

19. The learned Judge erred in his approach to the matters involved in the question of the fresh security documents, the execution of which by the Appellants the Respondents obtained on the morning of 6th October, 1960, (in the afternoon of which same day the Respondents seized and removed the Appellants' goods), and in failing to appreciate the significance of the Respondents' conduct on this point on the issue of their fraudulent conduct towards the Appellants and in failing to appreciate also the significance of the

In the Court of Appeal for Eastern Africa at Nairobi

No.27

Memorandum of Appeal

27th February 1964 continued

fact that the guarantee executed by the Appellants in the morning of the said 6th October, 1960 was in consideration of time agreed to be granted by the Respondents to the Appellants.

20. The learned Judge's finding that the action of the Respondents ("in obtaining signed security documents three days before the additional facility had expired") "was justified, for the reason that they were entitled to take such action as would put them in the same position had the Plaintiffs not broken their promise, (that is to return the documents immediately), and that the Plaintiffs should not be secured in a more favourable position by reason of having broken their promise than they would have been had they kept it" was irrelevant to any issue in the suit and is erroneous and contrary to law.

21. The learned Judge erred in finding that the Respondents "had formed no intention of seizing the Plaintiffs' shop goods before these security documents were signed".

22. The learned Judge's findings in regard to the limit of the Appellants' overdraft of Shs.140,000/= and the exceeding thereof and the related findings in regard to that aspect of the case are against the weight of evidence, and, even if supported by the evidence, such facts or findings did not afford in law any support or justification for the Respondents requiring re-payment of the overdraft of Shs.140,000/= or seizing and removing the Appellants' goods before the expiry of the said period for which the said overdraft was granted, namely up to 30th April, 1961.

23. The learned Judge erred in finding that Mr.Verjee produced and handed over to Mr. Williamson the draft letter in the morning of 6th October, 1960 and the said finding is against the weight of evidence and contrary to law.

24. The learned Judge's findings that "it was a fundamental condition of the agreement between the parties, as a result of which the Defendants granted the Plaintiffs overdraft facilities, that the Plaintiffs should conduct their account in a satisfactory manner and that on breach of such condition the overdraft was repayable, that in spite of repeated warnings given by the Defendants, the Plaintiffs did fail to conduct their account in a satisfactory manner,

or to the Defendants' satisfaction" are unsupported by evidence, and, even if such findings and facts were justified, they afforded no justification in law for requiring repayment of the overdraft or seizing and removing the Appellants' goods before the said 30th April, 1961.

25. The learned Judge's finding that the possibility of the seizure appeared to be common knowledge in the bazaar is unsupported by any evidence.

10 26. The learned Judge's finding that the letter purporting to authorise the seizure of the Appellants' shop goods was signed voluntarily by the said Keshavji and by the said Dharamshi, both being aware of its contents and purport, and that they acted properly on behalf of the Appellants is unsupported by any evidence or against the weight of evidence.

27. The learned Judge erred in admitting the letter signed in the afternoon of 6th October, 1960 as evidence.

20 28. The learned Judge erred in finding that "the call by the plaintiffs' representatives at the plaintiffs' shop, the stating of the intention to seize the plaintiffs' goods, was a clear and unambiguous demand for the repayment of the overdraft", and, in any case, even if, contrary to the Appellants' contentions, the overdraft was payable on demand, the said "clear and unambiguous demand" was not a due, legal or valid demand for repayment, no reasonable time to pay having been allowed to the Appellants
30 to pay, as required by law.

29. The learned Judge erred in finding that the Appellants expressly agreed that the Defendants should take possession of the goods or that that was freely agreed to by the Appellants, and in any case any such agreement, if made, was void for lack of consideration.

30. The learned Judge erred in dismissing the Appellants' suit with costs.

WHEREFORE the Appellants pray that this Appeal be allowed, that the judgment and decree of the Supreme
40 Court be set aside with costs to the Appellants in this Court and in the Supreme Court, that the Respondents be held liable to the Appellants on the issue of liability, and that the case be remitted to

In the Court of Appeal for Eastern Africa at Nairobi

No.27

Memorandum of Appeal

27th February 1964 continued

the Supreme Court on the issues as to damages and other relief.

DATED at Nairobi this 27th day of February 1964.

(sgd) A. G. KASSAM

for A.S.G.Kassam & COMPANY
ADVOCATES FOR THE APPELLANTS

TO:

The Honourable the Judges of the Court of Appeal for Eastern Africa, and

to:- 10

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

The address for service of the Appellants is care of A.S.G.KASSAM & COMPANY, ADVOCATES, COMMERCE HOUSE, GOVERNMENT ROAD, NAIROBI.

FILED the 27th day of February, 1964 at Nairobi.

?

for REGISTRAR OF THE COURT OF APPEAL.

No.28

Notice of Cross Appeal

2nd March 1964

No.28

NOTICE OF CROSS-APPEAL dated 2nd March 1964 20

IN THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

CIVIL APPEAL NO.15 OF 1964

BETWEEN

DHARAMSHI VALLABJJI
KESHAVJI DHARAMSHI
BACHULAL DHARAMSHI
MORARJI DHARAMSHI
RAGHAVJI DHARAMSHI .... APPELLANTS

AND

NATIONAL AND GRINDLAYS BANK LIMITED RESPONDENT 30

(Appeal from the judgment and decree of the Supreme Court of Kenya at Nairobi (The Honourable Mr.Justice Wicks) dated the 31st May 1963, in Supreme Court Civil Case No.1516 of 1961

In the Court of Appeal for Eastern Africa at Nairobi

No.28

Notice of Cross Appeal

2nd March 1964 continued

between

DHARAMSHI VALLABHJI
KESHAVJI DHARAMSHI
BACHULAL DHARAMSHI
MORARJI DHARAMSHI
10 RAGHAVJI DHARAMSHI all
trading as "DHARAMSHI VALLABHJI AND BROTHERS" .... PLAINTIFFS

and

NATIONAL AND GRINDLAYS BANK LIMITED .... DEFENDANT

NOTICE OF CROSS-APPEAL

TAKE NOTICE that, on the hearing of this Appeal National and Grindlays Bank Limited the Respondent above-named, will contend that the decision above-mentioned ought to be varied to the extent and in the
20 manner and on the grounds hereinafter set out, namely:

1. The learned Judge erred in law in holding that the letters of hypothecation were instruments within the meaning of the word instrument in S.2 of the Chattels Transfer Ordinance (Cap.281);

2. The learned Judge erred in law in holding that the said letters of hypothecation were invalid as against the Appellants for lack of attestation;

3. The learned Judge erred in law in holding that the said letters of hypothecation were inadmis-
30 sible in evidence for lack of attestation.

DATED this 2nd day of March 1964.

?

for HAMILTON HARRISON & MATHEWS,
Advocates for the Respondent

To: The Honourable the Judges of the Court of Appeal for Eastern Africa;

and

In the Court of Appeal for Eastern Africa at Nairobi

No.28

Notice of Cross Appeal

2nd March 1964 continued

To: A.S.G.Kassam, Esq.,
Advocate for the Appellants,
Commerce House,
Government Road,
Nairobi.

The address for service of the Respondent abovenamed is care of Hamilton Harrison & Mathews, Advocates, Esso House, Queensway, Nairobi.

Filed the 2nd day of March 1964.

?

10

REGISTRAR,
COURT OF APPEAL FOR EASTERN AFRICA

Drawn and filed by:-

?
HAMILTON HARRISON & MATHEWS,
Advocates,
Esso House,
Queensway,
Nairobi.

No.29

Notes of Arguments taken by The Honourable Sir Trevor Gould V.P. - 29th, 30th & 31st July 1964

No.29

20

NOTES OF ARGUMENTS TAKEN BY THE HONOURABLE SIR TREVOR GOULD V.P. on 29th, 30th & 31st July 1964

IN THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

(CORAM: GOULD, V.P., NEWBOLD & DUFFUS JJ.A.)

CIVIL APPEAL NO.15 OF 1964

BETWEEN

DHARAMSHI VALLABHJI
KESHAVJI DHARAMSHI
BACHULAL DHARAMSHI
MORARJI DHARAMSHI
RAGHAVJI DHARAMSHI
) .... APPELLANTS

30

AND

NATIONAL & GRINDLAYS BANK LTD. .... RESPONDENT

In the Court of Appeal for Eastern Africa at Nairobi

No.29

Notes of Arguments taken by The Honourable Sir Trevor Gould V.P. - 29th, 30th & 31st July 1964 continued

(Appeal from the judgment and decree of the Supreme Court of Kenya at Nairobi (Wicks J.) dated 31st May, 1963,

in

Supreme Court Civil Case No.1516 of 1961)

Notes taken by the Hon. Sir Trevor Gould, Vice-President

NAZARETH

10 Intended that Gratiaen should argue cross-appeal only, but grounds 2, 5 and 6(2) also. I will not deal with them. Gratiaen will and also reply to cross appeal. Damages claim - wrongful seizure of goods. Only question of liability was argued and dealt with - not quantum deferred by consent. Plaintiffs transferred from Standard Bank to defendant. Letter of Hypothecation. Equitable Mortgage 2490/10. This dated May 9th, 1960, some time after account opened. Letter of Hypothecation held "not valid".
20 Goods seized October 6th, 1960, long before facility should expire. In the letter of 13th May, 1960, exhibit C.1., record 198, overdraft exceeded Shs140,000/- in September, 1960. Plaintiffs say they had arranged for this with defendants. Defendants say at trial that the overdrawing was a breach of agreement. A number of documents were brought to plaintiff's shop. Letter of Hypothecation .... extending. P.211. New guarantee - P.212. New equitable mortgage in extension - P.213. Assignment of four or five policies of insur-
30 ance. All dated October 6th and signed by all the partners (except perhaps the assignment). The same afternoon the defendant's agents came with lorries and removed all goods - or nearly. During that time defendant obtained the signatures of two of the plaintiffs to a typed letter. Record P.203, exhibit C.6. Addition in ink. Despite when unable, objection was duly taken to admissibility. During the operation the landlords seized because of the distress levy. Strong evidence brought that it was the other way round. Plaintiffs
40 say repayment could not be required before April, 1961. The guarantee given on 6th October was on consideration of "not requiring immediate payment". P.16. Paragraph 9 of defence to "consent" P.16. paragraph 8(v).

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continued

Judge held that if letter of hypothecation invalid it would dispose of all issues but considered issues - and then

P.163. Line 25. Page 164. Line 1. Page 164. Line 16. P.190. Line 22 - he comes to consideration of validity.
P.191. Line 30.

Defendants contended valid and that also because they overdrew during July and September (and ? October), 1960, they were in fundamental breach and entitled to seize. 10

P.191 - Judge upholds this. Line 37.
P.187. Line 30 - Line 1, page 188. Broad perspective of judgment.
P.160. Line 4 - pleadings and contentions of parties.
P.164. Page 182. Parts of the evidence.
P.182 - Findings. Almost all against us. Even in spite of contradiction by Williamson.

First major question on appeal. By what authority or right did defendants seize goods. Judge's view - thought Letter of Hypothecation was defendant's main plank. It was not by reason of justification by those - as held not evidence and not valid. 20

Mr. Williamson claimed larger rights. P.71. Line 33. Acted under the Letter of Hypothecation. P.193. Line 24. Page 194.

Submit the approach wrong in several ways -

(1) It was against the pleadings. Plea was "rights under Letter of Hypothecation of 9.5.60". No oral agreement was pleaded. 30

(2) If the Letter of Hypothecation could not be relied on it was not open to the court to reserve the defendants by finding an unpleaded licence or agreement.

Think counsel is saying it was not put forward by counsel for defendant. P.82. Line 40.

No scope then to make an agreement. Went to seize the goods. No agreement was made. They pleaded a consent to a seizure. I say no contract made then. No agreement in nature of evidence. This itself refers to the Letter of Hypothecation dated 40

9.5.60. P.203 stems from Letter of Hypothecation. It is not very clear that judge relied on the extension of Letter of Hypothecation of 6th October. It was not a pledge being made. Plaintiff did not deposit goods. Was evidence our man had given. No finding in that.

STROUD JUDICIAL DICTIONARY (3RD) VOL. 3 P.2216. Hypothecation - pledge - property.

29 HALSBURY (3RD) 211 and 213. Para. 391 and Para.399. No scope for anything like this. Seizure only. Assuming knew context for the sake of argument. Clear plaintiffs 1 and 2 were not acting with authority express or coupled with 3, 4 and 5. No room for contending express - no there. Surprise operation. Implied authority; partner is only for carrying on the business, not for closing down or destroying it.

LINDLEY ON PARTNERSHIP (11TH) 183 - 4.
(12TH) P. 165

Acquiescence is legal right. Would cancel no rights nor binds partners. No express finding on this authority question. Record 20. Paragraph 4 (111). Point of authority raised. No expressly dealt with. P.99. Line 29.

Plaintiffs do not concede the other three defendants bound by the letter.

Gratiaen will deal. Will say licence to seize goods and falls within definition of "environment" under CHATTELS TRANSFER ORDINANCE and invalid.

The other ground is challenge. Altered after execution and insisted as to nature and no full and free consent. Evidence on that. P.28 - line 33. Page 39 - line 40.

During this cross-examination no affirmative suggestion made that the father signed after Keshavji. No mention that Pandya was a party to the document.

This on point of why D. (father) not called. No affirmative suggestion that contents were put. P.87 - line 18-20. Scott says. P.82 - Pandya. Line 10-30. In cross-examination P.98. Line 18 (Pandya). Line 32. Contradict Scott but says he handed it to Keshavji - line 99.

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continued

No question of seizing. This letter gives authority to seize goods. P.99 - line 42. To Scott - not even present to hand it over. Submit it was really left to P. Patel. Pandya confirms. Keshavji at 48. P.48 - line 7 (but answer is "yes". He says his copy says "no"). Agrees copy is wrong. Even the form of letter - p.203 - is suspicious.

I am familiar with circumstances which should induce us to reject the evidence of the defendants' witnesses on the afternoon of the 6th re the letter. 10

Now, as to misleading of Keshavji as to contents and lack of knowledge. In large gap before 'yours faithfully' suggest deliberate to allow addition. Preparation for fraud. It was prepared on bank's own machine as to what was said. P.104 - line 14 (chief) P.Patel. There he says third plaintiff present. Nothing said then that the letter gave authority to seize the stock. Line 43 - p.105. Line 2. No reference to letter being authority to seize. (? him at p.104 - line 43 - p.105. Line 2. No reference to 20 letter being authority to seize. (? him at P.104 - line 43 = first plaintiff. Nazareth agrees misread it). P.47 - line 42 - as point raised specifically, then Patel would surely have dealt with it specifically. Impossible to believe that persons who had signed 4 and 5 documents tnat very morning would have signed such a letter knowingly. Second appellant says does not know much English. Judge made same findings. Says he did not read the letter. Their evidence is that it was explained to him in Gujerati. P.92 - 30 line 15. P.110 - line 20 (P.Patel); P.104 - line 22.

Submit defendants cannot rely on the letter as a ground for justifying the seizure in the afternoon. Defendants relied for justification on breaches of agreement by overdrawing.

On that I submit judge and defendants misconceived the legal position. P.187 - line 30. P.188.

Defendants spent much time on this point. Thirty odd breaches. I submit overdrawing beyond an agreed limit could not be regarded as a fundamental breach - 40 to call in the whole of the overdraft and seize.

Effect of payment to Bank merely makes the Bank the debtor. Cheque is a mere request to pay its money.

2ND HALSBURY)3RD) 166. Part 311. Overdrafts.

P.227. Part 425. Cheque to overdraw is merely a request for an overdraft which the Bank is free to refuse.

P.56. Mr. Williams. Line 22. P.57 - line 1.

If Bank chooses to honour the cheque that could not possibly be regarded as a breach. Also no plea of condition in the defence.

My submission is that it was not open to the
10 Bank to call in in any circumstances before April. (Not referring to terms of Letter of Hypothecation).

If one judges finding of existence of a fundamental condition then no breach thereof has been proved.

Submit there was no agreement imposing any condition. No agreement as to terms on such. Overdraft was to be recallable.

Mr. Williams should have given evidence on that. P.75 - last line. August 1960. Williamson once
20 from that date. P.58 - line 9.

Mr. Williams says he did not explain. P.54 - line 39. P.55 "conducted properly". P.58 - "No part in physical opening". No explanation by him. Contradiction. Amin (Broker). P.59 - line 32.

P.60 - cannot be sure. Nothing definite.
P.30 - Keshavji says no warning. Line 25.
Amin failed to contradict him.

P.43 - line 10. Keshavji in cross-examination. P.26 - line 38. No reference to unsatisfactory
30 conduct.

Submit not a valid ground. Ground 7 - M/A should be unpheld.

Adjourned until 2.15 p.m.

T. J. Gould. 29.7.64

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continued

2.15 p.m. Bench and Bar as before.

Nazareth

M/A ground 17. Not of critical importance. If going above is not a breach as has been argued.

On 21.9 some cheques dishonoured. Up-country cheques not cleared.

Second plaintiff on the 23rd arranged with P. Patel for Sh.5,000/-. On 26th September ditto. Another Sh.5000/-. On 3rd October third Plaintiff said arranged with Nagesh Sh.3000/- more. On 6th October P.Patel agreed to convert Sh.10,000/- out of the Sh.13,000/- to a long term overdraft to April 30th, 1961. 10

At shop early a.m. of the 6th. That was about 8.30 a.m. according to Keshavji then the documents were signed on that inducement and pols of instruction given to defendants. Guarantee P.212 - "time given" below and Sh.150,000/- signed by the five partners.

In cross-examination of Keshavji. Page 31 - line 9 - 32. 20

Page 32 - line 20. Much in dispute 29/9. I can show no interview of that date. P.33 - line 34. How could the overdraft read Sh.144,000/- on the 24th and Sh.147,000/-. It has been no authorization of the sub-manager. Bearing in mind refusal on the 21st to honour. The days after the interviews, 23rd and 26th, it increased by Sh.5,000/- each. If no authorization would have been dishonoured. The earlier exceedings had been on uncleared cheques - allowed - then put a stop to. 30

On 4th October it exceeds Sh.150,000/-. P.35 - line 26. Shows our case is correct.

P.107 - line 5 (P.Patel in cross examination). Denies. Line 31. P.108 - This on basis that bank would not have honoured without an arrangement. As to earlier occasions I think it was against up-country cheques. July, I think, but stopped).

In September seven were dishonoured. 21st September. Lead to sort of crisis. Inference supports us. Dates so significant. P.68 - line 15. Williamson (in chief). 40

P.76. Cross examination. Line 18 (shows no interview of 29/9 - fabricated). Line 41 - peculiar distinction. Admitted interest authorised. Line 24, i.e., interest of 29th. Four present then.

Details given. Dhamji Verjee, one of them to be brought back.

P.78 - Handing the documents and request for them to be brought back. Request to Pandya, 29th - 6th. P.79 - line 1. P.84. Line 38 - P.86.

10 Big connection after the luncheon break. Submit purely fabricated meeting and break down in cross-examination. If it is accepted that he did fabricate the meeting on the 29th.

Documents presented for the first time on 6th October. Supports plaintiff's third interview story. Judge said merely confused.

Next major question. Whether the overdrafts were repayable on demand. Fact. Finding of judge. Page 184 - line 31.

20 Page 198, - no stipulation for conditions therefore must be taken as none. As to clause 2 in the Letter of Hypothecation. Printed. Must prefer to specific agreement. Judge gave them their rights on the basis of oral agreement. Must make it clear otherwise hypothecation on demand is a deadly trap.

Mr. Williamson made no suit claim. Only provided operated satisfactorily.

SHELDON - PRACTICE AND LAW OF BANKING (8TH) 323.

30 Judge's finding on this should be reversed. Letter of 16/11/60 - Page 210.

On 6th October (P.212) they said would give extra time. Would supersede any earlier agreement. New policies. Guarantee. Provide extra consideration. A variation of contract.

P.210. The conditions re no act of bankruptcy. Pleaded at page 15 - paragraph 8(iii). No notice was in fact given until 25/10 after seizure. P.208 - as to 214. Was conflict about/Williamson. /this.

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continued

Next contention upheld by judge that reasonable demand had been made. P.191 - bottom.

P.192 - line 6. (agreed by all "available" is not able")

P.193 - makes it plain no notice given before seizure at all. Pandya never left the shop till seizure from the signing of the documents. P.79 - line 23.

May 8th was only for reduction. On 8th exhibit C. 7 is a demand for whole, until then none for whole. 10

P.67 - line 17. Williamson in chief. All said to be on 6th October. No suggestion of a demand. Re the 29th interview which I say never occurred. P.69 - line 1. P.78 - line 24.

P.93 - line 8 - Never went before 6/10. No evidence of demand. Reasonable time is necessary.

VOL 27 HALSBURY (3RD) 200. Para 338. Reasonable time to raise.
Note (c): Brighty v. Norton '1862) 3B. 122E.R. 116 at 118 20
Toms v. Wilson (No.8) 122 E.R.524, 529, 531
Massey v. Sladen (No.9) 1868, L.R. 4 Exch.13

Adjourned to 10 a.m.
T. J. Gould, 30.7.64

30. 7.64. Bench and Bar as before

Nazareth continues:

One matter to correct. I think I said no pleading that loan repayable on demand. Error.

P.13. Paragraph 4(ii)? basis on the Letter of Hypothecation. 30

Letter of Hypothecation. No evidence in support. Mr. Williamson did not say referred a demand but immediately repayable if not conducted properly.

P.54 - line 39 - 55. Nullified in cross-examination.

On assumption that letter of hypothecation

admissible and valid. Even so submit defendants not entitled to seize the goods. (Not really appeal - it would be in anticipation of the cross-appeal).

Form is inappropriate for a fixed period loan. It is for loan immediately repayable. Clause 9. Page 223A.

That is only a power of seizure. If that, it were applicable to a loan for a year. Bank could next day take the goods and keep them for a year.
10 Turn the hypothecation into a pledge. Possession defeated.

Clause 7 indicates intention. Intention to trade. Two documents. This is a letter because fixed day. This one printed.

Clause 2 - "on demand". Contradicts the letter. This is general. Contract of loan is one document. Contract of hypothecation is another. Intention of first prevails. The manuscript words in the letter of hypothecation do not relate to the matter in
20 controversy.

Clause 3. Must replace the seized goods.

Clause 9. Must be construed in conformity ? adjunct to clause 10.

If seized under 9, no power of sale when loan due. How long? What risks? Exercise when power of sale about to arise?

Clause 10 could be read as demand after the first period. The question of seizure cannot stand unqualified. Contra rule.
30 Back Letter of Hypothecation and letter prepared by bank. P.138. Letter dated 13/5. Letter of Hypothecation 9/5. 7TH HALSBURY (2ND EDN) 331, paragraph 460. Glyn v. Marghetson (1893) A.C. 351. Headnote. P.354 "My Lords ...." P.355. Main object and purpose of the contract. P.358 ? Purposes if applied without qualifications. In letter 15/5 was to assure borrower he could have the money till April.

Karsales v. (Harrow) Ltd. v. Wallis (1956)
40 2 ALL. E.R. 866. P.868 H. Yeoman Credit Ltd v. Apps (1961) 2 ALL E.R. 281. P. 287 E - 289.

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continued

All my authority on this is an exemption clause except Glyn Marghetson. Evidence : P. 48 - line 21. Keshavji. Relevant to what is the fundamental basis. Argues - assuming money repayable on demand. On a.m. of 6th October the contract was modified. Guarantee. How could that be repudiated. Law of jungle.

6th October - account of Keshavji was the true one - submission. P.27 - line 28. K. P. Patel denied he went to the shop that a.m. P.109 - line 16. Patel. 10

Admitted in afternoon. Denied morning. So far as I recall it was not put to K. that Patel was not in the shop that morning. Nagesh said to have got the signatures. P.112, line 8 - 1.30. Pandya professed ignorance. P.93 - line12. Cross-examination - page 94. Remained for no purpose.

P.94 - line 38. Patel not there. Page 95, 96, 97. Submit he avoids committing himself to anything to avoid contradictions. Operation obviously planned from early that morning. Why else did he stay? 20 W. not telling the truth when he says 1 p.m.

Nagesh would not commit himself as to Patel. P.113 - line 21. Pandya says two plaintiffs away for two hours. Why two hours? Did not feel it right that Patel not there that a.m. P.39 - line 1. K. is cross-examined. Line 33. Father signed first. Not put that contrary was case. P.40 - line 8 (see page 48, yesterday's reference). As result of no challenge to evidence and then points we did not advise it needful to call the father. 30

No suggestion at cross-examination of K. that his father went to bank with him.

On 5/10/62 evidence of accounts. Then two witnesses re distress. Then Mr. Williamson. Amin. Then adjourn to 11/10 without any suggestion that father was at the bank. Right up to close of P's case. Judge made no adverse comment. Relied heavily.

16/10, - Pandya etc. Defendant's case. Suggestion first made. Judge converted himself into 40 a witness (grounds 9 and 10).

Re interview at bank - Williamson, page 19, said first and second plaintiff chose Nagesh. Page 112,

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continued

line 33, said third also chose. Saw them a long time. Patel - Nagesh just gave the information and left. Williamson missed, Williamson missed of conversation. Makes no sense at all in those circumstances. Submit Williamson untrue. Submit there has been no material contradiction of Keshavji's evidence. Judge did not analyse witness v. the other. When he is contradicted by the bank's witnesses the latter conflict with themselves.
10 Judge should have accepted Keshavji. Ask court to reverse the findings of fact by judge.

GRATIAEN:

(On ground 2, 5 and 6 (2))

Gist. Action for damages. Bank illegal in removing stock. Tort. Unless can from some legal right. The legal right which the bank relies on exclusively in justification was the hypothecation of 9/5/60 and extended as to amount 6/10. Judge accepted our legal objection (reply) to the effect
20 that the letter of hypothecation was invalid. Section 15 of CHATTELS TRANSFER ACT. The cross-appeal challenges that. My complaint in consequence of judge's finding should have been that only justification relied on partly failed but was established.

Judge took view that although Letter of Hypothecation invalid the bank's conduct was justified by an oral agreement between parties. Fundamental submission - no such agreement pleaded nor put to issue nor proved and finally no such oral agreement
30 can give hypothecal legal rights (law) and also clear from pleadings and evidence the parties purported to reduce the writing; when, if writing invalid, no oral agreement can be proved. Section 91 INDIAN EVIDENCE ACT (97).

On further point of law. It was not suggested that the letter of 6/10 was intended to create new legal rights and obligations. If it was (assumption) it was a letter of hypothecation, which was equally bad for want of attestation. Licence to remove
40 goods as a security.

In fairness to the bank this new theory of oral agreement was never mentioned by counsel in the Supreme Court. Whatever view of facts, if cross-appeal fails, action must succeed.

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Pleadings: The only oral agreements were:-

P.13 paragraph 4, (iv). Promise to give a letter of Hypothecation. No oral agreement on its terms. Para. 5 - line 15, i.e., we honoured our verbal agreement and gave them the Letter of Hypothecation containing the terms, etc. P.223 - Page 15, paragraph 7. Paragraph 8 - agreement honoured. Page 16 (v) tells of 6/10 pleaded.

So on morning of the 6th October the rights of 9/5 in another written agreement of 6/10. Page 9. Line 15. "with aforesaid consent"; pursuant of Letter of Hypothecation of 9/5. Judgment did not say that that letter created hypotheeal rights. Says it was an oral agreement evidenced by the document. There is no word of any such oral agreement in the shop. Their own evidence is "sign this" and all signed it.

Theory of new contract in p.m. of 6/10 is unrealistic. On the a.m. of 6/10 the defendant bank having signed legal documents at their request. Guarantee. Letter of Hypothecation extension - the title deeds.

The oral agreement in paragraph 7 does not include agreement to sign any such letter. Ask court to accept the position that when the plaintiffs had signed all the documents they were entitled to believe all. P.212 - and go back to shop thinking they had got terms - can trade without anxiety.

Bank formed second intent to seize. P.188 - line 5 - not communicated to us. Reason for the "raiding" party. P.82 - line 37. Exhibit C - as defence to criminal trespass? The rights they intended to exercise. P.71 - line 36 - Letter of Hypothecation. P.104 - line 10. Impossible to read into this an oral agreement. They have decided to exercise rights irrespective of whether they signed. P.193 - line 25. P.194. What are the terms of the oral agreement? When were goods to be taken? When were goods to be sold? What consideration? Is bad from that angle.

What could the undefined oral agreement confer? 2 INDIAN TRANSFER OF PROPERTY ACT; INDIAN CONTRACT ACT applied. MULLA (4TH) TRANSFER OF PROPERTY. P.368. Neither act deals with mortgages of moveable property. CHATTELS TRANSFER ORDINANCE. Judge held cannot invoke without a duly attested instrument.

English Common Law. Certainly there was a hypothecal right created by pledge. There is no such pledge here. Under Common Law there is a limited right which can be given by an oral mortgage of moveables in possession of borrower. But understand no legal rights. Is bankruptcy no priority? Right to say could enforce the mortgage through the court but licence to come and remove the goods is a different matter. A valid Letter of Hypothecation to a third party would defeat. Reeves v. Capper & another, 132 E.R. 1057. Was a mortgage with delivery. P.1058. "The ...."

27 HALSBURY (2ND EDN) P.253. My submission is that an oral agreement over chattels without possession valid between the parties. ? Whether could seize if it was a term of oral agreement. But must have all in writing. If invalid cannot fall back on an oral agreement. There are exceptions. Supposing there is a delivery by way of pledge and following on that a letter purports to record the terms though invalid as a Bill of Sale, cannot say can rely on the actual pledge. No further need to rely on the subsequent invalid document.

English principle of evidence the same when no actual delivery completing the contract. Oral evidence cannot be given if written is had.

In re Townsend, ex parte Parsons, 16 Q.B.D.532. This is complete answer to any attempt that the letter of October 6th was not an instrument in the CHATTELS TRANSFER ORDINANCE. (Instrument - section 2, CHATTELS TRANSFER ORDINANCE, paragraph 1(e). That includes the letter). Judgment of Cane J. Page 535 "That shows ..." Page 537.

The expectation of new enforcement does not alter the position in any way. Pledge is contemporaneous loan and deposit. P.542. Affirmed an appeal. Reduced to writing. Cannot look at anything else. Very close to what happened on the 6th October. P.545 "For the present ..." P.547 "The only ... "

The earlier Letter of Hypothecation - good consideration. Extension - good consideration. Impossible to show any valid consideration for this letter. Invalid from any point.

Adjourned to 2.15 p.m.
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2.15 p.m. Bench and Bar as before.

Gratiaen:

In Parsons - the Bill of Sale was void as not in proper form, yet letter consented to removal of his goods. Both parties believed good. Some were sold. Man bankrupt. Trustees got order from court to return the money and goods.

Next authority - valid contract of pledge - complete - mere fact that recorded is invalid instrument. Ex parte Hubbard (1886) 17 Q.B.D. - page 690. Head note, i.e., Bill of Sale only within the Ordinance if it is the recorded transaction which creates the rights and liabilities. Page 697, - line 3. Bowen - page 697 - line 8.

Submit our transaction - two letters of hypothecation which did not stipulate for delivery of possession - to contrary. Facts for invalidity - falls to ground. Invalidity of document makes transaction fall to ground. Approved by House of Lords.

Charlesworth v. Milles (1892) H.C. 231. P.239 - line 3. At 241 - "Now it is ....."

Submit true position is - how do they justify the taking of the goods? It was in pursuance of a transaction purporting to confer rights. Mere taking does not create rights even with permission. As manager said - taken under the letters of hypothecation. P.71 - line 35.

In re David Allester Ltd. (1922) 2 Ch. 211. Page 216. Headnote. The letter of the 6th October purports in terms to relate exclusively not to new rights but those under the letter of hypothecation.

Subramonian v. Lutchman. 50 I.A. 77 P.82 - line 2.

In our case judge never had any submissions in the situation he relied on. The rights claimed under 9 and 10 of main document were the only ones which could justify seizure. Evidence shows right of sale exercised some months later. Submit if judge right in holding documents invalid action will succeed.

O'DONOVAN

Respondents had two defences to trespass.

(1) Bank entitled to enter and seize under Letter of Hypothecation.

(2) In any event the exercise of this right, real or supposed, was consented to by plaintiffs evidenced inter alia by the letter and that is answer in trespass irrespective of what title passes. If right matters little what answers are to N's points. Think validity really relevant.

1. As to pleadings. What was relied on was the consent to plaintiffs to exercise of bank rights. I cannot support judgment in its entirety yet he upholds the contention that what was done was with the free consent of the plaintiffs.

2. I entirely agree that the parties were not entering into any separate agreement and did not intend to create any new rights. Both sides assumed (as they put it) that had a valid right to seize under the letter of hypothecation. All the letter did was to confirm no objections to exercise of rights.

3. Hardly necessary to read Benmax v. Austin Motor Co. Ltd. 1955 A.C. 370. Court asks to disturb primary findings only in exceptional cases. There is no misdirection by judge. Page 194. Line 28 ... confused".

4. Learned judge's next point is authority to sign for the plaintiff's form - the three who did. No evidence on record to express authority except - page 29 - line 32. All related, One and two most active. Page 30 - right hand man. Peculiarly in their knowledge. As to implied authority. Must be looked at in light of Letter of Hypothecation signed by all. Nothing unusual in three acquiescing.

5. Alteration. Judge's finding disposes of it.

6. Payable on demand point. Answer is -

(a) Letter of hypothecation clearly states "on demand".

(b) Construes consistently with the "arrangement".

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It was a demand but the bank indicated that as a matter of banking practice, bank has stated would let it run or would not recall it if account satisfactorily operated before April. Keshavji knew this. P.30 - line 12. Clearly unsatisfactory to draw on it in excess of agreed facilities also to tell banker that you cannot reduce to agreed limit. (October 6th).

7. What claim 9 gave was a right to take possession as security. To take and retain. Submit not contrary to paramount object but was to give security by giving a right to take possession when wished. Secondly, right to sell if default after amount is due. 10

8. Re need to call father. Rely on Newbold's interjection earlier.

Re Gratiaen's submission - I do not quarrel with his authorities. I agree purported to exercise powers under Letter of Hypothecation and all they got was a letter evidencing consent to do so. Whether it is "instrument" is not material. It is a defence to trespass as a tort. In Parsons v. Townsend the court was concerned with title to goods bankruptcy courts. No authority for saying action for trespass would lie. That is all I wish to say to reply on the appeal. (I accept latter given after seizure started. It relates back to all. Consent can easily be inferred from the circumstances. Must look at whole. Was it against the consent of owner? Evidence as to (blank in notes). I could rely also on G's contention (hope) that very similar to Parsons case because parties allowed the goods to be taken in mistake in belief that Letter of Hypothecation valid. P.164 - line 18. 20 30

I need not deal with consideration not concerned to establish contract. As to "shoddy" - not in the light of withholding the documents for a number of days. Consent - not contract. Principles on land. - "good day". Assume consent. Sense of absence of objection. Parties' transaction - Letter of Hypothecation - right of entry - 6th October - both parties under belief good - goods permitted to be taken. On being advised later may say "I now demand return", but still not a trespass. But hope court would find it necessary to decide this as the important point to be taken. My first defence is valid, i.e., that the Letter of Hypothecation is raised inter partes. 40

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Cross Appeal -

CHATTELS TRANSFER ACT, LAWS OF KENYA, VOL 1, CAP 28- demand from New Zealand.

Halami v. Official Receiver (1952) E.A.C.A. 200. Page 203. I should. Trimble-Hill rule is when colonial legislation follows legislation which has been judicially interpreted. That interpretation should be conclusive. Re-enacted several times in New Zealand. Meaning of certain provisions settled
10 then beyond controversy and adapted here. CRAIES ON STATUTE LAW - 5TH EDITION, 334 (2). Ask to have photostatic copy from New Zealand CHATTELS TRANSFER ACT. I have a copy and certificate, etc. (Gratiaen. No need. Accept the copies). First Act 1889. Original section 49. Hand in copy. Amended by splitting it into two but in the original section unreasonable to feel in it that inter partes could not form part of affidavit if no occupation and address added.

20 Now section 20. satisfaction. Section 42(2) Effect of non-compliance with section 49 has been considered in New Zealand courts. Does not invalidate instrument inter partes. Our enquiries indicate (from professional correspondents) that they stand unchallenged up to to-day. Regina v. Debb Ido, 15, ? N.Z.L.R. 591 - case stated is C/A. Good inter partes - though not attested. P.594. Edwards J Ratio-obtaining money by false pretences. Unattested yet effective between parties. Lee v.
30 Official Receiver (1902) 22, 747 - page 750 Te Aro Loan Co. v. Cameron (1895) 14 N.Z.L.R. Page 416, 411.

Submit then cases settle the meaning of section 20 of 1924 Act by the time the New Zealand legislation was adapted by the Kenya legislation. Entitled to far more weight than judgments of persuasive authority conclusively determined meaning of legislation adapted to Kenya unless can say completely and utterly wrong.

Another aspect in equity the bank was entitled
40 to enter into a floating security over stock in trade.

At Common Law could not be a right of future acquired chattels but issue in equity. Only question is whether CHATTELS TRANSFER ORDINANCE takes away that right. New Zealand decision shows does not take away Common Law rights - a fortiori should not

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equitate rights. Thomas v. Kelly (1888) A.C. 13 at page 515 - "A sale of good ...." In India the same. MULLA (4TH) 369 (At Common Law). Nothing in Indian legislation takes away equity rights over future acquired goods. Franks, ex-parte Official Assignee (1934) - N.Z. 881, page 888-9. Section 24 then referred to. Is reproduced in Kenya. 23=17; 24=18; 20=15.

There is no provision making instrument absolutely void. Whenever "void" is mentioned it is only against certain persons. 10

In favour of my learned friend is Miles J. in which he does not accept the N.Z. decision - Civil Case 914/C2. On this exact point many of his references not relevant. Page 10. As to "but" would he over comparison to read into that word an enlargement to invalidate against grantor when even non-registration does not - against grantor. Pages 11, 12, 13, 14. Comment. It is axiomatic.

Submit fundamentally wrong approach. These even not ordinary authorities. Even without giving any special force to the N.Z. authorities decisions it is the better view. 20

Wrong approach by Miles J. Better settled by Kenya law. Only other point is whether Wicks J. right in saying inadmissible as evidence. Presumably referring to section 68 of the LAW OF EVIDENCE ACT, page 191. Full cause of Madras. Pulaka Veetil Muthala Kulangara v. T.M. Menon I.L.R. Vol.32.P.410. If there is validity inter partes it is admissible in evidence. Purported to be a mortgage. Required attestation though not. 30

(Gratiaen - I am not going to raise this point. Miles J. rejected section (8).

Adjourned to 10 a.m. 31/7.
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July 31st, 1964. 10 a.m.
Bench and Bar as before

O'DONOVAN (to court)

As I apprehend learned friend's argument re clause 9 (covered briefly) that it was subordinate to main purpose and could not be relied on. Untenable. There is no power to sell the goods until the debt raised has become due. But there is prior to debt becoming due an express power to retain, as distinct from realizing, the goods as security for debt when it becomes due. Parties so expressly agree. It is not the paramount object that he remains in possession. Expression agreed only retains possession till bank wishes to forfeit its equitable title by possession. No hint of inconsistency with clause 3. There is a floating charge with liberty to bank to cancel it any time at discretion into fixed charge. Does not fasten on any of debtor's goods until then. Effect is that the debtor, until that time, has complete liberty to deal at will with the goods.

Effect of suit. Letter of Hypothecation has been considered in Mercantile Bank of India Ltd. v. Chartered Bank of India (1937) 1 ALL E.R. 231.

Decision not complicated by any Bill of Sale and etc. It was a company (excluded by definition) P.231 (iii). As soon as becomes fixed clause 3 would cease to operate. During continuance of floating security - submit Clause 3. Cannot talk rationally on red pencil and seems as though one of the important clauses of it. I deny fixed date. Even if it were given - bank reserved right to fixed charge at any time.

GRATIAEN:

I will reply first on argument on my point "assumption of invalidity". My learned friend has accepted as correct my authorities. The effect is as follows - if the hypothecation rights were derived exclusively from the letter of hypothecation the invalidity of the documents destroys the alleged hypothecary rights altogether.

2. If, as is clear, the parties intended that all rights be in the document, no oral evidence can

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be admitted of them. This is not the case where the rights were derived from an actual transfer of possession.

In this case I say that the justification for the bank's detention of my goods depends entirely on the Letter of Hypothecation. It has now been suggested that the so-called consent which is established by the letter connected with a lawful act what is otherwise a trespass.

Our complaint - page 10, paragraph 12. Page 11, line 1. It is proved that they came with men and lorries, started removing the goods - then we signed the letter - they continued. 10

I will show that within a very short time we wrote and demanded. (To Newbold - plain the detinue is included in paragraph 12)

The demand was proved without objection whether as a technicality of pleading the words "wholly deprived". 20

The actual conversion took place in December during the pending. I do not claim the conversion as later than suit. In sense of vitally depriving us it was a conversion.

Correspondence: Page 206 24/10 Threat to sell
Page 209 Wrongful detaining alleged
Page 209 (a) line 14. Validity challenged
P.210. Refuses P.210b

That is the position when we came to court. 30 (Newbold J.A. refers to prayer in plaint) Read in light of correspondence position of parties.

Learned friend says oral agreement evidenced by the document. Quibbling. Amount to nothing but allegation of a licence to remove all goods. Stems from an agreement. On their own explanation there was no agreement. If there was an agreement - no consideration for it.

The letter of 6/10 in itself created no title or interest. I was fully entitled to revoke it as 40 far as retention of goods concerned and it was in fact revoked when we demanded return of our property.

Must understand the letter in relation to the point of time it was written. Let us examine - if it was licence flowing through agreement - and even if for consideration - may be able to say cannot get damages until we demanded the return. Re licence - SALMOND ON TORTS, 13TH EDN., P 211, paragraph 59. Prima facie irrevocable. When licence alone without the advantage of hypothecary rights gives no legal title. P.212. Re - conversion by taking - CLERK AND LINDSELL ON TORTS (10TH) 415, (11TH) 899.

Learned friend seeks to bind the partnership by signature of two. A trading partnership ? implies authority from them to authorise removal under an invalid letter of hypothecation without consideration. P.110 - line 33. Reason. Only to get confirmation that could not reduce overdraft. SALMOND ON TORTS - page 263.

I was wrong in saying no conversion. It was a conversion by taking.

What was the common law right dealing the mortgage of immoveables before the Ordinance was enacted? First - right of pledge. Possessing security. Second - Common law recognised as having limited consequences; an agreement by way of mortgage without delivery of possession. Two matters must be treated in that context. Mortgage could only relate to goods in existence. Future goods could not be dealt with by such an agreement. Learned friend wants a mortgage at common law over a trader in trade; it is better in law on equity. WALDOCKS LAW OF MORTGAGES (2ND EDN) P.9; "Charges over possessing letter". At common law right to take possession would not be good. Must go through court.

Thomas v. Kelly (1888) 13 A.C. 506 at 515. Consider in relation to the context of the New Zealand cases was a misdirection - assumed then was a Common Law right without possession. At most Common Law would have given a right in equity to existing chattels. (? sewing machine existed). The equitable right is merely one to have the property applied to satisfaction. No title under the charge. In view of section 91 of the INDIAN EVIDENCE ACT cannot go behind to an unwritten agreement.

CHATTELS TRANSFER ORDINANCE - THE BILL OF SALE ACT was a helpful guide. Fundamental guide. No future goods and crops can be included. The intention

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of legislation is to protect every kind of person who needs protection - TRANSFER OF CHATTELS ORDINANCE. The creditor - against a false denial of terms of contractual rights. The debtor similar. Requires formality of presence and attestation of a third party. These parties doing business with the debtor. Collusion instruments. They say to have any validity at all it must be executed and attested in a particular way. Goes to root up whole of transaction but parties to agreement and third parties. In addition if not required it is invalidated only to a limited extent.

Miles J. says very significant that there is limited invalidity the Ordinance expressly says so. If no word of limitation means invalid for any purpose.

Miles J. had to deal with many objections that learned friend has relied on. The question is not in isolation. Any question is "what does section 15 mean?"

Section 14 - Want of registration. Invalid. Not to borrower.
Section 18 - Future goods - matter between parties (implication)
Section 17 - Schedule - ditto
Section 13 - Presumption of invalidity against certain persons.
Section 15 - Learned friend ask what validity means. Oxford Dictionary - "Good or adequate in law; legal force; legally binding."

In same breath validity - but - something (which is a must). These words are clearly imperative and not directory. Sealing is not essential but something else is. No words in 15 limit it to third parties.

Suppose Registrar has forged collusive instrument.

Creditors could only rely on section 15. MAXWELL ON INTERPRETATION OF STATUTES (10TH EDN.) P.376. "It has ... powers". Where got substantial rights under an instrument, is it asking too much of a bank to get it attested. Page 378 - line 55. Liverpool Borough Bank v. Turner 70 E.R. Page 703. Page 705 - Submissions (which were adapted) "Then with ....". Page 707 "An analogous ..."

That was even in face of later Act leaving out their express provision. If invalid as between third

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parties. Where are the words that say valid as between the parties?

In some of the N.Z. cases has the language of section 15 been examined and commented on? Privy Council case (Miles J.)

No need to speculate why attestation was demanded. Protection of creditors, evidence perjury opportunity. Section 68 - attesting witness called where issue raised.

10 The registration provisions pre-suppose a valid instrument. Having legal powers and authority. Learned friend says CRAIES ON STATUTE LAW - 5TH EDN. page 334 - judge interpreted in certain way and, if some use in subsequent enactment intended to adopt.

Yes. But it must be the same Parliament and judges of the same country. Going far to say Kenya legislature intended to adopt N.Z. decision. N.Z. cases have very persuasive force. Nothing in nature of stare decisis.

20 I say the N.Z. decision in some way supports me - in some ways demonstrably wrong. Regina v. Debb Ido. Headnote paragraph 1 is right. Imperative section 49 requires attestation - remains attestation.

The second ruling is not interpreting section 49 common law right. Page 592 - first count. No reference to instrument. Section 52 is in second count. P.593. P.596 - argument under section 52. Edwards J. That is only a correct statement if transaction is accompanied by delivery and there is no judgment on
30 that point.

P.595 - I rely on this judgment. Not a valid instrument. 49 imperative. That supports our case. In re Franks ex-parte Official Assignee (1934). Quotes section 33. Same as section 17 of KENYA ACT. Section 24 same as section 18 ditto. Grantor raised a defence. Raised untenable defence. Said schedule incomplete. Consequence of non-compliance expressly limited to certain persons by that section. Of no assistance. In fact I rely on it. Of no special
40 protection. Te Aro Loan Co. v. Cameron. Details of witnesses etc. Williams J. accepts position that must be a sufficient attestation. P.415 - argued merely directory, P.416 - must be attested. Imperative. Form of address sufficient. Nowhere

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says non-attestation does not invalidate. Then completely ignored and flouted.

Except for some reference to common law - imperative and invalid. Lee v. Official Assignee. Judge not understood the earlier decision purported to follow English decision which is clearly distinguishable. He had possession but that is not the point of the decision. P.750 - forgets imperative and so held. P.751 - Ditto. Would be right if had been pledge. Davies v. Goodman 5 C.P.D. 128 (1879-80). The section of the 1888 Bill of Sale Act, section 8 "As against all trustees etc." Expressly limits the invalidity to the classes. Section 10 says how it is to be done. Same report page 20. Coleridge not held valid but all parties. P.128 - limits consequences to section 8.

Ask court to hold there is no need to bring N.Z. cases. Go no further than say the section is imperative. INDIAN EVIDENCE ACT. If invalid - cannot say it is valid for some other purpose. Judge expressly pointed out no words of limitation.

NAZARETH:

O'Donovan submitted had right to seize under Letter of Hypothecation. Stands or falls on Gratiaen's submission on validity. Alternatively the seizure justified either because of right of seizure and inconsistent to fundamental bases or merely ancillary to right of sale and does not arise until debt due.

Consent

They came under rights with Letter of Hypothecation. Gratiaen also dealt with them. Misdirection by judge. Learned friend submitted none. This court might not interfere with those findings of fact. Re-hearing. Subject to advantages of seeing and hearing etc.

Submit judge not analysed the evidence. My learned friend has not been concerned to defend my reference to Williamson. This court invited to interfere in such a case. A point of misdirection. Judge coloured views by lack of calling first plaintiff and turning himself into witness.

Authority to sign exhibit C.6. Touched on by Gratiaen. Overdraft repayable on demand. Page 30, his addresses --" not being conducted in a proper

manner". The difference would be between closing account on ground of improperly conducted or seizing straight away. Does not mean thereby bank entitled to immediate repayment and seizure.

Learned friend says should not exceed limit. Was no evidence that money became payable or satisfactory conduct in the operation of the account, page 42, line 22. Had asked but not received a copy of bank rules. Letter of Hypothecation invalid.
10 Defendant's having seized and removed is trespass and conversion. Evidence of refusal to return = conversion. SALMOND ON TORTS (13TH) Page 215. If held valid - no right to seize. Clause 9 is not enforceable and valid part of context - fundamentally opposed. The right to seize had not yet arisen. Mercantile Bank of India Ltd. v. Chartered Bank of India, Australia & China & Co. Limited (1937) 1 ALL E.R. 231. In this case right of seizure was not contested. P.233 - H.P.240 - D. Loans on demand.
20 Debt was due. That is the issue here. Re costs - ask if allowed for two Queen's Counsel and one junior. Important. Would involve remission for assessment of damages.

Adjourned to 2.30 p.m.
T. J. Gould

2.30 p.m. Bench and Bar as before:

O'DONOVAN:

Issue of conversion was raised for first time in replies. If the action of the bank in taking
30 possession was originally lawful - then could be no conversion until demand and goods returned in spite of it. It was never plaintiff's case that it was one of conversion at a later date than the seizure. Only deviance pleaded for inventory.

Not pleaded.

P.23. Opening by court. Trespass.

P.25. Line 26.

Case dealt with on that basis. Not surprising that judge did not deal with subsequent events. Not
40 a ground of appeal.

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Re the New Zealand decisions - In considering section 15 cancan regard it history of the legislation. Particularly important that in section 49 of original Act of 1889 the requirements of the statute relating to execution of instrument and memo of satisfaction were in juxtaposition. Both concerned in getting an instrument on and off the register.

Form - first schedule. Attestation and requirement. Effect of the New Zealand decisions. An instrument in order to be valid against the three classes must be duly attested and registered but so far as the parties are concerned the Act creates no rights not existing at Common Law. Therefore defects in attestation and registration did not invalidate between parties.

Learned friend says -

(a) New Zealand courts have misconstrued common law.

(b) CHATTELS TRANSFER ACT was invalidity act - so that it enlarged what could be done in mortgages of chattels. Therefore when said must execute in a certain way that was the only way. Cornerstone of argument is - inability to act.

Fitzgerald in the House of Lords has quoted a possession essential. That is not what he said. 13 A.C.

At Common Law could mortgage in two different ways. Pledge. Or a mortgage which does not involve possession. Commonly called a Bill of Sale.

I am concerned to show that could in Kenya under equity validly get a floating charge.

Learned friend then said in equity no charge could be created except in respect of goods in existence. (Suit - specific performance).

<u>Case of Holroyd v. Marshall (1861) 11 E.R.999</u> - to contract a mortgage of future acquired property - being capable of specific performance - is good floating charge. Floating charge is dormant. FISHER'S LAW OF MORTGAGE, 6TH EDITION, 37, Paragraph 62 (7TH) 48. Prior to Bill of Sale Acts. Disregarding CHATTELS TRANSFER ACT it was property passable at Common Law. And in equity to mortgage as in case of

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future goods to create an equity charge which would attach as agreed.

N.Z. courts are saying that their rights are not taken away. Rules of construction relating to an invalidating act does not apply at all.

CRAIES ON STATUTE LAW - 5TH EDITION, CHAPTER 2. Page 240, para 3 - "When a statute ...." P.241 "No general ...."

New Zealand court law said certain requirements to be complied with to bind third parties. But if look at the mischief at which arrived it is altogether unnecessary to avoid an instrument with the parties.

Learned friend mentions collusion instruments and protection of the third parties. No need to say void as between the parties.

Problem before N.Z. courts - whether instalment which due not enable to do anything could not do before is the only way in future.

Corner stones - but for the Act the parties would not have been able to create these rights. What were the rights before Act? Does this not enable them to do it for the first time? Act does not take away by mandatory provision or right unless contrary, say it enables it to be done for the first time. That is N.Z. approach and correct. Also Mayers J. in B.L.Ghandi and others v. National & Grindlays Bank, No.668 of 1962.

My last submission. Canon of construction. My learned friend called in aid does not apply at all except in relation to enabling to ask which, for first time allowing something to be done, prescribes how it is to be done.

Costs - Ask for two counsel. Disagree instruction that for three.

GRATIAEN:

A new authority if acted whether the kind of instrument enforced and sanctioned by CHATTELS TRANSFER ACT is really rather more than old Common Law on equity rights. Must look not only at rights itself but manner of exercise.

In the Court of Appeal for Eastern Africa at Nairobi

No.29

Notes of Argument taken by The Honourable Sir Trevor Gould V.P. - 29th, 30th & 31st July 1964

continued

At best only an equitable right. They have goods secured and an injunction for the purpose. It is right of possession; a fundamental new departure. Imperative within the principle because it gives a right to come and seize - may lead to breach of peace - even if have document.

O'DONOVAN:

FISHER at page 38 - right to seize.

C.A.V.

Signed: T. J. Gould 10
July 31st, 1964

No.30

Notes of Arguments taken by The Honourable Mr. Justice Newbold - 29th, 30th & 31st July 1964

No.30

NOTES OF ARGUMENTS TAKEN BY THE HONOURABLE MR. JUSTICE NEWBOLD - 29th, 30th & 31st JULY, 1964

IN THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

CIVIL APPEAL NO.15 OF 1964

BETWEEN

DHARAMSHI VALLABHJI
KESHAVJI DHARAMSHI 20
BACHULAL DHARAMSHI
MORARJI DHARAMSHI
RAGHAVJI DHARAMSHI .... APPELLANTS
(Original Plaintiffs).

AND

NATIONAL AND GRINDLAYS BANK LIMITED ... RESPONDENT
(Original Respondent).

(Appeal from the judgment and decree of the Supreme Court of Kenya at Nairobi (Wicks J.) 30
dated 31st May, 1963

in

Supreme Court Civil Case No. 1516 of 1961).

Notes taken by The Honourable Mr. Justice Newbold

In the Court of Appeal for Eastern Africa at Nairobi

No.30

Notes of Arguments taken by The Honourable Mr. Justice Newbold - 29th, 30th & 31st July 1964

continued

29.7.64
10.00 A.M.

IN COURT: CORAM: GOULD, V-P, NEWBOLD & DUFFUS, JJ.A.

E.F.N.Gratiaen Q.C., J.M.Nazareth Q.C., Satish Gautama and Aziz Mohamed for Appellants

B. O'Donovan Q.C. and Sir William Lindsey for Respondent.

Nazareth

10 Gratiaen will argue cross appeal and grounds 2, 5 and 6(ii) of rights. O'Donovan has no objection. Appeal relates only to liability - question of damages by consent not considered by J.

Sets out facts. Account opened with R on 4/4/60. L/H dated 9/5, - J held them not valid. Overdraft facilities up to 30/4/61. Goods seized 6/10/60. Letter 13/5/60 - Ex. C 1 at P.198.

On 27/9/60 overdraft exceeded Shs.140,000/- - A saythey arranged to exceed this - R say any excess 20 a breach of agreement. On 6/10/60 in A.M. A executed documents brought to shop by R - they were:-

1) Letter extending L/H to Shs.150,000/- P.211
2) New guarantees at P.212.
3) New extension to equitable mortgage at P.213 and
4) Assignment of 4 of 5 policies of insurance - all dated 6/10/60 and signed by all A's.

On 6/10/60 in P.M. R came with lorries and removed goods from shop. During this R obtained signatures of 30 2 A's to letter dated 6/10/60 - Ex. C 6 at P.203- with an addition in ink. Dispute when addition made. Also landlord levied distress - R pleaded in Defence Para. 8(iv) that goods seized because of distress. Guarantees of 6/10 be made in consideration of not requiring immediate payment. R based defence on seizure under L/H - see P.16 para. 9 of Defence. J held if L/H invalid then it disposed of all issues re L/H - P.163 - and then held them invalid - see also P.164 L.17 and P.190 L.22 - J dealt with

validity of L/H and at P.191 L.35. J came to conclusion that L/H invalid.

R's contended that as A's overdrew during July and September 1960 they were in fundamental breach which entitled them to seize. J accepted this at P.191 L.37 and at P.187 L.30. P.160-164 - J sets out pleadings and issues. P.164-182 - J sets out evidence. P.182 onwards - J makes findings - almost any one against A was though R's witnesses contradicted themselves. 10

First major question is by what authority did R's seize goods. In view of J it was not under L/H as they not valid.
P.71 L.33 - Williamson said he acted under L/H.
P.193 L.25 - holding of J. Submit this is wrong - for following reasons:-

1) It was against pleadings. R's pleaded they acted under L/H. No oral agreement pleaded. Submit not open to Court to find in favour of R on oral agreement or licence not pleaded - 20 no evidence of oral agreement and was not put forward by counsel at trial. R's came to shop with letter and with intention of seizing goods whether or not letter signed - P.82 L.40. Thus no contract made on 6/10/60 - R's exercising a right given by P.203 which stems from L/H.

2) Not clear whether J relied on extension of L/H signed on A.M. of 6/10/60. The seizure in P.M. was not the making of a pledge.

3) Stroud (3rd Ed.) 2216 - L/H transfers neither 30 possession nor property. Pledge transfers possession and mortgage transfers property.

29 HALSBURY 211 Para. 391; 213 Para. 399.

Submit that in court A1 and 2 signed not acting with authority of other A's. This a surprise operation and no question of implied authority - implied authority to carry on not to close down.

Lindley Partnership (11th Ed.) 283 - this shows implied authority - (12th Ed.) 165, 166. J made no finding on point of authority of A1 and 2. Point 40 expressly taken in reply at P.20 para.4(m). See P.99 L.29. Submit letter on face of it an instrument within

Chattels Transfer Act and it is not attested and thus invalid in same way as L/H. Letter altered after execution and A's insisted as to nature of letter - thus no free consent. P.28 L.4 and P.38 L.35 - evidence resignature of letter - no suggestion that A1 signed after A2. P.87 L.18 - Scott's evidence. P.92 L.10 - Pandya's evidence - also P.98 L.28. P.48 L.8 - evidence of A2. Submit equivocally that evidence of witnesses for R in relation to Ex C.6 should not have been accepted. Large gap between end of letter and "yours faithfully". A2 was misled as to what he was signing. P.104 L.14 - evidence of Patel. No evidence that A's told letter was authority to seize goods. P.47 L.42 A2 denied he told letter authorised removal. Submit persons who had signed in A.M. several documents including guaranty would not have signed letter. A2 had only a slight knowledge of English - P.92 L.15 letter explained to him in Gujerati. P.110 L.20. Submit R's cannot rely on letter as giving authority to seize. Did A's commit breaches of agreement in overdrawing above limit. P.187 L.30 - finding of J. Submit overdrawing above agreed limit could not be regarded as breach justifying immediate demand for repayment of entire overdraft and if not justifying seizure. Not clear if this is defence pleaded.

Submit paying of money into account makes Bank debtor.

<u>2 HALSBURY (3rd Ed.)</u> 166 and 371.
226 and425 - overdraft if cheques drawn in excess this request for overdraft.

P.56 L.21 - evidence of Manager.

Submit drawing beyond limit not a breach of conditions of overdraft making it repayable. Submit not open to Bank in any circumstances to call in overdraft before 30/4/61. Even if accept J's findings of terms still no breach proved. Submit no agreement imposing any conditions on which loan could be called in. P.58 L.9. P.54 L.40 - this in conflict. P.59 L.31 - no evidence of condition. P.30 L.25 - evidence of A2. P43 L.10 - evidence of A2 and P.26 L.38. Submit improper exercise of account could not be grounds for seizure and submit Ground 7 of M/A correct.

Adj. to 2.15 p.m.
C.D.NEWBOLD
Justice of Appeal
29/7.

In the Court of Appeal for Eastern Africa at Nairobi

No.30

Notes of Argument taken by The Honourable Mr. Justice Newbold - 29th, 30th & 31st July 1964

continued

2.15 p.m. Bench and Bar as before

Ground 17 of M/A

On 21st September cheques dishonoured as up country cheques not cleared. Thus on 23rd September A2 arranged with P.P. Patel to have additional Shs. 5,000/- repayable on 8th October. Again on 29th September further 5,000/- on same terms. Again on 30th October A3 arranged with Nagesh for further 3,000/- on same terms. On A.M. of 6th October P.Patel promised to convert 10,000/- out of 13,000/- to long term overdraft repayable on 30/4/61. About one hour later documents referred to signed. Guarantees at P.212 in consideration of not requiring immediate payment. P.31 L.9 - evidence of A2 re increase. Submit no interview on 29th September.

If no authorisation how could overdraft reach 148,000/- on 27/9 if no agreement? Also note that on 24th September it was 142,000/-. The previous overdrawing against uncleared up country cheques. On 4th October overdraft exceeds 150,000/- for first time - see P.150 L.28 - this accords with evidence of further 3,000/- facility. A's say no interview on 29th September. P.107 L.3 or L.30 - evidence of P.Patel - no interview on 29th September but on 3rd October P.68 L.15 - evidence of Williamson P.76 L.18 - no interview on 29th September - agreed on 23rd September to allow amount over limit - alleged D. interview on 29th September - and matter dealt with by Pandya. But see evidence at P.85 L.38. If meeting of 29th September fabricated then result follows that documents presented for signature for first time on A.M. of 6/10/60. Was overdraft repayable on demand - submit J wrong in finding of fact that agreement for repayment - see P.184 L.31. P.198 - letter of 13/5/60- no reference to conditions. No evidence of oral agreement on which J came to his findings. It would be completely commercially unreasonable if Bank could call in overdraft on demand - if any such condition was to exist. It must be made clear - this not so in letter of 13th May.

Sheldon's Law of Banking (8th Ed.) 323.

P.210 - letter of 16/11/60 - this inconsistent with conditions of repayment of demand. P.212 - in any event terms of guarantee signed on 6th October would take place if any earlier agreement - this was

consideration of additional security. Para.8(iii) - act of bankruptcy pleaded - but in fact no such notice given before seizure and no act of bankruptcy before seizure - notice at P.208 in fact sent on 25th October. Submit letter at P.214 not produced till 10th October - not on 6th October.

Had reasonable demand been made? J held at P.191 L.38 by inference that no notice given. No allegation or plea of demand. But J found a reasonable demand. P.79 L.20 - Williamson says no written demand till 8th October. P.69 L.17 - no evidence of demand for repayment. P.68 L.1 confirms P.78 L.30 and P.93 L.9 where Pandya says never went to shop before 6th October. Submit reasonable time necessary.

27 Acts 200 at 338 cases on note (c).

Brighty v Norton 122 ER 116, 118.

Toms v Wilson 122 ER 524, 529, 531.

Massy v Sladen 1868 LR 4 Ex. 13.

Submit therefore seizure wrongful as not repayable on demand and in any event no demand.

Adj. to 10.00 a.m.
30/7/64
C.D. NEWBOLD
Justice of Appeal
29/7.

30/7/64. 10.00 A.M. Bench and Bar as Before.

Nazareth

Accept that para 4(ii) pleads overdraft payable on demand. P.54 L.39 - evidence overdraft up to 30/4/61 if account properly conducted. Except for this only question of demand rests on L/H. On assumption L/H valid, still R's not entitled to seize goods on 6/10 - this is anticipated answer to cross appeal. Submit L/H intended to deal with loans immediately repayable and not for a period. Essence of H is that goods remain no ownership and possession of owner. P.223 - L/H of 9/5 - Cl.9 this power to seize wholly inappropriate to loan for a period. Thus Bank could at any moment have turned

In the Court of Appeal for Eastern Africa at Nairobi

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Notes of Argument taken by The Honourable Mr. Justice Newbold - 29th, 30th & 31st July 1964

continued

L/H into pledge. Cl. 7 - this shows intention to trade. If printed for conflict with separate contract to contrary would be clearly in conflict - see also Cl.2. Submit a document specifically prepared for purpose overrides a document used for that occasion but also printed for general use. Cl.3 would unreasonably require A's to replace goods seized. Submit Cl.9 must be read as if power of seizure existed only after money became due - this Cl. gives only power of seizure. Cl.10 governs favour of sale after failure to pay on demand - but surely only if demand can properly be made. Submit power of seizure cannot stand unqualified. This document prepared and put forward by Bank- but also letter at P.198 with loan clearly up to a specific date. Also note that letter of 13/9 later than L/H of 9/5. 10

Rule of Construction re printed words.

7 Hals. (2nd Ed.) 331 para. 460.

Glyn v Marghetson 1893 A.C. 351, 354, 358.

Submit same principles apply here. Letter of 13/5 specifically used to show terms of contract - L/H merely adapted. Submit any term which is against fundamental time of contract will not be enforced. Fundamental object of contract is that A's should remain in possession and trade with goods - but L/H could prevent this and any terms therein contrary to fundamental term will not be enforced. Submit principle applicable to exemption clauses should apply. 20

Karsales v Wallis 1952 2 A.E.R. 866, 868 H. 30

Yeoman Credit Ltd. v Apps 1961 2 A.E.R. 281, 287 G.

Evidence on point of fundamental time. P.48 L.2. In any event terms of any previous contract had been modified in A.M. of 6/10 by guaranty. Events of 6/1 - submit evidence A2 correct.

P.27 L.28 - at P.109 L.16 Patel denied going in A.M.

P.112 L.8 - Nagesh Ahamed signatures.

P.93 L.12 - Pandya in shop in A.M. The continued presence of Pandya in shop from A.M. suggested that seizure planned previously. 40

P.118 L.26 - Nagesh uncertain whether Patel there.

P.39 L.1 - signature of letter - A1 signed first - no cross examination to contrary.

Submit that up to close of evidence for Pl. no suggestion that A1 at Bank and thus not necessary to call him now. Only late in R's case was it suggested that Patel had not been at shop in A.M. Submit no need to call father. J converted himself into witness in relation to father - from demeanour seemed to understand English - see Grounds 9 and 10 of M/A. Submit in spite of letter which played a prominent part in pleading there was no necessity to call father.

P.111 L.10 - Patel in contradiction with Nagesh. Williamson's evidence at P.69 untrue.

Submit that looking at evidence as whole no contradiction of A2's evidence - J made no attempt to evaluate it but rejected it on presumptions. Where his evidence in conflict with Bank's witness that witness himself contracted by other Bank witness. Ask that findings of fact of J be reversed and that appeal be allowed.

Gratiaen

Dealing with grounds 2, 5 and 6(ii) of M/A. Submit action based on illegal act in removing goods. Removed *prima facie* and court contains legal right to remove. Bank relied exclusively on L/H of 9/5/60 as later extended on 6/10. J accepted that L/H invalid for non compliance with Sec.15 of Cap.28. Submit that as J held L/H invalid this court established as only legal justification on which R relied had failed. J held that thought L/H invalid yet Bank entitled on oral agreement to seize goods. Submit:

1) no such oral agreement pleaded.
2) no such oral agreement in issue.
3) no such oral agreement proved.
4) no such oral agreement could give rights of hypothecary nature.
5) as contractual rights reduced to writing no oral evidence to contract can be proved - see Sec.97 of E.Act.

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Notes of Argument taken by The Honourable Mr. Justice Newbold - 29th, 30th & 31st July 1964

continued

In any event letter of 6/10 created new rights but even if it did it is an instrument under Cap.28 and held as not attested in same way as L/H. Point of new rights by letter never in issue and this not dealt with at trial. Thus if R fails on cross-appeal dismissal of action clearly wrong. Only oral agreements pleaded were as follows:-

1) P.13 para. 4 of defence.
2) P.14 para. 5 of defence.
Thus L/H extended to contain all rights, if any, of parties. 10
3) P.15 para. 7 - agreement of 27/9
4) P.15 para. 8 -
5) P.16 para. 8(v) - enlargement of original rights. Para. 9 - possession taken under L/H.

J does not say that letter created rights - he says oral agreement endorsed by letter - no evidence to that effect. Theory of new contract entered into on 6/10 unrealistic. On A.M. of 6/10 signed number of documents - 20

1) generally
2) exclusive of L/H
3) Equitable mortgage on all those signed by all 5 A's and entitled to believe their request for extension granted and that there would be no immediate action.

P.188 L.5 - no notice of seizure.

P.82 L.37 - plan of operation.

P.71 L.34 - goods taken under L/H.

P.104 L.10 - want to seize - where is there evidence of oral agreement creating fresh rights. 30

P.193 L.25 - J finding - where was this agreement and what was consideration for contract. At relevant time I. T. of P. Act and I. Contract Act applied.

Mulla T. of P. Act (4th Ed.) 363 - neither deals with mortgages of moveable property.

Cap.28 - this gives rights but J held these only created by attested instrument. Submit no English C.L. right. There is no right under pledge of goods dishonoured by borrowers. No pledges here. There is 40

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continued

a form of parol mortgage of moveables but gives no rights except on legal proceedings.

Reeves v Caffer 132 ER 2057

27 Acts (3rd Ed.) Para. 203

But any such mortgage could not be forced by seizure.

Then we have three documents which confer a right of seizure - reduced to writing - if they invoked cannot fall back on any such agreement. If there is pledge
10 followed later by document which had this pledge remains goods. But if no completed pledge oral agreement cannot be proved.

In re Townsend 16 Q.B.D. 532, 535, 542, 547 - this also shows that letter of 6/10 an instrument within Cap.28. See Cap.28 sec.2 - objection of instruments- (2).

Letter not in nature of pledge. Oral agreement cannot be looked at. L/H if valid given for good considerat-ion but no consideration for letter. Thus submit
20 letter invalid.

Ad. to 2.15 p.m.
C.D.NEWBOLD
Justice of Appeal
30/7.

2.15 p.m. Bench and Bar as Before.

Gratiaen

Facts of Townsend case similar.

In re Hardwick 17 Q.B.D. 690, 697, 698 if pledge complete then documents recording it not B/S - it merely records
30 as opposed to creating rights. Submit in this case 2 L/H which did not stipulate for goods to be in possession of lender - in fact contract. If letter fails then transaction fails.

Charlesworth v Mills 1892 B.C. 231, 239, 241.

R's justify removal of goods under L/H and not by the taking of the goods - this justification based on Cl.9 and 10 - see page 71 L.37.

In re David 1922 2 Ch. 211, 218.

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continued

P.203 - letter purports to relate to rights given by L/H.

Subranowain v Lakhman 50 I A 77, 82 - Evidence Act sec.91. Submit here parties intended that rights of all parties were to be embodied in L/H of May as extended in October. If they fail the whole transaction fails with them. R's purported to seize under Cl.9 and to sell under Cl.50. Submit J had to hold that there was a trespass as he had held documents invalid. 10

O'Donovan

R had two defences.

1) That Bank could seize under L/H.

2) That in any event the exercise of rights was consented to by A's, such consent being evidenced by letter and this a sufficient defence to claim for trespass irrespective of title to goods.

Submit submissions of Nazareth irrelevant. What was relied on in defence was consent by A's to exercise 20 of rights - J has gone beyond this and I cannot support him. But he has held that what was done was done with consent. Agree that parties did not enter into separate agreement on 6/10, - both sides assumed that L/H gave right to seize. So far as appeal relates to primary facts and credibility of witnesses and persons not called I refer to Bremmen Case 1955 A.C.370. No misdirection - P.184 L.14. Authority of A1 and 2 to sign on behalf of others. No evidence on record of express authority except P.29 L.32. Implied 30 authority - must be regarded in light of L/H signed by all parties giving right of seizure - this only carrying out agreement. J held letter altered after A2 signed but before A1 signed. As regards whether amount due on demand answer two-fold:-

1) L/H gave right.

2) Overdraft payable on demand but Bank intimated it would not exercise right if account operated satisfactorily. See P.30 L.12.

Submit to draw beyond limit is clearly to operate 40 account unsatisfactorily. But whether amount repayable

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continued

or whether right to seize thereafter existed. What was given by Cl.9 was a right to take possession when Bank wished. Agrees with Gratiaen that Bank purported to ask under L/H and secured consent to their doing so. Whether letter an instrument is immaterial - it is evidence of defence to trespass.

In re Townsend Case - court concerned with title to goods - not a question between parties or that there was a trespass. The consent relates back to any
10 acts done before. Unless act done without consent there is no tort. It was only this that J had to decide - see P.194 L.18 - and am not convinced to support him in other matters. No need to deal with consideration as not concerned to establish contract. A licence can exist without agreement - as if persons went on land to pass time of day. Person who has prior consent cannot claim in trespass but this quite different from right to withdraw consent and claim goods.

20 Cross Appeal.

Main submission is the L/H valid inter partes. Cap.28 derived from New Zealand.

Adams V Or. 1952 19 E.A.C.A. 200, 203.

- rule in Trimble v Hall 7879 5 A.C. 342. Submit this applies where provision modelled on New Zealand Act. If local legislature adopts provisions interpreted in New Zealand it must be taken to have adopted them with meaning given as result of decision.

Crewes Interpretation (5th Ed.) P.334.

30 Photostatic copies of New Zealand Chattels Transfer Act.

Gratiaen

Accepts it.

O'Donovan

First Act was 1889 - copies of Sec.49 handed in. By 1929 Sec. split into two. Submit 1889 Sec.49 meant only that means of satisfaction had to be attested. Present provisions in Sec.20 - of memo of satisfaction in Sec.42(ii).

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continued

Non compliance with Sec.49 - effect of decision is that instrument not invalidated inter partes - These authorities unchallenged up to today.

Queen v Dibildo N.Z. C.A. - Sec.594 - Unattested chattel transfer was effective inter partes.

Lee v Or. N.Z. S.C. 750.

Te Aro Loan v Cameron N.Z. S.C. 416.

Submit N.Z. decisions settle meaning of Sec.49 of 1889 Act and meaning of Sec.20 of 1920 Act when adopted in Kenya. Submit greater than pursuasive authority - they settled meaning as adopted unless it can be said they are utterly wrong. In equity Bank entitled to enter into transaction whereby a floating security acquired over chattels - does Cap.28 later take away that right - I submit not. N.Z. cases say the C.L. right not taken away and similarly I say equitable right not taken away. 10

Thames v Kelly 1881 13 A.C. 506, 515.

Mulla T. of P. Act (4th Ed.) P.369 - mortgage of moveable property. 20

In re v Franks N.Z. S.C. P.888 - Sec.24 is Cap.28 Sec.18. No provision in terms making an instrument absolutely void - only void against certain persons.

Givenji v N. & G. Bank C.C. 914/62 - decision of Miles J in favour of A.

P.10 - "bit" very confused.
"validity" what is meaning?

Submit Miles J should have followed N.Z. decisions as Kenya had adopted statutory provisions as determined by judicial decision. Was instrument inadmissible because of Sec.88 of Evidence Act by lack of attestation. Now Sec.71 - see P.191. 30

Pululea Veehi v Thiewithpiel 32 I L.R. (Madras) 410 - if it is valid inter partes without attestation then it is admissible.

Gratiaen

Do not raise this point.

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Notes of Arguments taken by The Honourable Mr. Justice Newbold - 29th, 30th & 31st July 1964

continued

O'Donovan

Ask that appeal be dismissed.

Adj. to 10.00 a.m.
31/7/64
C.D.NEWBOLD
Justice of Appeal
30/7.

31/7/64. 10.00 A.M. Bench and Bar as before.

O'Donovan

10 Submit Cl.9 not to be avoided as contrary to fundamental time of contract for period. No power to sell goods until debt due - but an express power to sign and retain goods. The paramount object of contract that A's remain in possession for 1 year - only till such time as Bank perfects both. No inconsistency with Cl.3 - L/H a floating charge with liability to Bank at any time as to fixed charge. Charge does not fasten on any goods till converted into fixed charge. A's have liability till charge 20 becomes fixed to deal with goods as he wishes.

Mercantile Bank v Chartered Bank 1937 1 A.E.R.231.

Cl.3 only operates while it is a floating charge - during continuance of floating security. The essential point is that the Bank took a security which it could at any time convert into a fixed charge.

Gratiaen

Assuming L/H invalid.

O'Donovan

30 Verified my authorisation thus if hypothecary rights, derived exclusively from L/H then invalidity of L/H destroyed those rights. If as policies intended all rights incorporated in written documents then no oral evidence of other terms can be given. This is not a case where hypothecary rights derived from possession as in case of pledges. Submit in this case justification for Bank's seizure depends entirely on L/H and Bank in evidence so said. It is submitted that letter of hypothecation avoided

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Notes of Arguments taken by The Honourable Mr. Justice Newbold - 29th, 30th & 31st July 1964

continued

trespass - but para.11 of Plaint claimed trespess and deprivation Claim is also one in detinue.

P.206 - intention to sell.

P.209 - detention.

P.209A - restore goods.

P.210 - demand refused.

J said oral agreement on 6/10 which gave consent. O'Donovan says a licence - but this stems from agreement. But in this one case there was no agreement - only a signature. Also, if an agreement no consideration. Letter gives no right to sell and in itself created no interest in goods. If a licence it could be revoked and it was revoked on demand for release. In any event a letter given after some goods taken does not cover the goods earlier seized. 10

Assuming licence good and assuming it a defence to removal, it is not a defence to subsequent acts and sale.

Salmond on Torts (13th Ed.) 211 - Agreement which is revocable. In any event licence gives no legal interest in goods. 20

Clerk & Lindsell (10th Ed.) 415 (9th Ed.) 899.

Further licence signed by two partners and cannot bind others. P.110 L.33 - object in signing letter to show that overdraft could not be reduced.

Salmond P.263 - conversion.

Submit Bank cannot succeed unless the L/H good.

What was C.L. right re mortgage of immoveables before Cap.28.

1) Right of pledges - a possessing security. 30

2) Agreement by way of mortgage without delivery of possession - but rights limited. Agreement could only relate to goods in existence; future goods could not be dealt with by this.

Waldor's Mortgage (2nd Ed.) 9 - charges and non possessing terms - remedy a personal action in contract -

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Notes of Arguments taken by The Honourable Mr. Justice Newbold - 29th, 30th & 31st July 1964

continued

securing credits in bankruptcy.

Thames v Kelly 1888 13 A.C. 506 at 515.

The C.L. would give a right in equity only to goods in existence. No equitable rights existed entitling a person to possession prior to Cap.28. But in any event cannot go back behind the written agreement of L/H. Cap.28 - submit English B/S Acts very different and thus not a good guide. In England future goods not covered as it is in Kenya. Submit intention of legislature to protect any kind of person who needs protection - creditor, debtor and third parties doing business with debtor (collusive instruments). It is a condition of validity that documents to be attested - it goes to a root of matter whoever is concerned. In addition if further formalities not completed with documents invalidated to certain extent. As Miles J said if invalidity limited the Ord. expressly says so. Only question is the meaning of Sec.15 and whether it is imperative. Sec.14 - limited invalidity - want of registration irrelevant as against parties.

Sec.18 - future goods valid as between parties.

Sec.17 - again valid as between parties.

Sec.13 - if not registered in time presumption of being void against certain persons.

Sec.15 - no limit on reference to validity - valid means good in law - but here carries implication that attestation is essential to validity. "shall" is imperative and not If words imperative then no other words binding imperative requirement in relation to third parties. An unattested registered document could only be challenged by creditor by virtue of Sec.15.

Maxwell (10th Ed.) 376, 378 - if rights confused their requirements must be complied with. Surely if Bank had to get these rights A should comply with attestation.

Liverpool Bank v Turner 70 E.R. 703, 705,707 - this a strong case as words of express invalidation left out in later Act. In none of N.Z. cases has language of Sec.15 been examined. Unnecessary to consider reasons why attestation required. The registration provisions foresuppose a valid instrument.

In the Court of Appeal for Eastern Africa at Nairobi

No.30

Notes of Arguments taken by The Honourable Mr. Justice Newbold - 29th, 30th & 31st July 1964

Craes P.334 - if statute judicially interpreted use of same words carries same meaning - but it must be same parliament and same judges. Do not object to submissions of O'Donovan in so far as binding authority is concerned - but Stare decisis does not apply between what may be called separate judicial systems which at no time formed one chain.

Dibb Ido case - sec.49 requiring attestations is said to be imperative - second only relates to C.L. rights. Rely on judgment at P.595/6. Submit this supports A's case. 10

Franks Case Sec.23 same as K sec.17. Sec.24 same as K. Sec.18. Consequence of non-compliance with sec.23 expressly limited. This whole effect of case.

Te Aro Case P.415 - argued words. P.416 - held imperative. Question not whether section imperative but whether it complied with. It is not suggested that lack of attestation does not invalidate document. In present appeal there is no attestation in any form.

Lee's case Submit J wrong in this case. On facts the 20 creditors had a pledge as he was given possession but agree this not ground of decision. P.750 - this in conflict with other N.Z. decisions and has misunderstood U.K. case.

Davies v Goodman 1879 5 C.P.D. 128, 20. Necessary to consider B/B Act 1878 Sec.8 and 10. Sec.8 expressly limits invalidity to particular persons. Sec.10 to be read with A - this reason why appeal allowed.

Submit N.Z. Case shows that Sec.15 imperative. Submit if Sec.15 imperative absence of words and limitation 30 makes it invalid for all purposes.

Nazareth

Submit if L/H invalid their defence of no avail. If L/H valid the right of seizure whether ineffective as opposed to fundamental term or alternatively that if any arose when right of sale arose which in turn arose when debt due. As regards consent. Seizure under L/H - if L/H invalid seizure a trespass.

Misdirection on finding of Fact

No necessity for misdirection - appeal by way of 40

In the Court of Appeal for Eastern Africa at Nairobi

No.30

Notes of Arguments taken by The Honourable Mr. Justice Newbold - 29th, 30th & 31st July 1964

continued

re-hearing - C/A must deal with matter after giving due thought to views of J based on demeanour. If account of interview of 29th September fabricated then it does to root of credibility. J misdirected himself in relation to position of A1 - no evidence of A1 not a witness. Authority to sign letter of 6/10. This dealt with by Gratiaen. Overdraft repayable on demand. Submit a difference between closing an account and demanding immediate repayment. 10 When overdraft exceeded Bank could have refused further facilities but this does not mean Bank entitled to immediate repayment and entitled to seize goods. No evidence that loan repayable if a/c operated unsatisfactorily as only witness was Mr. Williamson and he does not say so. Rules never given to A2 - See P.42 L.23. Submit as L/H held invalid and as Bank seized under it - the seizure and removal both trespass and conversion - refused to return evidence of conversion.

20 Selwood (13th Ed.) 265

If L/H held valid no right to seize as Cl.9 imperative as either had or right to seize had not arisen.

Mercantile Bank v Chartered Bank 1937, A.E.R. 231 - submit this different as right of seizure not contested - sums due - P.240 D. Ask that appeal be allowed with costs for three counsel. Ask for direction that case be remitted to S.C. for consideration of damages.

30 Adj. to 2.30 p.m.
C.D.NEWBOLD
Justice of Appeal
31/7.

2.30 p.m. Bench and Bar as before.

O'Donovan

The conversion.

If action of Bank in taking possession was lawful there could be no conversion with demand made and goods not returned. It was never A's 40 case that this was one of conversion as some time after goods taken. This never an issue - see P.23 and 25. Case dealt with on basis of trespass - J did not deal with it, and not made ground of appeal.

In the Court of Appeal for Eastern Africa at Nairobi

No.30

Notes of Arguments taken by The Honourable Mr. Justice Newbold - 29th, 30th & 31st July 1964

continued

Re N.Z. decisions

In construing Sec.15 permissible to have regard to history - the original N.Z. 1889 Act sets out requirements of getting instrument on and off register in juxtaposition. Attestation one requirement for registration.

Submit N.Z. decisions say this:-

An instrument to be valid against third parties must be attested and registered but as far as parties concerned it creates no rights which did not exist before, therefore defects did not invalidate inter partes. 10

Gratiaen says this is wrong as:-

1) C.L. misconstrued.

2) Act enabling by increasing power to mortgage. As C.L. possession not essential to mortgage, never could be so by pledge or by mortgage which did not give possession.

I submit that in Kenya R could validly create floating charges. Gratiaen submitted no equitable charge over future goods. 20

Holroyd v Marshall 11 ER 999 - this authority that contract mortgaging future goods transfer property to mortgages when required.

Fisher Law of Mortgage (6th Ed.) 37 Para.62 - Mortgage of Goods. Thus disregarding Cap.28 it was possible at C.L. and in Equity to mortgage existing goods and for future goods to acquire equitable charge. N.Z. Courts say these rights not taken away. Thus rule of construction re enabling Acts does not apply. 30

Craes (5th Ed.) 240 para.3 - 241 - no general rule. Mischief at which provisions arrived at is unnecessary to avoid instrument inter partes for failure to comply with provision. See Mayers J in Cl.668/62. Submit that canon of construction referred to by Gratiaen applies, only to enabling Acts and this not an enabling Act. Agrees with application for two but not three counsel.

Gratiaen

On new authority:-

The issue is whether Cap.28 merely relates to old C.L. or equitable rights. If equitable rights remedy to bring action and seems equitable remedy - it gives no right to possession and sale of goods in absence of legal process.

O'Donovan

Under Cl.9 an equity a right to seize goods existed.

10 C.A.V.

C.D.NEWBOLD,
Justice of Appeal.
31/7/64.

No.31

NOTES OF ARGUMENTS TAKEN BY THE HONOURABLE MR. JUSTICE DUFFUS ON 29th, 30th & 31st JULY, 1964

IN THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

CIVIL APPEAL NO.15 OF 1964

20 BETWEEN

DHARAMSHI VALLABHJI
KESHAVJI DHARAMSHI
BACHULAL DHARAMSHI
MORARJI DHARAMSHI
RAGHAVJI DHARAMSHI .... APPELLANTS

A N D

NATIONAL AND GRINDLAYS BANK LIMITED ..... RESPONDENT

(Appeal from the judgment and decree of the Supreme Court of Kenya at Nairobi (The Hon. Mr. Wicks) dated the 31st May, 1963,

30

in

CIVIL CASE NO. 1516 OF 1961

In the Court of Appeal for Eastern Africa at Nairobi

No.31

Notes of Arguments taken by The Honourable Mr. Justice Duffus - 29th, 30th & 31st July 1964

continued

NOTES OF MR. JUSTICE DUFFUS J.A. IV

Nazareth:- will deal with appeal, Gratiaen with cross appeal - Gratiaen will deal with grounds 2, 5 and 6(ii).
Nazareth submits:- Only question liability, agreed damages deferred with consent - Outlines facts.
Letters hypothecation - 9th May, 1960.
Goods seized 6th October, 1960, letter (page 198) of 13th May, 1960.
30th September, 1960, overdraft exceeded Shs.140,000/-
Defendants say this was breach agreement. 10
Execution of documents
Ex.G1(a) Letter hypothecation extension (P.212)
Ex.G2(b) New Guarantee. (212)
G3(c) Charge

On 6th October, 1960.
That same afternoon defendants removed goods and effects.

In course of removal defendants obtained signature to a typed letter (page 203) dated 6th October, 1960 (Ex.G. 6)- 20
Letter brought by the Defendants, addition in ink of words "Sewing Machine and Spares" - Document objected to. Landlords came to levy distress. Defendants plea (page 15) paragraph 8(4) -
Distress occurred on account of the seizure. Defendants abandoned their contention.
Guarantee 6th October, 1960, made in consideration of defendants not requiring immediate payment of overdraft (page 212) (page 16 paragraph 9.)

Defence 30

Seizure pursuant to letter of Hypothecation dated 9th May, 1960. Judgment on Letters of Hypothecation Page 163.
Page 190 - Defendants contend, Plaintiffs in fundamental breach of condition and Defendants entitled to seize. Upheld on judgment page 191 (bottom page)
Page 187 - 188.

Finding that account not operated in a satisfactory manner.

Judgment Page 160 to 164. Deals with pleadings, 40
on Pages 164 - 182 - Evidence Page 182 on.

Findings, 1st question. What authority or right

did defendants have to seize goods. Williamson's evidence Page 71. Sub-Manager of Bank seized goods under letters of Hypothecation. Judgment Page 193 last paragraph to page 194. Objections to this:-

(i) Against the pleadings. Defendants had pleaded, they acted pursuant - Letters of Hypothecation dated 9th May, 1960. No oral agreement pleaded - Court could not rescue Defendants by finding oral agreement - not pleaded - Oral agreement not even argued by Counsel for Defendants at the Hearing. Defendants brought this already typed. Page 82. Intention to seize goods whether letter signed or not. No scope for any bargain or contract to be made.

In fact, no agreement was made. Defendants only pleaded this as a consent to seizure not as an agreement. A requires consideration. No contract made on 6th October.

Defendants were exercising a right.
Letter dated referred to the letter of Hypothecation (Page 203).
The letter of 6th October, 1960 depends on any rights in the Letters of Hypothecation.

(ii) The seizure was not the making of a pledge it was in fact a seizure. Not a finding in judgment but this may be said to have suggested -

Nature pledge.

Mortgages and Hypothecation. STROUDS JUDICIAL DICTIONARY VOLUME 3 Page 211 Paragraph 391 - definition pledge - pledge requires consideration - HALSBURY VOLUME 29 Page 211 para 39. No scope for seizure to be regarded as pledge.

Assuming letter was freely given - Clear Plaintiffs 1 and 2 did not act with authority express or implied of the other Plaintiffs. This was a surprise operation.
No implied authority. Implied authority is for the purpose of carrying on business not to close it down. LINDLEY ON PARTNERSHIP 11th Ed. Page 183 - 184 12th Edition Page 165 - One partner could not wind up without authority of others.

In the Court of Appeal for Eastern Africa at Nairobi

No.31

Notes of Arguments taken by The Honourable Mr. Justice Duffus - 29th, 30th & 31st July 1964

continued

Acquiescence does not create contractual rights against him.

No finding as to authority to sign Ex. G 6(i) Plaintiffs answer Page 4.

(iii) of reply - point expressly were taken (Page 99 line 30)

Plaintiffs not concede that letters bind the Plaintiffs also say not admissible, not valid, a licence to seize goods within meaning of instrument in CHATTELS TRANSFER ACT. 10
Not attested, invalid under Section 16

(2) Letter altered after execution.

(3) Misled as to nature of letter.

Evidence - 2nd Plaintiff

Page 28 - line 5 page 38 - Page 39 top page

In his cross-examination and generally no suggestion made that father signed after second Plaintiff.

No suggestion Pandya (6th Defence witness) took part in signing of letter. 20
Non-calling of first defendant -

Evidence Scott

Page 87 line 9 Pandya - Page 91 on at Page 92 line 10 cross-examination Page 98 line 18 contradictions.
1st Plaintiff witness. Page 48 line 6 Evidence for defence as to signing of this document should be rejected.

2nd appellant misled as to contents of document.
Ex. G. 6 - manner of typing - large gaps in between. 30
Preparation for fraud if necessary.

Patel's Evidence

Page 104 line 14
Nothing said about letter being a letter of authority to take away stock.
Second Plaintiff Page 47 - line 42
No witness - said that

In the Court of Appeal for Eastern Africa at Nairobi

No.31

Notes of Arguments taken by The Honourable Mr. Justice Duffus - 29th, 30th & 31st July 1964

continued

1st and 2nd plaintiffs said it was a letter of authority to seize goods -
Pandya's evidence Page 92 line 10
2nd Plaintiff knowledge everything slight -
No evidence he read the letter. Page 110 line 20
Whole evidence shows that the Plaintiffs were misled.
Defendants cannot rely on this letter as a ground to justifying the seizure.
10 Breach of agreement by over-drawing account.

Legal Position:-

Judge held theirs to be a fundamental condition -
Over-drawing above agreed limit, could not possibly be regarded as a breach justifying demand of payment of whole of overdraft, and then subsequent seizure of goods.

LAW Lodgment makes Bank a Debtor. Cheque and request for payment.
20 Without authority, a cheque then becomes a request to the Bank for an overdraft.

McWilliams Evidence Page 56 - on this point -

Bank voluntarily chose to honour cheques - could not be regarded as a breach.

Defence did not plead account to be conducted in satisfactory manner and that on failure of this that overdraft would be payable in full.

Not entitled to call in loan before 30th April, 1961, under any circumstances.
30 If judges finding of this accepted, no breach of conditions have been proved.

No agreement as to terms on which overdraft could be recalled.

Evidence Williamson Page 75 - 76

Evidence MacWilliam Page 58 line 9

Unsatisfactory opening of account Page 54. He arranged overdraft.

Amin's Evidence Page 59 - Not tell Plaintiffs conditions of overdraft - 2nd Plaintiff's Evidence

In the Court of Appeal for Eastern Africa at Nairobi

No.31

Notes of Arguments taken by The Honourable Mr. Justice Duffus - 29th, 30th & 31st July 1964

continued

Page 30 Line 25

Page 43 Line 10 Page 26 Line 38.

Ground 7 should be upheld.

Adjourned to 2.15 p.m.

W.A.H.Duffus

2.15 p.m. Bench and Bar as before

Nazareth continues

Ground 17 -
Plaintiff's case - (Page 27). Arrangements for -
Shs.13,000/-, 10
Overdraft on 6th October, 1960.
Patel agreed with Plaintiff to convert Shs.13,000/-,
along with Shs.140,000/-, into agreed overdraft.
Guarantee (Page 212)

First three lines -
2nd Plaintiff's evidence - Page 31 on - No interview
on 29th September, -

How could amount of excess of overdraft be
reached without authority Sub-Manager admitted
refusal on 21st September, so arrangements were made 20
on 23rd September to increase Shs.5,000/-, and on
26th September, another increase of Shs.5,000/-, -
If no authorization cheques would be dishonoured.

Previous overdrafts were against un cleared
country cheques - overdraft exceeds Shs.150,000/-,
for first on 4th October, Page 35 Line 27 -
Plaintiff's case authorized to go up to Shs.153,000/-,

Evidence P. Patel - Page 107 - approach on 3rd
October, on 21st September, seven cheques dishonoured -
30
Page 68 Williamson's Evidence on 29th September, cross-examination Page 76 Line 18 overdraft up to Shs.148,868/-
hardly without sanction -

He admitted he authorized an increase on the 23rd
Page 84 - admits mistaken - No interview on 29th
September, 1960. In re-examination witness completely
contradicts himself a correction after luncheon break-

Williamson clearly lying - if Williamson lied - inferences.

Documents presented to Defendants for first time on the 6th October, 1960.

Williamson's Evidence accepted dispute contradictions in evidence.

Was overdraft repayable on demand? No evidence of this judgment Page 184 and Page 198 - Confirmation of period of overdraft.

10 Up to 30th April, 1961, no conditions attached if there were, it should have appeared in this letter -
Clause 2 and 10 of Ex. 1 (2) (Page 223).

In conflict with express agreement of parties - Printed document must yield to express agreement. Payment could not be demanded until 30th April, 1961, nor could security be enforced -

Judge gave rights on evidence of oral agreement. No evidence of such an agreement. Bank had good 20 security in the property, realized over Shs.150,000/-. SHELDON, PRACTICE AND LAW OF BANKING 8th Edition, Page 323.

Defendant's letter C.14, Page 210, Ex. G.2, Page 212 -

The Defendants agreed to give extra time in consideration for extra security and execution of new documents. New policies of Assurance given new agreement, a variation of rights previously binding.

No act of Bankruptcy - Page 214 - Letter in 30 dispute Page 19 - No notice given before seizure. No demand for repayment before seizure - Not pleaded, no evidence of this.

Page 79 Williamson Line 20 on - C.7 First demand for payment money, Page 69 - Peculiar -

A demand to reduce to Shs.140,000/-, after documents Exs. G. 1, 2 and 3 had been executed.

Pandya's Evidence Page 93 - Reasonable time to pay -

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continued

HALSBURY VOLUME 27 Page 200 (3rd Ed.) Paragraph 338

BRIGHTY V. NORTON - 122 E.R. 116, (Head Note) and P.118

Toms v. Wilson - 122 E.R. 524 (Head Note) and Judgment 529-531)

Massey v. Sladen (1868) L.R. 4 Ex.13.

Seizure wrongful, trying to get money before due.

Adjourned to 10 a.m. 30.7.64

W.A.H. Duffus

30.7.64. 10
10.00 a.m. Bench and Bar as before.

Nazareth:-

Corrects, point as to loan being payable on demand - refers to para 4(ii) of statement of defence. Based apparently on Letters of Hypothecation.

MacWilliams Evidence Page 54, 55 - On this point evidence nullified on cross-examination -
On assumption Letters of Hypothecation are valid and admissible, nevertheless. Defendants were not entitled to seize goods - 20
Letters of Hypothecation were not admitted - P.223 A.
Clause 9 Only a power of seizure - Hypothecation could be turned into a pledge -
Clause 10 gives right of sale -
Clause 7 Intention to trade with goods -

If there are two contracts and one clearly sets out date for repayment and other does not, then if printed form like Letters of Hypothecation were held to apply purpose of contract would be defeated -
Security - contradicting contractual document, if 30
security provided for loan repayable on a fixed date.

Letter of Hypothecation contradicts the letter relied on-

Printed document as against written typed document -
Typed document is a specific document submits both documents to be read together and the document prepared for specific purpose must prevail -

Specific words added to Letters of Hypothecation are not in relation to question when loan is repayable.

Absurd position if goods are seizable if money was not repayable. Money is not payable on demand.

Clause 9 - cannot be operative until the money becomes due.
Clauses which go against fundamental basis of contract cannot be given effect or must be given
10 interpretation consistent with this.

Clause 10 power of sale only arises when the money is due.

If perishable goods seized under Clause 9. What happens if right of sale had not arisen?

Power of seizure should only be used if power of sale arises or is about to arise.

Printed form inapplicable to loan for a fixed period.

Power of seizure in a document prepared by Bank-
20 Letter Page 198, dated 13th May four days after Hypothecation must be regarded as a variation.
Letter must prevail if any conflict between the two - Both documents prepared by Bank.
Construction must be against them.

2 Ed. HALSBURY VOLUME 7 Page 331 para. 460.

Rule of construction. Glynn v. Marghetson (1893) A.C. 351 Page 351 para. 354 - Defendants no power of seizure until loan becomes payable -

Seizure day after contract entered into and
30 several months before money became due.

Intended that debtor should remain in possession.

A contract of Hypothecation could be turned into a pledge.

Exemption clauses law should apply to this case (Karsales v. Wallis (1956) 2 A.E.R. 864 at 868.

This case on a matter of construction, stronger than in that case.

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Notes of Arguments taken by The Honourable Mr. Justice Duffus - 29th, 30th & 31st July 1964

continued

Yeoman Credit Limited v. Apps, '1961) 2 ALL E.R. 281 - 287 on paragraph 289.

Cases based on principal fundamental intention of parties must be carried out.

Glynn v. Marghetson

Was not an exemption clause - Principle is that fundamental intention of parties must be carried out- Intention of parties - On evidence -
2nd Plaintiff Page 48 Line 21 never completed seizure at any time. 10

6th October - Contract between parties in April or May had been modified - and had agreed to give time to pay -
Could goods be seized few hours after the security was given -

Extension of Letter of Hypothecation (Page 211) Ex. G1.
Facts of 6th October gave four insurance policies Page 27 Line 30

Evidence 2nd Plaintiff P.Patel - Page 109 Line 19 - denied going into shop in morning - 20
Nagesh Navertan - Page 112 - witness to documents - 6th October -
Pandya - Page 93 - cross-examination - Why did he remain in Bank? Knew practically nothing - apparently operation planned for the morning - Only explanation for Pandya's presence - Williamson not true when he said he came to a decision at 1 p.m. -
Nagesh Page 118 Line 27 onwards - not recollect if P. Patel there - 30

Letter of 6th October - G. 6 evidence of 2nd Plaintiff was not challenged - so did not think it necessary to call the father - Page 36 Line 39 - 2nd Plaintiff's evidence - 3rd Plaintiff gave evidence -

Deals generally with evidence - no necessity to call father - Judge relied largely on this - Judge converted himself into a witness - G. 9 - 10 -

Question of duress was not proved - No need to call father to prove letter G. 6 was obtained under duress and misled as to contents - 40

In the Court of Appeal for Eastern Africa at Nairobi

No.31

Notes of Arguments taken by The Honourable Mr. Justice Duffus - 29th, 30th & 31st July 1964

continued

Bank witness account of what happened on 6th October was untrue - No serious contradictions - Plaintiff's witnesses. Judge not examine evidence properly - 2nd Plaintiff's evidence should have been accepted - Judge wrong in rejecting 2nd Plaintiff's evidence - Asks Court to reverse findings of fact against Plaintiff and allow appeal.

Gratiaen:- Grounds of appeal 2, 5 and 6 (ii) - Plaintiff action for damages claim - Defendant acted illegally in removing goods from shop. Prima facie a Tort defendants must prove a legal right to do so. Legal right relied on by Bank was right created by Letters of Hypothecation of May, 1960, extended by that of 6th October - Judge accepted that these two documents creating Hypothecary rights were invalid. Section 15 CHATTELS TRANSFER ACT, Cross Appeal challenges correctness of his findings. Judge should have held that only legal justification on which Bank relied having failed. The Tort was established and remained only to assess damages - Judge held Bank's conduct justified on an oral agreement which justified seisure's goods.

(1) No such oral agreement pleaded -

(2) Nor put in issue.

(3) None proved.

(4) Finally no such oral agreement can give legal rights of hypothecary nature, indeed as

(5) Parties intended and did in fact reduce to writing, the contract, then if document is invalid and cannot be put into evidence then no oral contract can be proved. Section 97 EVIDENCE ORDINANCE 1963

(6) Not suggested that letter Ex. G. 6 was intended to create new legal rights or obligations, but if it was then,

(7) It was a letter of hypothecation equally void as were the earlier letters, Section 15 CHATTELS TRANSFER ACT.

This is a new theory of trial judge. Oral agreement pleaded - Statement of Defence - Paragraph 41 on 4th April, 1960

In the Court of Appeal for Eastern Africa at Nairobi

No.31

Notes of Arguments taken by The Honourable Mr. Justice Duffus - 29th, 30th & 31st July 1964

continued

4 (IV) Promise to give a letter of Hypothecation -

(5) Plaintiffs carried out oral agreement and gave the Letter of Hypothecation - this was at Page 223 - Held invalid in Law -

(7) Statement of Defence -

(8) The oral agreement was honoured -

8 (V) The power to seize -

(9) The defendants took possession of the goods pursuant to the letter of Hypothecation -

Judge did not say that letter (G.6) created hypothecary rights and obligations be said there was an oral agreement evidenced by this document. 10

No oral agreement in shop except at most to sign the document - On morning of 6th October - Left Bank having signed a number of documents entitled to create legal rights or obligations - The guarantee, extension of Letters of Hypothecation - The title deeds.

Paragraph 7 Statement of Defence - when document signed Plaintiff entitled to believe their request would be granted (Page 212) - 20
Entitled to go back to the shop and feel had got time and could trade -

Bank formed a secret intention to take goods away as soon as got documents.

Judgment Page 188 Line 5 - Williamson's Evidence - Page 82 Line 30 onwards - Letter G. 6 gave no legal rights - Page 71 bottom page William's evidence - Page 104 Line 10 -
Patel's evidence reason for raid - Is there any oral agreement creating fresh rights? No plea - No evidence- 30
Judgment - Last para. Page 193 and 194. What was valuable consideration for this so called oral agreement? - What rights could this agreement have in fact conferred. At time of this arrangement the INDIAN TRANSFER ACT in INDIAN CONTRACT ACT - MULLA 3rd Edition, Page 370 - No rights made oral agreement could be brought in aid. CHATTELS TRANSFER ACT (KENYA) Section 15 - Not applicable here.
English Common Law applicable - Pledge - Pledge and possession to the lender - no such pledge - Goods in 40
possession of owner - no licence to come in and remove goods.

In the Court of Appeal for Eastern Africa at Nairobi

No.31

Notes of Arguments taken by The Honourable Mr. Justice Duffus - 29th, 30th & 31st July 1964 continued

Reeves v. Capper and another - 132 E. R. 1057 - No such verbal Mortgage in this case. No property passed without delivery.
3 HALSBURY - Volume 27 Page 163 - Paragraph 253 - Only very limited - rights given but no right to seizure; by oral mortgage of goods unaccompanied by any delivery - In this case reduced to writing - In this case invalidity of instrument and so cannot fall back on oral agreement.
10 Different where contract is complete and no need to rely on the subsequent illegal instrument in writing- IN RE TOWNSEND, 16 Q.B.D. 532 at 535 also applies to letter Ex. G. 6. CHATTELS TRANSFER ACT Section 2. - instrument - A licence to take possession of CHATTELS as security for debt - at page 536 - 542 - s seizure done in pursuance of rights under original Letters of Hypothecation.
Letter G. 6 no new consideration - at page 545 at 547 - First Letters of Hypothecation and extension
20 given for good consideration, but no consideration for the letter G. 6 - Completely invalid.

Adjourned to 2.15 p.m.
W.A.H. Duffus.

2.15 p.m. Bench and Bar as before.

Gratiaen continues:

In re HARDWICK 17 Q.B.D. 690 - Judgment Esher M.R. Page 697.
Bill of Sale - a right to take possession even though it was right to take immediate possession.

30 Difference between a pledge or pawn with delivery of possession and of mortgage or LS/H with possession remaining in the borrower.

This authority approved by House of Lords - Charlesworth v. Mills (1892) A.C., 231 at page 239 and page 241 and page 242 - Mere taking with permission confers no title - Title is traced to Clause 9 and Clause 10 of original letters of hypothecation and also to the further LS/H of 6th October.

40 Page 71 - bottom of page - evidence of Williamson, Bank Manager.

In re David Allester Ltd (1922) 2 Ch. 211 at page 216. P.203 G. 6.

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No.31

Notes of Arguments taken by The Honourable Mr. Justice Duffus - 29th, 30th & 31st July 1964

continued

With reference to the Letter of Hypothecation - Subramonian v. Lutchman 50 I. A77 at page 82 - Issue not raised before trial judge.

Parties intended right to take over and sell goods as indicated by parties, to be incorporated in the LS/H.

Right of Sale was in fact exercised some months after - In any event if judge right holding documents invalid then he had to hold there was a trespass on goods and only question for determination was damages.

O'Donovan: 10

Two defences -

(1) Right to seize goods under LS/H

(II) In any event such seizure was consented to by plaintiff, inter alia, letter of 6th October applies -

this is an answer to question of trespass. If either succeeds defence is established. Plaintiff's submissions - no oral agreement -
What defence relied on was consent of the plaintiff to exercise of seizure. Judge has gone beyond this, 20
cannot support all findings but he did find that what was done was with free consent of the plaintiffs.

Agrees that parties were not always entering into any separate agreement by letter G.6

Both sides assumed that the plaintiffs had a good right to act under LS/H.

All Ex. G.6 does is to agree that the defendant could enforce these rights.

FACTS

Court of Appeal would rarely interfere - Ex. G.6. 30
Signature of two plaintiffs without authority of the partners.

No evidence of express authority - page 29, line 32 onwards - only place in evidence with a reference.

Implied authority - all partners had in fact signed the LS/H - Nothing unusual in act of the other two partners.

Alteration of letter - Finding Judge - altered

In the Court of Appeal for Eastern Africa at Nairobi

No.31

Notes of Arguments taken by The Honourable Mr. Justice Duffus - 29th, 30th & 31st July 1964

continued

after signature of first plaintiff but before second plaintiff - finding of fact - no right to take possession, either of Letter of Hypothecation expressly stated "repayable on demand" - or if account operating satisfactorily - undertaking not to require overdraft to be paid.

Second plaintiff's evidence - page 30, line 12, submits possession is first whether amount repayable or not.

10 Clause 9 of Ex. 12. (223) L/H gave the bank a right to take possession and a right to sell these goods - Calling of father ? necessary in view of submissions re Ex. G.6.

Ex. G.6 - whether this is a Letter of Hypothecation or not, is not important.

It is a defence to charge of trespass as a tort. Case of Re Townsend 16 Q.B.D. - 532. No authority that Townsend could have faced Parsons for trespass - The letter is an absolute defence.

20 The consent relates back to acts committed before or after the consent - court has to look at everything done - Was this done against consent of owners? If they consented there is no tort - There is evidence that they did, in fact, consent all along.

Very similar case of Townsend v. Parsons. Judgment page 194, middle of page.

Consideration - not trying to establish a comtract. What they got on 6th October was belated
30 compliance with what they required from days before.

Consent is a licence - This was pursuant to earlier agreement.

Parties could not make a new contract for they thought they already had a contract and were giving effect to it.

Not liable in trespass but may be liable if refuse to deliver up goods after a demand - in detinue - First defence - Letters of Hypothecation valid - CHATTELS TRANSFER ORDINANCE, Cap. 28
40 derived from a New Zealand Act.

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continued

Halami v. Official Receiver. 19 E A.C.A. 200 Page 203 - Trimble v. Hall 1879 5A. C. 342 - modelled on N.Z. Act - Settled definitely in New Zealand, local legislation must have intended to bring legislation with meanings attached to these terms in New Zealand.

CRAIES ON STATUTE LAW - 5TH EDITION, page 334

Copies of New Zealand Act - handed up to Court.

Original Act 1889. Section 49.

Provisions of attestation only applied to Registration Section 20 - Section 42 (2). 10

Effect of non-compliance with Section 49 has been considered in New Zealand courts. Held this decision not invalidated that instrument "inter partes".

This authority stands unchallenged up till today. Reg. v. Dibb Ido, 15, Court of Appeal 591 - Lee v. Official Receiver 22 Supreme Court N.Z. 747 at page 750 - Te Aro Loan Co. v. Cameron 14 N.Z. L.R. 411.

These decisions settle the meaning of section 49 of 1889 and Section 20 of 1924 Act, at time N.Z. legislation adopted in Kenya. These cases determine meaning of legislation adapted in Kenya, except one can say they are completely and utterly wrong. 20

In equity bank entitled to enter into transaction whereby acquired floating security over stock in trade on plaintiff's premises - Although at common law could not mortgage future chattels but this could be done in equity - Does CHATTELS TRANSFER ACT take away this right ? - submits no - Position in equity.

Thames v. Kelly 13 A.C. (1888) page 506 at 515. 30
MULLA 4TH EDITION TRANSFER OF PROPERTY ACT, page 369.

Nothing implied in legislation to take away equitable rights in future acquired property.

In N.Z. In re Franks ex parte Official Assignee (1934). Supreme Court. N.Z. - Section 24 reproduces Section 18, Kenya - Section 23 by Section 7, Kenya - No provision anywhere making chattels instrument absolutely void - when void it is only against certain persons.

Refers to decision of Miles J. Dodhia v. National & Grindlays Bank - Case 914/1962 of 22/10/1963, page 10. Meaning of word "but" - validity. Page 13.

Did not follow New Zealand authorities - not ordinary authorities. These decisions settle Law N.Z. and Kenya subsequently adapted N.Z. statute when these decisions were in force. Page 191 judgment. 321 INDIAN LAW REPORTS 410 MADRAS - Validity inter partes.

10

Adjourned to 10 a.m.
W. A. H Duffus.
31.7.64

31.7.64

10 a.m. Bench and Bar as before

O'Donovan asked by President, if intends to or has dealt with Cl.9 and Cl. 10 of LS/H O'Donovan Cl. 9 - power to take possession

No power to sell under Cl. 10 until debt secured has become due, but there is provision on debt becoming due, and express power to Bank to retain the hypothicated goods as security for debt until it becomes due - Not paramount object that debtor retains and remains in possession for one year - expressly agreed he only retains possession, until the Bank decides to go into possession.

20

No inconsistency with Cl. 3 - This is a floating charge with liberty of Bank at any time to convert into fixed charge - Does not fasten on any of the debtor's goods until converted into a fixed charge based on possession - effect is until this is done debtor has complete liberty to deal with goods.

30

Mercantile Bank of India Ltd. v. Chartered Bank India (1937) 1 A.E.R. 231.

A seizure under the licence to seize.

As soon as it becomes a fixed charge, Cl. 3 no longer applies. Cl. 3 only operates whilst a floating charge is in existence. Cl. 9 one of the most important provisions of the letter.

40

Even if a fixed debt was given - Bank reserved

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a right to have fixed charge on the goods in the shop. Gratiaen.

On appeal - that judgment should have been given for Plaintiff if documents were invalid.

If documents invalid then all hypothicated rights destroyed and no rights left to Bank -

If intention parties that all rights should be incorporated in written document, then if document is invalid then no oral evidence can be given.

PLEDGE 10

Transfer of possession if there was a transfer of possession by delivery, subsequent invalid document not affect position. Justification for Bank's detention of goods depends entirely on validity of the two letters of hypothecation.

Plaintiff - Paragraph 12 (p. 10 - 11).

Removal of goods before signature of letter. This is a claim in trespass and in detinue. "Wholly deprived" the demand has been proved.

The actual sale took place in December, after the institution of this action. A conversion since they deprived Plaintiff of goods. 20

Correspondence.

P. 206 - Letter of 24.10.1960

P. 209 - P. 209A

P. 210 - P. 210A

Pleadings based on facts up to then. Accepts no plea of a demand for return of goods.

Alternative answer - a consent to what happened. Judge found an oral agreement evidenced by the document. Submission in effect a licence to remove goods. 30 A licence stems from agreement - there was no agreement - only a piece paper signed - If there was an agreement then there was no consideration. The so-called licence created no title in Bank. Plaintiffs fully entitled to revoke licence.

Was fact revoked when return of property was

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demanded? Some goods already taken before letter given - Licence - SALMOND 13 Ed. 211. A licence is revocable, not suggested it is not. A licence without a valid letter of hypothecation gives no interest or title.

Conversion by taking CLERK AND LINDSELL ON TORTS 11th Ed. P. 422.

Signature by only two of five partners cannot bind all. Absence of valuable consideration. Ex. G.6 - P. 110. Patel's evidence Line 33 onwards SALMOND ON TORTS 13th Ed. 260. A conversion. There was in fact a conversion. Respondents must show that judge wrong in holding the letters of hypothecation were invalid.

What was common law right dealing with mortgage of moveables before Chattels Transfer Act. These were -

(a) Pledge. Actual possession is creditor -

(b) Did recognize with certain limited consequences and agreement byway of mortgage without delivery, but

(c) could only relate to goods in actual existence at time of agreement - future goods could not be dealt with under such an agreement.

In law no legal rights - In equity -

WALDOCK LAW OF MORTGAGES 2nd Edn. Cannot foreclose but can appoint a receiver or by judicial sale - Court action necessary.

Thomas v. Kelly 13 A.C. 506 and 515 (bottom page)

Evidence Act s. 91 contract in writing cannot rely on oral contract. Chattels Transfer Act (Cap.28).

Different from English B/Sale Act.

Intention legislation whilst authorising transaction of this kind. Intends to protect everyone who needs protection. Creditor, and the debtor must be protected. Instrument required to be witnessed by third party. Third party doing business with debtor to be also protected - this is where proviso for registration plays a large part.

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Section 15 to have any validity document must be executed and attested in a particular way. A condition of validity.

Then if not registered document only invalid to a limited extent.

No limitation of invalidity here - in consequence it becomes invalid in all cases - only question here is meaning of section 15 - Are its provisions imperative or not - section 14 a limited invalidity as section 18 - also section 17, section 13 further - What does validity mean? Oxford Dict. "Good and adequate. In law - possessing legal authority and force and legally binding". 10

Section 15 must mean if not attested then the document is invalid - Attestation is essential to validity.

Section here clearly imperative and not directory- If words are imperative then they are not words in section 15 that excuse this - MAXWELL 10th Ed. Page 376 implied nullification - page 378 - Liverpool Bank V. Turner 70 E.R. Page 703, 705, 707 - 20

If invalid to third party, how can it be said to be valid between mortgagor and mortgagee.

New Zealand cases, language Sec. 15 not considered or commented on - "But" - "shall" Judgment Miles J. at page 15 New Zealand authorities.

Craies 334 Judicial interpretation of Statute and subsequent amendments -

- interpretation of proviso -

It must be same parliament and judges of same country who give that interpretation - 30

No proviso that judicial judgments of one colony binds judge of another colony.

Difference as to judgments of an English Court - Judgment of Privy Council would bind these courts, but not judgments of courts in other colony -

Judgments even had to be flown over here.

Would not bind this Court but entitled to great respect. Regina v. Debb Ido. 15 N.Z. L.R. 591

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An enforcement of a common law right.

Pages 595 - completely supports case of plaintiff.

Page 594 Position at Common Law apparently different in New Zealand. Here section 91 Evidence Act applies.
In re Franks ex-parte Official (1934) N. 2 L.R. 886
Section 23 and section 24 same as section 17 and section 18 in Kenya. There position is clear and is
10 of no assistance to this court.

Rely on this as there is an express limitation in section 17 and section 18.

Te Aro Loan Co. v. Cameron 14 N.Z. L.R. 411 page 416
Held: section 49 was imperative.

And that attestation was imperative, but in that case had been sufficiently complied with - here requirements have been completely ignored.

Lees case 22 N.Z. L.R. 747. Held Judge there misunderstood earlier decisions and purported to
20 follow English decision - distinguishable. Here the lender had possession. Judgment page 750. He disregarded previous finding that attestation is imperative.

Davies v. Goodman 5 C.P.D. 128

English Bill of Sale 1878 section 8 expressly limits the invalidity of Bill of Sale not attested as required. Section 10 merely states how this has to be done. Judgment of trial court at page 20. Judgment Lees case judge clearly misled himself on
30 all the cases he quoted. Submits New Zealand cases lay down principle section 15 is imperative and therefore non-compliance makes the instrument invalid. Judgment here correct. Refers to judgment of Miles J.

NAZARETH:

Further in reply

Relies on submissions

Letter of Hypothecation invalid. Even if Letter

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of Hypothecation were valid, as loan for fixed period, no right to seize had not arisen.

Right of seizure inconsistent with fundamental law of contract or alternative as ancillary to right of sale and this right had not yet arisen.

Consent to seizure

Right was made under Letter of Hypothecation. If these letters were invalid - seizure wrongful.

Misdirection - Appeal is by way of re-hearing.

Williamson's Evidence 10

Misdirection on question of 1st Plaintiff. Judge turned himself into witness. Question of immediate repayment. No evidence loan repayable on satisfactory running of account. Could not justify demand for repayment.

2nd Plaintiff - Defendants seized under Letters of Hypothecation which have been declared to be invalid. On trespass and conversion. Evidence of refusal to return goods.
SALMOND ON TORTS (13th Ed.) page 265. If Letters of Hypothecation held valid - No right to seize and as Clause 9 was not part of contract as fundamentally opposed to basis of contract - or else right to seize had not arisen as it was ancillary to section 10 - Only arise when debt became due. 20

Bank of India v. Chartered Bank of India (1937) 1 All E.R. 231. In that case loan had become due - Different here. Right of seizure did not exist.

FACTS

Judge made no proper analysis. Facts not justified by evidence. 30

Costs - asks for court to hear further address -

Two Queen's Counsel and one Junior asks for three Counsel.

If successful also necessitate a direction back to court below.

Adjourned to 2.30 p.m.
W.A.H. Duffus

2.30 p.m. Bench and Bar as before.

O'DONOVAN in reply

If original taking not unlawful - could be no conversion unless and until a demand is made and referred.

Never Plaintiff's case that there was a conversion at a stage later than first taking.

Opening Plaintiff's case - p.23 and 25 Trespass - case dealt with on that basis.

10 NEW ZEALAND DECISIONS Permissible to have reference to history of legislation - original 1889 New Zealand Act section 49.

Attestation and registration necessary for third parties - but so far as parties are concerned act created no new rights and therefore attestation and registration did not affect rights between parties.

Chattels Transfer Act. Submission that this was an enabling act - refer to Thomas v. Kelly 13 A.C. at 515.

20 Bank here under Rules of Equity in Kenya could obtain a valid floating charge on assets in Kenya. Gratiaen submitted otherwise.

GRATIAEN:

Submitted that in Equity could not seize and sell goods without reference to court. Holyood v. Marshall 11 E.R. 999, H.L.

O'DONOVAN:

Common Law in Equity

FISHER'S LAW OF MORTGAGE (6th Edn.) page 37, para-
30 graph 62 (7th Edn. Clause 3).

Disregarding CHATTELS TRANSFER ACT, a person could at Common Law and Equity mortgage his chattels or in respect of future goods an equitable charge.

New Zealand Courts say that these rights have not been taken away.

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Rule of construction relating to enabling acts does not apply at all.

CRAIES STATUTE LAW page 240
acts page 241 - distinction 'absolute' or 'directory' -

What is mischief - at which provisions are aimed - altogether unnecessary to avoid an instrument between parties insofar as attestation is concerned.

Agrees necessary insofar as third parties are concerned. 10

This Statute not authorize parties to do anything could not already do -

Judgment Mayers J. in B.L. Ghandi and others v. National & Grindlays Bank No.668 of 1962.

Submissions of construction by Gratiaen not applied in enabling acts.

Costs -

GRATIAEN (permission) Must bear in mind not only the right but manner in which it would be exercised.

Remedy was to bring an action to have goods secured and an injunction for that purpose. 20

This is not 'directory' but it is imperative.

O'DONOVAN: Fisher's LAW OF MORTGAGE page 38.

Right at Common Law or Equity to seize the goods.

C.A.V.
Signed: W.A.H. DUFFUS
31st July, 1964.

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JUDGMENTS OF THE COURT OF APPEAL DATED
2nd September 1964

IN THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

Coram: Gould, V.P., Newbold and Duffus, JJ.A.

CIVIL APPEAL NO. 15 OF 1964

BETWEEN

DHARAMSHI VALLABHJI
KESHAVJI DHARAMSHI
10 BACHULAL DHARAMSHI) .... APPELLANTS
MORARJI DHARAMSHI
RAGHAVJI DHARAMSHI

AND

NATIONAL AND GRINDLAYS BANK LIMITED ..... RESPONDENT

(Appeal from a judgment and
decree of the Supreme Court
of Kenya at Nairobi (Wicks J.)
dated 31st May, 1963)

in

20 Civil Case No. 1516 of 1961)

JUDGMENT OF NEWBOLD J.A.

This appeal arises out of an action in which the plaintiffs, who carried on a business in partnership in Nairobi, sued the defendants, who were a bank and are hereinafter referred to as the bank, for, *inter alia*, damages resulting from a trespass alleged to have been committed by the bank in seizing the plaintiffs' stock-in-trade, which was the subject of a letter of hypothecation given as security for an
30 overdraft with the bank. The trial proceeded on the basis that the only issue to be determined initially was the issue of liability; and only if that issue was determined in favour of the plaintiffs would the remaining issues in relation to damages be investigated. The trial judge gave judgment in favour of the bank and held that though the letter of hypothecation was

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(i) The Honourable Mr. Justice Newbold

continued

invalid nevertheless no trespass had been committed. From this decision the plaintiffs appealed on a number of grounds, which raised issues both of fact and of law, and the bank cross-appealed asserting that the letter of hypothecation was valid.

So far as is relevant to the issues raised on appeal, the facts as found by the trial judge may be concisely stated as follows. On the 4th April, 1960, the plaintiffs opened a banking account with the bank and the bank undertook to provide overdraft facilities 10 to the plaintiffs. The limit of the overdraft facilities then agreed was Shs.140,000/- and the conditions attached thereto were that the amount was repayable on demand, that the account had to be conducted to the satisfaction of the bank and that the agreement was to come up for review on the 30th April, 1961. As security for such overdraft facilities the plaintiffs gave to the bank, inter alia, a letter of hypothecation over their stock-in-trade and certain other articles specified in the letter. This letter of hypothecation 20 was signed by the plaintiffs on the 4th April, 1960, after the printed form had been duly filled in, though it was dated the 9th May, 1960. The letter of hypothecation was neither attested nor registered. Subsequently, on the 13th May, 1960, the bank wrote to the plaintiffs confirming the overdraft facilities. On a number of occasions the plaintiffs exceeded the limits of the overdraft facilities and on the 29th September, 1960, the bank extended the limit of the overdraft facilities by Shs.10,000/- to Shs.150,000/-, but this 30 extension was for a period only until the 3rd October, 1960. In consideration of this extension certain documents, including an extension of the limit set out in the letter of hypothecation, were handed to the plaintiffs for signature on the understanding that they would be returned to the bank. These documents were not returned and cheques were drawn in excess of the additional limit. On the morning of the 6th October, 1960, an official of the bank went to the premises of the plaintiffs with fresh documents and 40 with instructions either to have the original documents, if signed, returned to the bank or to obtain the signature of the plaintiffs to these fresh documents. That morning the plaintiffs signed the fresh documents, which included an extension of the letter of hypothecation and a new guarantee. Later that morning two of the plaintiffs went to the bank and showed to an official of the bank a draft letter setting out that the plaintiffs were unable to pay their creditors,

whereupon the plaintiffs were asked to reduce their overdraft to the agreed limit of Shs.140,000/- and stated that they were unable to do so. Following upon, and consequent upon, this the bank, without any formal notice, caused the stock-in-trade and other articles of the plaintiffs to be seized under a power contained in the letter of hypothecation on the afternoon of the 6th October, and during the course of the seizure two of the plaintiffs voluntar-10 ily and with knowledge of its contents signed a letter, dated 6th October, referring to the letter of hypothecation and authorising the seizure as the overdraft could not be reduced as promised.

On these facts the trial judge held that the letter of hypothecation was invalid and conferred no power on the bank to seize the goods, but that the bank had committed no trespass in seizing the goods as the plaintiffs had expressly agreed to the goods being seized by the bank as security for the 20 overdraft. Accordingly the trial judge determined the issue of liability in favour of the bank and dismissed the action with costs.

From this decision the plaintiffs appealed on a large number of grounds, some of which challenge the trial judge's findings of fact, in particular the conditions on which the overdraft was granted, the circumstances in which the limit was extended and the circumstances relating to the seizure of the goods, and others challenge his decision in 30 law. The bank cross-appealed challenging the trial judge's decision that, by reason of lack of attestation, the letter of hypothecation was invalid as far as the plaintiffs were concerned. The issues which arise on this appeal are more clearly stated if they are looked at as a whole and without regard to the rather artificial distinction between the appeal and the cross appeal. These issues are as follows:

First, is the letter of hypothecation valid 40 inter partes?

Secondly, if so, does clause 9 of the letter of hypothecation effectively confer on the bank a power of seizure and was this power properly exercised?

Thirdly, if not, does the letter of the 6th October authorising the seizure provide a good defence to the bank against some or all of the

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plaintiffs?

Fourthly, if neither the letter of hypothecation nor the letter of the 6th October entitles the bank to seize the goods is there any other authority which justifies the seizure?

Before I deal with the issues there are some general remarks which I should make. It is clear that as the bank has seized the goods of the plaintiffs then the bank is liable in trespass unless it can justify the seizure. During the course of the appeal 10 an attempt was made by the plaintiffs to base their claim in the alternative in detinue or on a conversion subsequent to the seizure. In my view it is not open to the plaintiffs to make a claim in detinue as the pleadings neither aver the refusal of a demand nor claim the return of the goods. In any event the trial was not conducted on the basis that the claim arose out of detinue or a conversion subsequent to the seizure, the judge did not so deal with it and there is no ground of appeal relating to any such claim. 20 In these circumstances I do not consider it open to the plaintiffs to raise these new claims at this stage. Generally, as regards the grounds of appeal relating to the findings of fact, the trial judge arrived at his findings in the majority of instances after having considered the credibility of the witnesses. The plaintiffs alleged, inter alia, fraud and duress on the part of the bank. The trial judge specifically found that he was unable to believe the main witness for the plaintiffs and that he believed 30 the witnesses of the bank though on occasion the memory of one or more of them was at fault. In these circumstances as regards primary findings of fact I do not consider that on appeal those findings should be interfered with unless either it is clear that the trial judge has not taken proper advantage of seeing and hearing the witnesses or he has misdirected himself. The evidence was carefully analysed by Mr. Nazareth and while it is clear that in certain instances the trial judge's findings may be 40 at fault, and indeed Mr. O'Donovan did not attempt to support certain findings, nevertheless I am not satisfied that the trial judge has failed to take proper advantage of seeing and hearing the witnesses. Mr. Nazareth has urged that the judge misdirected himself in his comments and suppositions about one of the plaintiffs who was not called as a witness. I agree. It is not clear how the judge knew that the

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person in question was one of the plaintiffs and in my view the judge wrongly adopted the role of a witness in relation to a person who was not a witness in the trial. But I am satisfied that this misdirection of the trial judge was quite immaterial to his specific findings of primary fact and should not be the reason on which to reverse such findings. As regards the presumptions drawn by the judge from the failure to call certain witnesses, the judge was
10 perfectly entitled to make those presumptions under section 144 illustration (g) of the Indian Evidence Act (now section 119 of the Evidence Ordinance,1963).

Turning now to the first issue, it is not in dispute that the letter of hypothecation is an instrument within the meaning of the Chattels Transfer Ordinance (Cap.28 and hereinafter referred to as the Ordinance) and that it was not attested. Section 15 of the Ordinance reads as follows:-

> "15. Sealing shall not be essential to the
> 20 validity of any instrument; but every execution of an instrument shall be attested by at least one witness, who shall add to his signature his residence and occupation."

Does this section mean that if the instrument is not attested it is invalid for all purposes? Or does it mean that lack of attestation, whatever other effect it may have, does not invalidate the instrument between the parties thereto? Mr. O'Donovan in an able argument has submitted that the latter is
30 the correct interpretation of the section. The steps in his argument are as follows: that Kenya adopted the Ordinance from New Zealand and that in so doing it must be assumed to have adopted each section with the meaning placed upon it by decisions of the New Zealand courts; that the New Zealand courts have interpreted the equivalent to section 15 as meaning that lack of attestation does not invalidate the instrument _inter partes_ and therefore section 15 should bear the same meaning; and that
40 in any event there is nothing in the Ordinance making an instrument which does not comply with the provisions of the Ordinance absolutely void but only void as against certain third parties; and in no case is the instrument made void as between the parties to the instrument.

I accept that when Kenya adopts the legislation

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continued

of a Commonwealth country with a similar system of law then, in construing the provisions of the adopted legislation, regard should be had to the judicial decisions of the Commonwealth country on the meaning of the equivalent section. I accept that proposition subject to two qualifications: first, that any such decision is not absolutely binding and may be disregarded if in the view of the East African court the decision is clearly wrong; and, secondly, that such decisions disclose a consistent interpretation of the section in question and are not at variance one with another. Mr. O'Donovan referred to four New Zealand decisions and submitted that these decisions on the equivalent section to section 15 disclose that lack of attestation does not invalidate the instrument inter partes. The first of these in chronological order is Te Aro Loan Co. v. Cameron,(1895) 14 N.Z.L.R. 411. In this case it was held that the provisions of the New Zealand section were imperative, but that the instrument was properly attested when the attesting witness stated his occupation and residence as "Civil Service, Wellington". The next case is Regina v. Dibb Ido, (1897) 15 N.Z.L.R. 591 where it was held that the provisions of the section were imperative and that an unattested instrument was invalid, but that at common law the transaction resulted in the property in the goods passing from the grantor of the instrument. The next is Lee v. The Official Assignee in Bankruptcy, (1903) 22 N.Z.L.R. 747 where it was held that non-compliance with the provisions of the section does not invalidate the instrument inter partes but merely makes it incapable of registration. The last case is In re Franks, (1934) N.Z.L.R. 886, where it was held that failure to comply with the provisions of a different section which specifically provided that such failure invalidated the document "to the extent and as against" certain specified third parties did not result in the document being invalid inter partes. I consider that the only one of these decisions which supports Mr. O'Donovan's submissions is Lee's case (supra). The decisions in the Te Aro case (supra) and the Dibb Ido case (supra) are, it would seem, contrary to his submissions as they hold that the provisions of the section are imperative; and the Frank case (supra) does not seem to me to be relevant. In my opinion these cases do not show a consistent interpretation by the New Zealand courts of the equivalent section as meaning that lack of attestation does not invalidate the document inter partes and in my view the courts in Kenya were completely free to come to their own

oonclusion on the effect of failure to comply with the provisions of section 15 of the Ordinance. Reference was made to two Kenya decisions, one in 1962 and the other in 1963. In Gandhi and Others v. National & Grindlays Bank Ltd., Civil Case 668 of 1962, Mayers J. on an application for an interim injunction held that the absence of specific provision making a defective instrument void as against the grantor probably resulted in the instrument being valid as against the grantee. In the course of his short ruling Mayers J. did not refer to section 15 and he specifically stated that he was not in his ruling determining the validity of the instrument. In Dodhia v. National & Grindlays Bank Ltd., Civil Case 914 of 1962, Miles J. after a careful and exhaustive examination of the authorities, including the New Zealand decisions, and the Ordinance came to the conclusion that lack of attestation resulted in the instrument being invalid for all purposes. The trial judge arrived at the same conclusion and I consider that in order to determine whether or not he is correct it is only necessary to look at the provisions of the Ordinance as a whole applying the normal canons of construction.

In my view the determination of the first issue hinges upon whether the provisions of section 15 are mandatory or directory. If the provisions are mandatory then the absence of any words specifically declaring the instrument void is immaterial. As Vice-Chancellor Page Wood said in Liverpool Borough Bank v. Turner, 70 E.R. 703 at page 707, "if the Legislature enacts that a transaction must be carried out in a particular way, the words that otherwise it shall be invalid at law and in equity are mere surplusage." The first thing to be noticed is that the section refers specifically to validity in stating that sealing is not essential to validity and continues, in words framed in the imperative, but every execution of an instrument "shall" be attested. Taken by itself that wording would appear to be mandatory and this appearance is strengthened when comparison is made with section 22 which deals with the form of the instrument; there the wording is that the instrument "may" be in the form set out in the schedule. Where two sections deal with the formal requirements of an instrument and in the one case the phraseology is imperative and in the other it is permissive, then there is a presumption that such difference is deliberate. When examination is made of the provisions of the Ordinance it is note-worthy that

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continued

in every case where the instrument is specifically made invalid only as respects third parties for failure to comply with some provision, such failure would result in notice not being available to the third party of either the execution of the instrument or of the articles covered by the instrument. Such lack of notice might well prejudicially affect the rights of third parties, but would not be of importance _inter partes_. If, as I consider is the position after an examination of the Ordinance, the object of the legislature is to protect not only third parties but also the parties to any instrument, the requirement that some formal ceremony is essential to the validity of the document would be an obvious provision and would be one which the legislature considered essential to the validity of the instrument _inter partes_. I consider that the requirement of attestation not only to the execution of the instrument but also to the execution of a memorandum of satisfaction shows that the legislature desired to ensure that where the owner of goods conveys any interest or rights over those goods to secure the payment of money or the performance of any obligation, then, in protection both of the borrower and the lender, the execution of the instrument charging the goods and the execution of the instrument discharging the goods have each to be attested in order to be valid. In my opinion section 15 should be read as mandatory; to do otherwise is to disregard the words of the section and to set at naught the intention of the legislature as ascertained from the provisions of the Ordinance as a whole. To say that an instrument which is not attested is perfectly valid between the parties thereto is nothing other than to say that the words of section 15 and of section 34 requiring attestation are complete surplusage and are to be disregarded. I cannot accept that such is the position. Accordingly, I am satisfied that, by reason of lack of attestation, the letter of hypothecation of the 9th May, 1960, (as well, of course, as the extension of such letter executed on the 6th October, 1960) is invalid between the parties and confers no rights upon either of the parties thereto.

Having regard to my views on the first issue, it is unnecessary to deal with the second issue. This issue involves subsidiary issues of fact, for instance the terms upon which the overdraft was granted, and subsidiary issues of law, for instance whether the letter of the 13th May, 1960, must be

regarded as having paramount effect over the terms of a printed letter of hypothecation and whether clause 9 is contrary to any fundamental term of the contract. As the matter was, however, argued at some length I think I should state, without giving my reasons, that in my view, if the letter of hypothecation had been valid, the power conferred by clause 9 thereof - which is merely a power to seize at any time - was both effective and validly exercised in the circumstances of this case even though in other circumstances such a power might not properly be exercised in view of the principle referred to by Cockburn, C.J. in Stirling v. Maitland, 122 E.R. 1043 at 1047.

Turning now to the third issue, Mr. O'Donovan did not seek to support the judge in his finding that there was an express agreement between the plaintiffs and the bank authorising the bank to seize the goods. He put his case no higher than this: that the claim was in trespass; that a defence thereto would be consent to the taking of the goods; that two of the plaintiffs consented to such seizure, as is shown by the letter of 6th October, and that they must be considered as having implied authority from the other three to give such consent. Mr. Gratiaen submitted that the letter conferred no new rights; that if it did it was itself invalid as being an instrument within the Ordinance which was not attested; that in the circumstances the two partners could not be presumed to have implied authority to dispose of the business; and that if the letter conferred new rights there was no consideration for such agreement. It is clear that there was no evidence of any agreement authorising seizure other than such agreement as can be spelt out of the terms of the letter. The letter reads as follows:-

> "With reference to the Letter of Hypothecation executed by us on 9th May, 1960, we hereby authorise you to take over our stocks (and then there were inserted the words 'Sewing Machine(s) and spares') as we regret that we are not in a position to reduce our overdraft as promised."

One of the witnesses for the bank stated that the object in having the letter signed was to confirm that the plaintiffs were unable to reduce their

In the Court of Appeal for Eastern Africa at Nairobi

No.32

Judgments of the Court of Appeal - 2nd September 1964

(i) The Honourable Mr. Justice Newbold

continued

overdraft. At no time did the bank seek to seize by virtue of any authority created by the letter and I think it quite clear that the letter does not seek to create any new rights but merely to confirm a position which created rights under the letter of hypothecation. This being so, if no rights existed under the letter of hypothecation then no rights are created by this letter. As Lord Esher M.R. said in Ex parte Parsons, 16 Q.B.D. 532 at page 542 in respect of a somewhat similar situation: "It is clear that this was done in exercise of the right supposed to have been conferred by the original agreement. Townsend was not aware that he could withstanding this supposed right, and he did not intend to give any new consent or enter into any new arrangement". I cannot for a moment believe that any of the plaintiffs would have consented to the bank seizing the stock-in-trade if they did not think that they were merely giving a formal and unnecessary consent to the exercise of a right which the bank had. If, in fact, it turns out that the bank did not have that right then the consent is nugatory and of no effect. If I am wrong in this view then in any event, quite apart from any question of the implied authority of one partner to sign on behalf of others, if the letter creates a right to seize, as opposed to recording an existing position, clearly it is an instrument within the Ordinance and, as it is not attested, it is, for reasons I have already stated, invalid inter partes. Finally, apart from such invalid letter, there is no other evidence of the consent, even if such evidence were admissible, on which the bank relies to escape liability. Accordingly, I am satisfied that the letter of the 6th October does not provide the bank with a good defence against any of the plaintiffs.

As regards the fourth issue, while there was some argument on the matter, it is not clear to me precisely how this issue is relevant as Mr. O'Donovan did not seek to justify the seizure on any grounds other than the letter of hypothecation and the consent. The issue may have arisen by reason of the decision of the trial judge. Assuming, but not deciding, that either at common law or in equity movables can be made security for a loan in a manner not affected by the provisions of the Ordinance and without the possession of the movables being given to the lender, I am quite satisfied that without express agreement such a transaction would not per se confer a right of seizure without legal proceedings.

In this case, apart from clause 9 of the letter of hypothecation, there was no evidence of any such agreement and any such evidence would in any event have been inadmissible. Accordingly, I am satisfied that there was no other authority which justified the seizure.

For these reasons I am of opinion that the appeal succeeds. I arrive at this opinion somewhat reluctantly, though it may well be said that if a lender wishes to acquire a right to seize a debtor's goods, a right not normally possessed by a creditor, then the lender should ensure that he takes all the necessary steps to acquire the right. I would set aside the judgment and decree and remit the case to the Supreme Court with a direction to decide the remaining issues on the basis that the issue of liability had been decided against the bank. As regards the costs in the Supreme Court I would direct that they be within the discretion of the trial judge on the final determination by him of all the issues. As regards the costs of the appeal (including the costs arising out of the cross-appeal), I would direct that these be paid by the bank and I would give a certificate for two counsel.

Dated at Nairobi this 2nd day of September,1964.

C. D. NEWBOLD
....
JUSTICE OF APPEAL

(ii) The Honourable Sir Trevor Gould V.P.

IN THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

Coram: Gould, V.P., Newbold and Duffus, JJ.A.

CIVIL APPEAL NO. 15 OF 1964

BETWEEN

DHARAMSHI VALLABHJI
KESHAVJI DHARAMSHI
BACHULAL DHARAMSHI
MORARJI DHARAMSHI
RAGHAVJI DHARAMSHI
.... APPELLANTS

AND

NATIONAL AND GRINDLAYS BANK LIMITED ...... RESPONDENT

In the Court of Appeal for Eastern Africa at Nairobi

No.32

Judgments of the Court of Appeal - 2nd September 1964

(ii) The Honourable Sir Trevor Gould V.P.

continued

(Appeal from a judgment and decree of the Supreme Court of Kenya at Nairobi (Wicks J.) dated 31st May, 1963

in

Civil Case No. 1516 of 1961).

JUDGMENT OF GOULD V.P.

I have had the advantage of reading the judgment of Newbold J.A. with whose reasoning and conclusions I agree; I wish to add only a few words of my own. 10

It is only with great reluctance that I am impelled to hold that a document between two parties, admittedly signed by one of them, cannot be relied upon by the other for lack of an attesting witness. That position may of course arise under the English Bills of Sale Acts in the light of the specific language used in section 9 of the Amendment Act of 1882. Section 15 of the Chattels Transfer Ordinance (Cap. 28 Laws of Kenya) requires attestation by one witness, who shall add his residence and occupation, 20 but leaves the result of failure to comply with that requirement to implication. However, agreeing, as I do, with the learned Justice of Appeal (and with two of the New Zealand cases mentioned by him) that the requirement of the section is mandatory, I am constrained to agree also that invalidity must follow if the requirement is not fulfilled, and there is nothing to exempt the parties from the completeness of that invalidity as there is where other sections of the Ordinance apply. 30

Having reached the conclusion that the letter of hypothecation is invalid as an "instrument" under the provisions of the Ordinance I do not find that the result of that invalidity can be avoided by any other approach to the instrument. In the New Zealand case of Regina v. Dibb Ido (1897) 15 N.Z.L.R. 591 it appears to have been held (under similar legislation) that an instrument by way of security purporting to transfer goods by way of mortgage was invalid as such for lack of an attesting witness but was effective at common 40 law to pass the property in the goods to the grantee. Even if that case is correctly decided (and I share the doubts on that point expressed by Miles J. in Dodhia v. National & Grindlays Bank Ltd. (Civil Case

914 of 1962) it does not apply here. The letter of hypothecation did not purport to transfer the property in the chattels and no such question arises; it purported only to create a security and was acted upon as such when the seizure was made, and it is in just that capacity that the Ordinance declares it invalid. Clause 9 of the letter of hypothecation which gave a right to the bank to take possession of the goods at any time (and was relied upon by the bank) gave a right to the bank to substitute another form of security for the letter of hypothecation, but in essence the power given by the clause is part of the security contained in the letter of hypothecation. Even if regarded as a separate right it would itself fall within the provisions of the Ordinance as a licence to take possession of chattels. I think that the essence of the whole matter is this - that to justify the seizure the bank relied upon the letter of hypothecation and nothing else, that such reliance was upon the document as creating a security and that as such it was invalid under the Ordinance.

I would add a word on the third issue mentioned by the learned Justice of Appeal - whether the letter of the 6th October, 1960, provided a defence. I agree with the learned Justice of Appeal that the letter created no new rights or no enforceable rights. Looked at only as evidence of a consent (and putting aside the question of whether it bound all the appellants) the letter appears to me to denote no more than acquiescence in the exercise of a right believed to exist. The evidence that the seizure of the "Sewing Machine & spares" was queried and those words inserted in the letter after a telephone call had been made to the bank for verification, indicates that the appellants were prepared to acquiesce only so far as they considered they were bound. That is no more than absence of opposition to the exercise of such rights as the bank might possess and appears to me to fall short of a true consent which would afford a defence in trespass.

In the result the appeal is allowed and there will be the orders proposed in the judgment of the learned Justice of Appeal.

Dated at Nairobi this 2nd day of September,1964.

T. J. GOULD
....
VICE PRESIDENT

In the Court of Appeal for Eastern Africa at Nairobi

No.32

Judgments of the Court of Appeal - 2nd September 1964

(iii) The Honourable Mr. Justice Duffus

IN THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

(Coram: Gould V.P. Newbold and Duffus, JJ.A.)

CIVIL APPEAL NO. 15 OF 1964

BETWEEN

DHARAMSHI VALLABHJI
KESHAVJI DHARAMSHI
BACHULAL DHARAMSHI .... APPELLANTS
MORARJI DHARAMSHI
RAGHAVJI DHARAMSHI

AND 10

NATIONAL AND GRINDLAYS BANK LIMITED ...... RESPONDENT

(Appeal from a judgment and decree of the Supreme Court of Kenya at Nairobi (Wicks J.) dated 31st May, 1963

in

Civil Case No. 1516 of 1961).

JUDGMENT OF DUFFUS J.A.

I agree with the judgments of Newbold J.A. and of Gould V.P. 20

I also have with reluctance arrived at the decision that the letters of hypothecation are invalid especially as it was, in my view, the duty of the borrower, here the plaintiffs/appellants to ensure that the document which they executed for the purpose of securing the loan from the bank was properly and lawfully executed. The provisions of section 15 of the Chattels Transfer Ordinance are in my opinion absolute and mandatory and the proper attestation of the execution of an instrument under that Ordinance 30 is essential to its validity. In this case there has been no attempt to carry out the provisions of the section and as the Ordinance clearly applies to instruments such as the letters of hypothecation in this case, it follows that the document is invalid.

The document, however, covers a transaction that is in itself lawful and its illegality would not taint any other collateral agreement: I believe that

In the Court of Appeal for Eastern Africa at Nairobi

No.32

Judgments of the Court of Appeal - 2nd September 1964

(iii) The Honourable Mr. Justice Duffus

continued

the learned trial judge had this in mind when he considered the effects of an oral agreement but as Gould V.P. points out in his judgment the bank relied on section 9 of the letters of hypothecation to justify the seizure and this was an invalid document.

Apart from their rights under the document counsel for the respondents also relied on the fact that the plaintiffs had by the letter of the 6th October (Exhibit C.6) expressly agreed to the seizure and therefore could not complain of an act to which they had consented. The question was argued as to whether two partners could in these circumstances bind the other three absent partners, but in my view there is no necessity to decide this as I agree with Newbold J.A. that the letter did not create any new right but only confirmed the rights which the parties believed already existed under the invalid letters of hypothecation. The letter specifically referred to the letters of hypothecation and in effect authorised a seizure under the terms of that document. I am of the view, therefore, that this letter would not justify the seizure by the bank as the document under which the seizure was in fact made by the bank was illegal and void.

I therefore agree that the bank will be liable in damages for the illegal seizure, and with the order set out in the judgment of Newbold J.A.

Dated at Nairobi this 2nd day of September, 1964.

W.A.H. DUFFUS
....
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

?
....
AG. ASSOCIATE REGISTRAR

In the Court of Appeal for Eastern Africa at Nairobi

No.33

Order of the Court of Appeal 2nd September 1964

No. 33

ORDER OF THE COURT OF APPEAL dated 2nd September, 1964

IN THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

CIVIL APPEAL NO. 15 OF 1964

Between

DHARAMSHI VALLABHJI
KESHAVJI DHARAMSHI
BACHULAL DHARAMSHI .... APPELLANTS
MORARJI DHARAMSHI
RAGHAVJI DHARAMSHI

10

and

NATIONAL AND GRINDLAYS BANK LIMITED .... RESPONDENT

(Appeal from the Judgment and Decree of Her Majesty's Supreme Court of Kenya at Nairobi (The Honourable Mr. Justice Wicks) dated the 31st May, 1963

in

Supreme Court Civil Case No. 1516 of 1961

Between

Dharamshi Vallabhji
Keshavji Dharamshi
Bachulal Dharamshi
Morarji Dharamshi
Raghavji Dharamshi trading as
"DHARAMSHI VALLABHJI & BROS."......... Plaintiffs

20

and

National and Grindlays Bank Limited .. Defendants).

In Court: On the 2nd day of September, 1964

Before the Honourable the Vice-President Sir Trevor Gould the Honourable Mr. Justice Newbold a Justice of Appeal and the Honourable Mr. Justice Duffus a Justice of Appeal.

O R D E R

THIS APPEAL and CROSS APPEAL coming on for hearing on the 29th, 30th and 31st days of July, 1964 AND UPON HEARING E.F.N. GRATIAEN, ESQUIRE of Her Majesty's Counsel, J.M. NAZARETH ESQUIRE of Her Majesty's Counsel, S.C. GAUTAMA ESQUIRE and AZIZ MOHAMED ESQUIRE of Counsel for the Appellants and B. O'DONOVAN ESQUIRE of Her Majesty's Counsel and SIR WILLIAM O'BRIEN LINDSAY

30

In the Court of Appeal for Eastern Africa at Nairobi

No.33

Order of the Court of Appeal 2nd September 1964 continued

of Counsel for the Respondent IT WAS ORDERED that this Appeal do stand for judgment and upon the same coming for judgment this day IT IS ORDERED:

1. THAT the Appeal be, and is hereby allowed;
2. THAT the Judgment and Decree of the Supreme Court be, and are hereby set aside;
3. THAT the case be and is hereby remitted to the Supreme Court with a direction to decide the remaining issues on the basis that the issue of liability had been decided against the Bank;
4. THAT the Respondent do pay to the Appellants the costs of this Appeal (including the costs arising out of the Cross-appeal);
5. THAT the costs in the Supreme Court be within the discretion of the trial Judge on the final determination by him of all the issues;
6. THAT a Certificate for two Counsel be, and is hereby granted.

GIVEN under my hand and the seal of the Court at Nairobi this 2nd day of September, 1964.

Sd. M. D. DESAI

AG. REGISTRAR,
COURT OF APPEAL FOR EASTERN AFRICA

ISSUED on this 27th day of October 1964.

S E A L

I certify this is a true copy of the original

(Signed)

28.10.64. Ag. Registrar
Court of Appeal for
Eastern Africa

In the Court of Appeal for Eastern Africa at Nairobi

No.34

Order granting conditional leave to appeal to the Judicial Committee - 26th October 1964

No. 34

ORDER GRANTING CONDITIONAL LEAVE TO APPEAL TO THE JUDICIAL COMMITTEE dated 26th October 1964

IN THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

CIVIL APPLICATION NO. 4 OF 1964

In the Matter of an Intended Appeal to the Judicial Committee

BETWEEN

NATIONAL AND GRINDLAYS BANK LTD. .... Applicant 10

AND

DHARAMSHI VALLABHJI, KESHAVJI DHARAMSHI, BACHULAL DHARAMSHI, MORARJI DHARAMSHI, RAGHAVJI DHARAMSHI t/a "DHARAMSHI VALLABHJI & BROS." .... Respondents

(Application for conditional leave to appeal to the Judicial Committee from a judgment and order of the Court of Appeal for Eastern Africa at Nairobi (Gould V.P., Newbold J.A. and Duffus J.A.) dated the 2nd Sept., 1964 in 20

Civil Appeal No. 15 of 1964

Between

Dharamshi Vallabhji & 4 ors. t/a "Dharamshi Vallabhji & Bros." .... Appellants (Orig.Plaintiffs)

And

National and Grindlays Bank Ltd. .... Respondent (Orig.Defendant)

In Court this 26th day of October, 1964 30

Before the Honourable the President (Sir Samuel Quashie-Idun) the Honourable Mr. Justice Newbold, a Justice of Appeal, and the Honourable Mr. Justice Duffus, a Justice of Appeal

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O R D E R

UPON application made to this Court by Counsel

In the Court of Appeal for Eastern Africa at Nairobi

No.34

Order granting conditional leave to appeal to the Judicial Committee - 26th October 1964 continued

for the above-named Applicant on the 17th day of September, 1964 for conditional leave to appeal to the Judicial Committee as a matter of right under S.181(2)(a) of the Kenya Constitution and for a stay of execution of this Court's judgment above-mentioned in so far as it ordered the Applicant to pay to the Respondents the costs of the appeal and cross-appeal pending the appeal to the Judicial Committee AND UPON HEARING Sir William Lindsay of Counsel for the
10 Applicant and J. M. Nazareth Esq., of Her Majesty's Counsel and Aziz Mohamed Esq., of Counsel for the Respondents It IS ORDERED that the Applicant do have conditional leave to appeal as a matter of right to the Judicial Committee from the judgment above-mentioned subject to the following conditions and that the Applicant do deposit into Court the taxed costs of the appeal and cross-appeal within fourteen days of taxation and that the Respondents be only permitted to withdraw such costs on their
20 giving security to the satisfaction of the Registrar for the reimbursement to the Applicant of the amount withdrawn in the event of the appeal to the Judicial Committee succeeding:

1. That the Applicant do within sixty (60) days from the date hereof enter into good and sufficient security to the satisfaction of the Registrar in the sum of Shs.10,000 (ten thousand shillings),

(a) for the due prosecution of the appeal;

30 (b) for payment of all costs becoming payable to the Respondents, in the event of -

(i) the Applicant not obtaining an Order granting it final leave to appeal, or

(ii) the appeal being dismissed for non-prosecution, or

(iii) the Judicial Committee ordering the Applicant to pay the Respondents' costs of the appeal.

2. That the Applicant shall apply as soon as prac-
40 ticable to the Registrar of this Court, for an appointment to settle the record and the Registrar shall thereupon settle the record with all convenient speed, and that the said record shall be prepared and shall be certified as ready within sixty (60) days from the date hereof;

In the Court of Appeal for Eastern Africa at Nairobi

No.34

Order granting conditional leave to appeal to the Judicial Committee - 26th October 1964 continued

3. That the Registrar, when settling the record, shall state whether the Applicant or the Registrar shall prepare the record, and if the Registrar undertakes to prepare the same he shall do so accordingly, or if having so undertaken, he finds he cannot do or complete it, he shall pass on the same to the Applicant in such time as not to prejudice the Applicant in the matter of the preparation of the record within thirty (30) days hereof; 10

4. That if the record is prepared by the Applicant the Registrar of this Court shall at the time of the settling of the record state the minimum time required by him for examination and verification of the record, and shall later examine and verify the same so as not to prejudice the Applicant in the matter of the preparation of the record within the said sixty (60) days;

5. That the Registrar of this Court shall certify (if such be the case) that the record (other than the 20 part of the record pertaining to final leave) is or was ready within the said period of sixty (60) days;

6. That the Applicant shall have liberty to apply for extension of the times aforesaid for just cause;

7. That the Applicant shall lodge its application for final leave to appeal within fourteen days from the date of the Registrar's certificate above-mentioned.

8. That the Applicant, if so required by the Registrar of this Court, shall engage to the satisfaction of the said Registrar, to pay for a typewritten 30 copy of the record (if prepared by the Registrar) or for its verification by the Registrar, and for the cost of postage payable on transmission of the typewritten copy of the record officially to England and shall, if so required by the Registrar, deposit in Court the estimated amount of such charges.

AND IT IS FURTHER ORDERED that the costs of and incidental to this Application be costs in the intended appeal. 40

DATED at NAIROBI this 26th day of October, 1964.

ACTING REGISTRAR
COURT OF APPEAL FOR EASTERN AFRICA

ISSUED at NAIROBI this 2nd day of November, 1964

I certify that this is a true copy of the original.

Ag. Associate Registrar.

No. 35

ORDER GRANTING FINAL LEAVE TO APPEAL TO THE JUDICIAL COMMITTEE dated 27th November 1964

IN THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

CIVIL APPLICATION NO. 4 OF 1964

In the Matter of an intended Appeal
to the Judicial Committee

BETWEEN

NATIONAL AND GRINDLAYS BANK LIMITED .... APPLICANT

10 AND

DHARAMSHI VALLABHJI, KESHAVJI DHARAMSHI
BACHULAL DHARAMSHI, MORARJI DHARAMSHI
RAGHAVJI DHARAMSHI trading as "DHARAMSHI
VALLABHJI & BROS." .... RESPONDENTS

(Application for final leave to appeal to the Judicial Committee from a judgment and order of the Court of Appeal for Eastern Africa at Nairobi (Gould V.P., Newbold J.A. and Duffus, J.A.) dated the
20 2nd September, 1964, in

Civil Appeal No.15 of 1964

Between

Dharamshi Vallabhji & 4 others trading as
"Dharamshi Vallabhji & Bros."....... Appellants
(Orig.Plaintiffs)

and

National and Grindlays Bank Limited..Respondent
(Orig. Defendant).

In Chambers: this 27th day of November,1964

30 Before the Honourable Mr. Justice Spry, a Justice of Appeal

In the Court of Appeal for Eastern Africa at Nairobi

No.35

Order granting final leave to appeal to the Judicial Committee 27th November 1964 continued

O R D E R

UPON application made to this Court by Counsel for the above-named Applicant on the 25th day of November, 1964, for final leave to appeal to the Judicial Committee AND UPON HEARING Jayant Nichhabhai Desai, Esq., of Counsel for the Applicant and Aziz Mohamed, Esq., of Counsel for the Respondent IT IS ORDERED:

1. THAT the applicant do have final leave to appeal to the Judicial Committee, the conditions imposed by this Court by its order dat4d 26th October, 1964, having been duly complied with by the Applicant; 10

2. THAT the Registrar do, within seven days from the date of this order, dispatch the Record including this order to England by air-mail at the expense of the applicant;

3. THAT the costs of the application be costs in the said Appeal, and be paid to the Respondent in the event of the appeal being dismissed for want of prosecution. 20

GIVEN under my hand and the Seal of the Court at Nairobi this 27th day of November, 1964.

M. D. DESAI

ACTING REGISTRAR,
COURT OF APPEAL FOR EASTERN AFRICA

ISSUED at Nairobi this 28th day of November, 1964.

I certify that this is a true copy of the original

(Signed)

28.Xi-1964. Ag. Registrar 30
Court of Appeal for Eastern Africa

E X H I B I T S

Exhibits

EXHIBIT R

R.

DEFENDANT'S NOTES THAT THE STANDARD BANK OF SOUTH AFRICA LOANED Shs. 95,000 ON THE NGARA ROAD PLOT TO THE PLAINTIFFS

Defendant's Notes that The Standard Bank of South Africa loaned Shs.95,000 on the Ngara Road Plot to the Plaintiffs

Piece goods, Cotton, Rayon,
Woollen.
Box 5816 Nbi

10 Dharamshi Valabhji & Bros.

O D Shs 140000/ against property valued
at Shs 150000 /- and Stocks about
Shs 200000/-

Plot	Shs	75000/
Bldg		75000/-
		150000/-

O/D
at SBSA
about 95,000/-

Agreed in
principle
? 1960

20

EXHIBIT K

K.

LETTER PLAINTIFFS TO DEFENDANT DATED 4TH APRIL 1960

Letter Plaintiffs to Defendant 4th April 1960

PARTNERSHIP ACCOUNT

4th April 1960

The Manager
National and Grindlays Bank Limited.
NAIROBI

Dear Sir,

We the undersigned Dharamshi Vallabhji,
30 Keshavji Dharamshi, Bachulal Dharamshi, Morarji Dharamshi & Raghavji Dharamshi carrying on the business of Dealers in Cotton & Woollen piece goods in co-partnership under the name or style of Dharamshi Valabhji & Bros. request you to open

Exhibits

K.

Letter Plaintiffs to Defendant 4th April 1960 Continued

a Current Account in the name of the firm entitled Dharamshi Valabhji & Bros account.

Cheques drawn on the account will be signed by any one of the partners.

We hereby agree to conform to the rules governing Current Accounts at the National and Grindlays Bank Limited, Nairobi.

Please send us a statement of our account monthly/quarterly and supply us with a cheque book of 50 forms large. 10

All correspondence relating to the account is to be sent to:-

Name Dharamshi Valabhji & Bros.

Address. P.O. Box 5816,
Nairobi.

Yours faithfully,

(Sgd.) Dharamshi Vallabhji (in Gujerati)
(Sgd.) K.D. Vaghela
(Sgd.) B.D. Vaghela
(Sgd.) M.D. Vaghela 20
(Sgd.) Raghavji

Introduced by V.J. Amin (Broker)

Stamp
NATIONAL AND GRINDLAYS
BANK LIMITED, NAIROBI

Officer's Initial

Full Names

Mr.Dharamshi Valabhji		will sign (signature in Gujerati)
Mr.Keshavji Dharamshi		will sign K.D. Vaghela
Mr.Bachulal	do.	will sign B.D. Vaghela
Mr.Morarji	do.	will sign M.D. Vaghela
Mr.Raghavji	do.	will sign Raghavji

30

Exhibits

M.

Guarantee,
23rd April
1960

EXHIBIT M

GUARANTEE DATED 23RD APRIL 1960

TO NATIONAL AND GRINDLAYS BANK LIMITED

IN CONSIDERATION of your agreeing at the request of the Undersigned not to require immediate payment of such of the sums mentioned below as are now due or unpaid and in consideration of any further sums which you may hereafter advance or permit to become due the Undersigned Dharamshi Valabhji, Keshavji
10 Dharamshi, Bachulal Dharamshi, Morarji Dharamshi and Raghavji Dharamshi hereby guarantee to you the payment to you on demand of every sum of money which may be now or may hereafter from time to time become due or owing to you anywhere from or by Dharamshi Valabhji & Bros. (hereinafter referred to as "the Debtor" which expression shall where the Debtor is a firm include the person or persons from time to time carrying on business in the name of the said firm) or from or by the Debtor jointly with
20 any other or others in partnership or otherwise including the usual banking charges.

This Guarantee is to be a continuing security for the whole amount now due or owing to you or which may hereafter from time to time until the expiration of the notice hereinafter mentioned become due or owing to you by the Debtor and remain unpaid but nevertheless the total amount recoverable hereon shall not exceed shillings one hundred & forty thousand together with interest thereon at
30 your then current rate from the date of your demand until payment.

This Guarantee is to be in addition and without prejudice to any other securities or guarantees which you may now or hereafter hold from or on account of the Debtor and is to be binding on the Undersigned as a continuing security notwithstanding any settlement of account or the Undersigned or any of them (if more than one) being under disability or dying until the expiration of one month from the
40 time when you shall receive notice in writing to the contrary from the Undersigned or the personal representatives of the Undersigned.

Exhibits

M.

Guarantee,
23rd April
1960
Continued

This Guarantee is to be binding as a continuing security on the others or other of the Undersigned (if more than one) notwithstanding that it may have ceased to be so binding on any one or more of them by reason of any such notice as aforesaid to the contrary or disability bankruptcy release or otherwise howsoever.

You are to be at liberty in the event of this Guarantee ceasing from any cause whatsoever to be binding as a continuing security on the Undersigned or any of them (if more than one) to open a fresh account or accounts with the Debtor and no moneys paid from time to time into any such account or accounts by or on behalf or to the credit of the Debtor shall on a settlement of any claim under this Guarantee be appropriated towards or have the effect of payment of any part of the moneys due from or owing by the Debtor at the time of this Guarantee ceasing to be so binding as aforesaid unless the person paying in such moneys shall at the time direct you in writing specially to appropriate the same to that purpose.

Any demand under this Guarantee shall be considered as having been duly made if signed by any one of your managers or other authorised officials and sent by registered post addressed to the Undersigned at the address above given or at the last known place of abode or business within East Africa of the Undersigned.

It is hereby agreed that an admission or acknowledgement in writing by the Debtor or by any person authorised by the Debtor or by any person authorised to draw on the account of the Debtor or a certificate signed by any of your managers or other authorised officials of the amount of the indebtedness of the Debtor to you or otherwise shall be binding and conclusive on the Undersigned in all Courts of Law and elsewhere.

You are to be at liberty without thereby affecting your rights hereunder at any time or times until you shall have received the whole amount due or owing to you by the Debtor or so

long as any part thereof shall remain unpaid by the Debtor to you to determine or vary the amount of any credit to the Debtor to vary exchange renew modify or release any securities or guarantees held or to be held by you from or on account of the Debtor or in respect of the moneys hereby guaranteed to renew bills or promissory notes in any manner and to compound with give time for payment to accept compositions from and make any other arrangements with the Debtor or to from or with the Undersigned or any of them (if more than one) or any obligants on guarantees bills notes or securities held or to be held by you from or on account of the Debtor or in respect of the moneys hereby guaranteed. And in case of bankruptcy arrangement or composition with creditors or liquidation any dividends you may receive from the estate of the Debtor or others shall not prejudice your right to recover from the Undersigned or any of them (if more than one) to the full extent of this Guarantee any sum which after the receipt of such dividends may remain unpaid to you by the Debtor.

Specifically and without prejudice to any other provision herein contained you are to be at liberty, in case of there being more than one Undersigned, to release any one or more of the Undersigned from liability hereunder without prejudicing or affecting your rights in any way against the other Undersigned.

Until you have been repaid all moneys to which this Guarantee shall extend the Undersigned will take no step to enforce any right or claim against the Debtor for any reimbursement in respect of moneys paid by the Undersigned to you hereunder.

If any payment made to you from any source in respect of moneys to which this Guarantee shall extend is subsequently recovered from you under or (as to which a certificate signed by any of your managers or other authorised officials shall be binding and conclusive on the Undersigned as aforesaid) repaid by you in contemplation of the provisions of any enactment relating to fraudulent preference then unless you shall be held by a court of competent jurisdiction to have been party to the fraud such payment shall not

reduce or extinguish any liability of the undersigned hereunder and no release given to the Undersigned by you in reliance in whole or part upon such a payment shall constitute a waiver of or in any way prejudice your rights against the Undersigned hereunder. And in any such event you shall be at liberty to do and the Undersigned will at your request do and procure to be done all such acts matters and things as may in your opinion be requisite or expedient for the protection of such rights. 10

Where the Debtor is a Company or a Society or a body or group of persons whether (in any of such cases) incorporated or unincorporate and also where at any time before or during the continuance of this Guarantee the Debtor was or is an infant or under disability then as between the Undersigned and you this Guarantee shall be taken to include and shall extend to all moneys heretofore or hereafter from time to 20 time lent paid or advanced by you in any way to for or on account of or apparently for the purposes of the Debtor at the request or instance of or by honouring the cheques drafts bills or notes or obeying the order or directions of the Debtor or any of the Directors or Managers or Officials or persons appearing to be or acting as Directors or Managers or Officials for the time being of the Debtor and you shall not in any way be 30 prejudiced or affected by the want of borrowing powers on the part of the Debtor or of the Directors or Managers or Officials of the Debtor for a particular purpose or otherwise or by any excess or informality in the exercise of any such powers or by any failure of or irregularity defect or informality in any security given by or on behalf of the Debtor or by the fact that for any reason you shall have no right or less than an absolute right to 40 recover payment of such moneys from the Debtor and all moneys so lent paid or advanced as aforesaid shall be held and taken to be money due and owing to you from the Debtor for the purposes of this Guarantee whether the same shall be recoverable by you from the Debtor or not and if and so far as such moneys shall not be so recoverable the Undersigned shall be liable

Exhibits

M.

Guarantee, 23rd April 1960 Continued

to you therefor in the capacity of principal Debtor and this Guarantee shall (subject to the limitation as to the total amount recoverable hereinbefore contained) be an indemnity to you by the Undersigned and be construed accordingly the consideration for the giving of which shall be the keeping of a banking account with the Debtor and the permitting such account to be overdrawn or the lending payment or advancement of moneys to for or on account
10 of or apparently for the purposes of the Debtor as the case may require.

Where it is necessary in order to meet the circumstances of the case words used herein importing the singular number only shall include the plural and vice versa and where this Guarantee is signed by more than one the expression "the Undersigned" herein used shall include each and every of them and everything herein contained shall be binding on the Undersigned respectively and their
20 respective personal representatives estates and effects and the obligations undertaken in this Guarantee shall have effect as joint obligations by the Undersigned and every combination of them and as several and distinct obligations by each of them.

Dated this 23rd day of April One thousand nine hundred and sixty

Signed by the above-named in the presence of Witness 30 Address Occupation (Sgd.) ? National and Grindlays Bank Ltd Nairobi Bank Official	(Sgd.) Dharamshi Vallabhji (in Gujerati) (Sgd.) K.D.Vaghela (Sgd.) B.D.Vaghela (Sgd.) M.D.Vaghela (Sgd.) Raghavji
Signed by the above-named Witness to all signatures	

Exhibits

N.

Letter of Deposit 23rd April 1960

EXHIBIT N

LETTER OF DEPOSIT
DATED 23 APRIL 1960

NAIROBI, 23 April 1960

The Manager,
National & Grindlays Bank Ltd.,
NAIROBI.

Dear Sir,

I/We hereby confirm that the documents of title herein described, have been deposited with your Bank by me/us with intention to create, upon the Bank's usual terms, an Equitable Mortgage by way of continuing security upon all the property comprised therein or to which the same or any of them may relate in order to secure the payment of all sums due or which at any time and in any manner become due by me/us to the Bank under or in pursuance of a guarantee dated the 23rd day of April 1960 entered into by me/us with the Bank, a copy of which is attached in respect of which guarantee Dharamshi Valabhji & Bros is/are the principal debtor/s.

It is hereby agreed that the maximum sum/s to be secured by this Mortgage is Shillings one hundred & forty thousand.

The undermentioned documents of title have been deposited by me/us with you as aforesaid

Title Deeds of Plot L.R.No.209/2490/10, .0861 of an acre, Nairobi Municipality.

Yours faithfully,

(Sgd.) Dharamshi Vallabhji
(in Gujerati)
(Sgd.) K.D. Vaghela
(Sgd.) B.D. Vaghela
(Sgd.) M.D. Vaghela
(Sgd.) Raghavji

EXHIBIT L.1

Exhibits

L.1

Equitable Charge for Shs. 140,000 28th April 1960

EQUITABLE CHARGE FOR Shs.140,000 DATED 28TH APRIL 1960

COLONY AND PROTECTORATE OF KENYA

THE REGISTRATION OF TITLES ORDINANCE
(Chapter 160 of the Revised Edition)

MEMORANDUM OF CHARGE BY DEPOSIT OF TITLE
(Form U)

NAIROBI/MOMBASA

10 Document of Title No(s). IR.6363 LR.209/2490/10 was/were deposited by me/us with National & Grindlays Bank Ltd. by way of charge on the 28th day of April 1960.

The Chargor and the Chargee hereby certify in accordance with the provisions of the Stamp Duty Ordinance, 1959, that the amount hereby secured is Shillings one hundred & forty thousand (Shs.140,000-) /uncertain.

Dated this 28th day of April 1960.

20 Signed in the presence of - Signature of Chargor -

(Sgd.) ?
Advocate Nairobi

((Sgd.) Dharamshi Vallabhji
((in Gujerati)
((Sgd.) K.D. Vaghela
((Sgd.) B.D. Vaghela
((Sgd.) M.D. Vaghela
((Sgd.) Raghavji

Received the above-quoted Document of Title:-

Signed in the presence of -
(Sgd.) A.Cawalba
30 Advocate
Nairobi

Signature of Chargee -
for NATIONAL AND
GRINDLAYS BANK LTD.
(Sgd.) ?
Manager Nairobi

LAND TITLES REGISTRY - COLONY OF KENYA
INLAND DISTRICT, NAIROBI - REGISTERED No.I.R.6363/13
Presented 27.5.1960 (Sgd.) ?
Time 3.15 p.m. Registrar of Titles.

Exhibits

L.2

Further Equitable Charge for Shs.150,000

EXHIBIT L.2

FURTHER EQUITABLE CHARGE
FOR Shs. 150,000

(Stamp)
KENYA REVENUE
TEN
SHILLINGS
10

The Chargor and Chargee hereby certify that the amount hereby secured has been increased from Sh.140,000/-. to Sh.150,000/-. 10

Chargee	Chargor
For NATIONAL AND GRINDLAYS BANK LTD.	(Sgd.) Keshavji Dharamshi
	(Sgd.) Bachulal Dharamshi
(Sgd.) ?	(Sgd.) Dharamshi Vallabhji (in Gujerati)
	(Sgd.) Morarji Dharamshi
Manager Nairobi	(Sgd.) Raghavji

Identification No.2

Letter of Hypothecation 9th May 1960

EXHIBIT I.2

IDENTIFICATION NO.2 20

LETTER OF HYPOTHECATION
DATED 9TH MAY 1960

F 101a

HYPOTHECATION OF GOODS TO SECURE
CASH CREDIT OR OVERDRAFT

To 9.5.1960
THE MANAGER,
NAIROBI

Sir,

In consideration of the National and Grindlays Bank Limited (hereinafter called "the Bank") allowing me us the undersigned an overdraft in current account up to Shillings One hundred & forty thousand only I/we hereby hypothecate to the Bank as a continuing security for payment of the amount from time to 30

Exhibits

Identification No.2

Letter of Hypothecation 9th May 1960 Continued

time and for the time being owing by me/us in respect of the said overdraft all goods of the description appended hereto in my/our ownership or disposition which are now in or shall from time to time hereafter be brought into the shop and godown belonging to or in the occupation of me/us at Indian Bazaar Nairobi and elsewhere wherever situate and/or in transit.

And I/we declare that all goods of the description appended hereto now in the said
10 are free from any previous hypothecation mortgage or charge and I/we undertake not to create hereafter any hypothecation mortgage or charge thereof or thereon ranking in priority to or pari passu with this security.

And I/we agree and undertake that

(1) The account in respect of the said overdraft shall be debited with interest at per cent per annum or at such other rate as shall from time to time be agreed upon with monthly
20 rests or as arranged with the Bank from time to time and with the usual banking charges;

(2) The balance for the time being owing on the said account with interest thereon at the rate aforesaid shall be paid by me/us to the Bank on demand;

(3) During the continuance of this security I/we will keep in the said shop and godown goods belonging exclusively to me/us of the description appended hereto and of a total value equal to the
30 amount for the time being owing in respect of the said overdraft plus a margin of per cent;

(4) I/We will furnish to the Bank at the close of business hours on the last day of each month, and at such other times as the Bank may require, full and correct particulars of all goods of the description appended hereto in my/our ownership or disposition then in the said shop and godown and of the then market values thereof;

(5) I/We will keep the goods hereby hypothecated
40 separate and apart from all other goods in my/our possession and will keep the same from being distrained for rent, rates or taxes, or taken or attached under any execution;

Exhibits

Identification No.2

Letter of Hypothecation 9th May 1960 Continued

(6) I/We will keep the goods hereby hypothecated in good condition and insured against fire and other risks as may be required by the Bank to their full value and will on demand deposit with the Bank the policy or policies of such insurance duly assigned to the Bank if required and will on receipt of any moneys thereunder forthwith pay the same to the Bank to be credited to the said account;

(7) Unless otherwise directed by the Bank, I/we shall be at liberty in the ordinary course of business to sell all or any of the goods hereby hypothecated, but I/we will upon receipt of the proceeds of every sale of the said goods forthwith pay the same to the Bank to be credited to the said account;

(8) The Bank or any person authorised by the Bank may at any time or times enter the said shop and godown and inspect and take particulars of any goods therein;

(9) The Bank or any person authorised by the Bank may at any time or times, and whether the power of sale hereinafter contained shall have become exercisable or not, enter the said shop and godown or any place where the same may be and take and retain possession of the goods hereby hypothecated or any of them and of all or any promissory notes or bazar chits for the time being held by me/us for the proceeds of any of the said goods theretofore sold by me/us;

(10) If I/we shall fail to pay on demand the balance for the time being owing on the said account or any interest thereon or if there shall be a breach of any of the agreements on my/our part herein contained, the Bank may at any time thereafter sell or realise in such manner as the Bank may think fit and without responsibility for any loss in connection therewith, the goods hereby hypothecated or any of them and any promissory notes or bazar chits for the proceeds of any of the said goods sold by me/us, and apply the net proceeds of sale or realisation thereof in or towards satisfaction of the balance owing on the said account with

interest thereon and the amount of all costs charges and expenses incurred by the Bank in taking possession of, keeping, insuring, selling or attempting to sell or realise the same; and no previous notice to me/us of any such sale or realisation shall be necessary and I/we hereby waive any such notice; and I/we will accept the Bank's account as sufficient evidence of the amount produced by any such sale or realisation and of the amount of such costs, charges and expenses as aforesaid; and I/we will sign all such documents, furnish all such information and do all such acts and things as may be required by the Bank for enabling or facilitating any such sale or realisation;

10

(11) The Bank shall have a lien on all goods, promissory notes and bazar chits of which possession shall be taken by the Bank and the proceeds of any sale or realisation thereof for all moneys for the time being owing by me/us to the Bank on any other account and whether severally or jointly with any other person or persons.

20

DESCRIPTION OF GOODS

Entire stock in trade consisting of piecegoods, ready made clothes, fancy goods, tailoring materials, sewing machines and their spare parts, trade fittings and fixtures and goods of similar nature that forms part of our stock whilst stored and or lying in shops and godowns situate on plot No.467 Indian Bazaar Nairobi and elsewhere wherever situate and/or in transit.

30

For and on behalf of:-
DHARAMSHI VALABHJI & BROS.

(Sgd.) K.D. Vaghela Partner
(Sgd.) Dharamshi Vallabhji (in Gujerati) Partner
(Sgd.) B.D. Vaghela Partner
(Sgd.) M.D. Vaghela Partner
(Sgd.) Raghavji Partner

40

Inland Revenue Stamp

NATIONAL AND GRINDLAYS
BANK LTD. NAIROBI

Exhibits

C.1

Letter Defendant to Plaintiff 13th May 1960

EXHIBIT C.1

LETTER DEFENDANT TO PLAINTIFFS DATED 13TH MAY 1960

NATIONAL AND GRINDLAYS BANK LIMITED
Government Road,
NAIROBI.

13th May, 1960.

Messrs. Dharamshi Valabhji & Bros,
P.O.Box 5816,
Nairobi. 10

Dear Sirs,

With reference to your call on us, we confirm having established an overdraft facility in your account with us to the extent of Shs. 140,000/- until 30th April, 1961.

As security for the overdraft we have received the Title Deeds of plot L.R.No: 209/2490/10, from the Standard Bank of South Africa Ltd. We also hold a Letter of Hypothecation over your stocks. 20

We are registering the Equitable Mortgage in our favour and have debited your account with Shs. 247/- being the cost of stamping and registration of Memorandum of Charge and the Discharge by Standard Bank of South Africa Ltd., made up as follows:-

Stamp Duty on Memo of Charge....Shs.	144-
Registration fee............... ..	20-
Our charges.....................	14-
Stamp duty on Discharge.........	59-
Registration fee................	10-
Shs.	247-.

30

Interest will be charged at the rate of 6½ % per annum with monthly rests.

Yours faithfully.

(sd)??????????
SUB-MANAGER.

WW.

EXHIBIT C.2

LETTER DEFENDANT TO PLAINTIFFS
DATED 17TH JUNE 1960

Exhibits

C.2

Letter,
Defendant to
Plaintiffs,
17th June
1960

NATIONAL AND GRINDLAYS BANK LIMITED,
GOVERNMENT ROAD.

17th June, 1960.

Messrs. Dharamshi Valabhaji & Bros.,
P.O. Box 5816,
Nairobi.

10 Dear Sirs,

We have to advise that after paying your cheque No. TE 029958, favouring Barclays Bank (D.C.O.), for Shs.3,000 your account as at the close of business yesterday was overdrawn to the extent of Shs.142,978/13, i.e. Shs.2978/13 in excess of the limit. We shall be glad, therefore, if you will adjust the account at your early convenience and in future please work within the authorised limit.

20 Yours faithfully,

SUB-MANAGER.

Exhibits

C.3

Letter, Defendant to Plaintiffs, 28th July 1960

EXHIBIT C.3

LETTER DEFENDANT TO PLAINTIFFS DATED 28TH JULY 1960

NATIONAL AND GRINDLAYS BANK LIMITED,
GOVERNMENT ROAD.

28th July, 1960.

Messrs. Dharamshi Valabhji & Bros.,
P.O. Box 5816,
Nairobi.

Dear Sir, 10

We have to advise that your account as at the close of business yesterday was over-drawn to the extent of Shs. 141,862/51, i.e. Shs. 1,862/51 in excess of the limit, and we shall be glad if you will send us a remittance to adjust it.

Yours faithfully,

SUB-MANAGER.

C.4

Letter, Defendant to Plaintiffs, 12th August 1960

EXHIBIT C.4

LETTER DEFENDANT TO PLAINTIFFS DATED 12TH AUGUST 1960 20

NATIONAL AND GRINDLAYS BANK LIMITED,
GOVERNMENT ROAD.

12th August, 1960.

Messrs. Dharamshi Vallabhji & Bros.,
P.O. Box 5816,
Nairobi.

Dear Sirs,

We have to advise that your account as at the close of business yesterday was over- 30 drawn to the extent of Shs. 142,013-, i.e. Shs. 2,013 in excess of the limit, and we shall be glad if you will send us a remittance to adjust it at your early convenience.

Yours faithfully,

SUB-MANAGER.

Exhibits

G.1

Letter of Hypothecation, 6th October 1960

EXHIBIT G.1

LETTER OF HYPOTHECATION DATED 6TH OCTOBER 1960

NAIROBI

6.10.1960

To - The Manager,
National and Grindlays Bank Limited,
N A I R O B I.

Sir,

10 I/We, the undersigned, refer to the letter of hypothecation dated the 9th day of May 1960 granted by me/us to the National and Grindlays Bank Ltd., (hereinafter called 'the Bank') as a continuing security for an overdraft in the current account of up to Shs.140,000-. (Shillings One hundred and forty thousand) In consideration of the Bank at my/our request increasing the limit of the said overdraft by a further Shs.10,000-. (Shillings Ten thousand) in all,
20 I/We hereby declare and agree that the goods hypothecated to the Bank by the said letter of hypothecation shall henceforth be a continuing security for and be charged with the amount from time to time and for the time being due in respect of the said overdraft up to the said new limit, and that the said letter of hypothecation shall henceforth be read and take effect in all respects as if the limit of the said overdraft stated therein were the said new limit of
30 Shs. 150,000- (Shillings One hundred and fifty thousand).

Yours faithfully,

For and on behalf of:-
(Rubber Stamp) DHARAMSHI VALABHJI & BROS.

(Sgd.) Dharamshi Vallabhji
(in Gujerati)

Inland Revenue Stamp
National and Grindlays Bank Ltd.
40 Nairobi.

(Sgd.) K.D. Vaghela
(Sgd.) B.D. Vaghela
(Sgd.) M.D. Vaghela
(Sgd.) Ranghavji

Exhibits

G.2

Guarantee,
6th October,
1960

EXHIBIT G.2

GUARANTEE DATED 6TH OCTOBER 1960

TO NATIONAL AND GRINDLAYS BANK LIMITED

IN CONSIDERATION of your agreeing at the request of the Undersigned not to require immediate payment of the amounts mentioned below as are now due or unpaid and in consideration of any further sums which you may hereafter advance or permit to become due the Undersigned Dharamshi Valabhji, Keshavji Dharamshi, Bachulal Dharamshi, Morarji Dharamshi and Raghavji Dharamshi hereby guarantee to you the payment to you on demand of every sum of money which may be now or may hereafter from time to time become due or owing to you anywhere from or by DHARAMSHI VALABHJI & BROS. (hereinafter referred to as "the Debtor" which expression shall where the Debtor is a firm include the person or persons from time to time carrying on business in the name of the said firm) or from or by the Debtor jointly with any other or others in partnership or otherwise including the usual banking charges.

10

20

This Guarantee is to be a continuing security for the whole amount now due or owing to you or which may hereafter from time to time until the expiration of the notice hereinafter mentioned become due or owing to you by the Debtor and remain unpaid but nevertheless the total amount recoverable hereon shall not exceed Shillings One hundred and fifty thousand (Sh.150,000-) together with interest thereon at your then current rate from the date of your demand until payment.

30

This Guarantee is to be in addition and without prejudice to any other securities or guarantees which you may now or hereafter hold from or on account of the Debtor and is to be binding on the Undersigned as a continuing security notwithstanding any settlement of account or the

40

Exhibits

G.2

Guarantee, 6th October, 1960 Continued

Undersigned or any of them (if more than one) being under disability or dying until the expiration of one month from the time when you shall receive notice in writing to the contrary from the Undersigned or the personal representatives of the Undersigned.

This Guarantee is to be binding as a continuing security on the others or other of the Undersigned (if more than one) notwithstanding
10 that it may have ceased to be so binding on any one or more of them by reason of any such notice as aforesaid to the contrary or disability bankruptcy release or otherwise howsoever.

You are to be at liberty in the event of this Guarantee ceasing from any cause whatsoever to be binding as a continuing security on the Undersigned or any of them (if more than one) to open a fresh account or accounts with the Debtor and no moneys paid from time to time into any such
20 account or accounts by or on behalf or to the credit of the Debtor shall on a settlement of any claim under this Guarantee be appropriated towards or have the effect of payment of any part of the moneys due from or owing by the Debtor at the time of this Guarantee ceasing to be so binding as aforesaid unless the person paying in such moneys shall at the time direct you in writing specially to appropriate the same to that purpose.

Any demand under this Guarantee shall be
30 considered as having been duly made if signed by any one of your managers or other authorised officials and sent by registered post addressed to the Undersigned at the address above given or at the last known place of abode or business within East Africa of the Undersigned.

It is hereby agreed that an admission or acknowledgement in writing by the Debtor or by any person authorised by the Debtor or by any person authorised to draw on the account of the
40 Debtor or a certificate signed by any of your managers or other authorised officials of the amount of the indebtedness of the Debtor to you or otherwise shall be binding and conclusive on the Undersigned in all Courts of Law and elsewhere.

Exhibits

G.2

Guarantee,
6th October
1960
Continued

You are to be at liberty without thereby affecting your rights hereunder at any time or times until you shall have received the whole amount due or owing to you by the Debtor or so long as any part thereof shall remain unpaid by the Debtor to you to determine or vary the amount of any credit to the Debtor to vary exchange renew modify or release any securities or guarantees held or to be held by you from or on account of the Debtor or in respect of the moneys hereby guaranteed to renew bills or promissory notes in any manner and to compound with give time for payment to accept compositions from and make any other arrangements with the Debtor or to from or with the Undersigned or any of them (if more than one) or any obligants on guarantees bills notes or securities held or to be held by you from or on account of the Debtor or in respect of the moneys hereby guaranteed. And in case of bankruptcy arrangement or composition with creditors or liquidation any dividends you may receive from the estate of the Debtor or others shall not prejudice your right to recover from the Undersigned or any of them (if more than one) to the full extent of this Guarantee any sum which after the receipt of such dividends may remain unpaid to you by the Debtor.

10

20

Specifically and without prejudice to any other provision herein contained you are to be at liberty, in case of there being more than one Undersigned, to release any one or more of the Undersigned from liability hereunder without prejudicing or affecting your rights in any way against the other Undersigned.

30

Until you have been repaid all moneys to which this Guarantee shall extend the Undersigned will take no step to enforce any right or claim against the Debtor for any reimbursement in respect of moneys paid by the Undersigned to you hereunder.

40

If any payment made to you from any source in respect of moneys to which this Guarantee shall extend is subsequently recovered from you under or (as to which a certificate signed by any of your managers or

Exhibits

G.2

Guarantee,
6th October
1960
Continued

other authorised officials shall be binding and conclusive on the Undersigned as aforesaid) repaid by you in contemplation of the provisions of any enactment relating to fraudulent preference then unless you shall be held by a court of competent jurisdiction to have been party to the fraud such payment shall not reduce or extinguish any liability of the Undersigned hereunder and no release given to the Undersigned by you in
10 reliance in whole or part upon such a payment shall constitute a waiver of or in any way prejudice your rights against the Undersigned hereunder. And in any such event you shall be at liberty to do and the Undersigned will at your request do and procure to be done all such acts matters and things as may in your opinion be requisite or expedient for the protection of such rights.

Where the Debtor is a Company or a Society
20 or a body or group of persons whether (in any of such cases) incorporated or unincorporate and also where at any time before or during the continuance of this Guarantee the Debtor was or is an infant or under disability then as between the Undersigned and you this Guarantee shall be taken to include and shall extend to all moneys heretofore or hereafter from time to time lent paid or advanced by you in any way to for or on account of or apparently for the purposes of the Debtor at
30 the request or instance of or by honouring the cheques drafts bills or notes or obeying the order or directions of the Debtor or any of the Directors or Managers or Officials or persons appearing to be or acting as Directors or Managers or Officials for the time being of the Debtor and you shall not in any way be prejudiced or affected by the want of borrowing powers on the part of the Debtor or of the Directors or Managers or Officials of the Debtor for a particular
40 purpose or otherwise or by any excess or informality in the exercise of any such powers or by any failure of or irregularity defect or informality in any security given by or on behalf of the Debtor or by the fact that for any reason you shall have no right or less than an absolute right to recover payment of such moneys from the Debtor and all moneys so lent paid or advanced as aforesaid shall be held and taken to be money due and owing to you

Exhibits

G.2

Guarantee,
6th October
1960
Continued

from the Debtor for the purposes of this Guarantee whether the same shall be recoverable by you from the Debtor or not and if and so far as such moneys shall not be so recoverable the Undersigned shall be liable to you therefor in the capacity of principal Debtor and this Guarantee shall (subject to the limitation as to the total amount recoverable hereinbefore contained) be an indemnity to you by the Undersigned and be construed accordingly the consideration for the giving of which shall be the keeping of a banking account with the Debtor and the permitting such account to be overdrawn or the lending payment or advancement of moneys to for or on account of or apparently for the purposes of the Debtor as the case may require. 10

Where it is necessary in order to meet the circumstances of the case words used herein importing the singular number only shall include the plural and vice versa and where this Guarantee is signed by more than one the expression "the Undersigned" herein used shall include each and every of them and everything herein contained shall be binding on the Undersigned respectively and their respective personal representatives estates and effects and the obligations undertaken in this Guarantee shall have effect as joint obligations by the Undersigned and every combination of them and as several and distinct obligations by each of them. 20 30

Dated this 6th day of October One thousand nine hundred and sixty.

Signed by the above-named Dharamshi Valabhji, Keshavji Dharamshi, Bachulal Dharamshi in the presence of	(Sgd.) Dharamshi Vallabhji (in Gujerati)
	(Sgd.) Keshavji Dharamshi
Witness (Sgd.) ? Address P.O.Box 30081, NAIROBI Occupation Bank Official	(Sgd.) Bachulal Dharamshi

40

Signed by the above-named Morarji Dharamshi & Raghavji Dharamshi in the presence of) (Sgd.) Morarji Dharamshi

Witness (Sgd.) ?) (Sgd.) Raghavji
Address P.O.Box 30081, Nairobi
Occupation Bank Official

Exhibits

G.2

Guarantee, 6th October 1960 Continued

EXHIBIT G.3

10 LETTER OF DEPOSIT DATED 6TH OCTOBER 1960

G.3

Letter of Deposit, 6th October 1960

F 216 B

NAIROBI. 6-10-1960

The Manager,
National & Grindlays Bank Ltd.,
NAIROBI.

Dear Sir,

I/We hereby confirm that the documents of title herein described, have been deposited
20 with your Bank by me/us with intention to create, upon the Bank's usual terms, an Equitable Mortgage by way of continuing security upon all the property comprised therein or to which the same or any of them may relate in order to secure the payment of all sums due or which at any time and in any manner become due by me/us to the Bank under or in pursuance of a guarantee dated the 6th day of October 1960, entered into by me/us with the Bank, a copy of which is attached,
30 in respect of which guarantee Dharamshi Valabhji & Bros. is/are the principal debtor/s.

It is hereby agreed that the maximum sum/s to be secured by this Mortgage is Shillings One hundred and fifty thousand.

The undermentioned documents of title have been deposited by me/us with you as aforesaid.

Exhibits

G.3

Letter of Deposit, 6th October 1960 Continued

Title Deeds of Plot L.R.No.209/2490/10, 0.0861 of an acre, Nairobi.

Yours faithfully,

(Sgd.) Dharamshi Vallabhji
(in Gujerati)
(Sgd.) K.D. Vaghela
(Sgd.) B.D. Vaghela
(Sgd.) M.D. Vaghela
(Sgd.) Raghavji

Inland Revenue Stamp
National and Grindlays
Bank Ltd., Nairobi.

10

EXHIBIT H

H.

Plaintiffs Letter to Creditors

PLAINTIFFS LETTER TO CREDITORS

MESSRS. DHARAMSHI VALABHJI & BROS.

P.O. Box 5816,
NAIROBI.

Dear Sirs,

RE: MESSRS. DHARAMSHI VALABHJI & BROS.

We, the undersigned Messrs. Dharamshi Valabhji & Bros. admit that we have to pay you the amount shown against your name in the Schedule written hereunder; but due to acute financial crises prevailing in the market, we regret to inform you that we are not in a position to pay the amount due to you at a time.

20

We, therefore, propose to pay the amount due to you in equal twelve instalments, and will pay the first instalment on and thereafter instalments will be paid on the of each succeeding calendar month until payment in full. We agree that should we fail to pay the instalments due to you on its due date, the whole of the amount then remaining

30

unpaid and due shall be come due and payable immediately and you will be at liberty to take legal proceedings against us.

Exhibits

H.

Plaintiffs Letter to Creditors Continued

You will, sir, notice that We wish to pay the amount due to you in full but what we want is twelve months' time to pay the same and to avoid costs of legal proceedings. We, therefore, humbly request you to accept our above offer and signify your approval thereto by signing your signature
10 against your name.

Thanking you in anticipation,

Yours faithfully,

To!!

S.NO:	Name of Creditor	Amount due to the creditors	Creditor/s' Signature

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EXHIBIT C.5

LETTER DEFENDANT TO JAMAL PIRBHAI & SONS DATED 6TH OCTOBER 1960

C.5

Letter, Defendant to Jamal Pirbhai & Sons, 6th October 1960

6th October 1960
3.15 P.M.

20

Messrs.Jamal Pirbhai & Sons,
P.O.Box 209,
Nairobi.

Dear Sir,

We hereby undertake to pay you the sum of Shs.6100/- (Shillings six thousand one hundred) being three months rent on the premises of the shop of Dharamshi Vallabhji & Bros., Bazaar, Nairobi.

30

Yours faithfully,

For and on behalf of
National & Grindlays Bank Ltd.
(Sgd) J.R. Scott
Manager

Received the sum of Shs.6100/-
(Sgd.) ?
7/10/60

Exhibits

C.6

Letter, Plaintiffs to Defendant, 6th October 1960

EXHIBIT C.6

LETTER PLAINTIFFS TO DEFENDANT DATED 6TH OCTOBER 1960

Nairobi;
6th October, 1960.

The Manager,
National and Grindlays Bank Ltd.,
Nairobi.

Dear Sir,

With reference to the Letter of Hypothecation executed by us on 9th May, 1960, we hereby authorise you to take over our stocks sowing machine & spares as we regret we are not in a position to reduce our overdraft as promised. 10

Yours faithfully,

Dharamshi Valabhji & Bros.
(Sgd.) K.D.Vaghela
(Sgd.) Dharamshi Vallabhji
(in Gujerati) 20

C.7

Letter, Defendant to Plaintiffs, 8th October 1960

EXHIBIT C.7

LETTER DEFENDANT TO PLAINTIFFS DATED 8TH OCTOBER 1960

NATIONAL AND GRINDLAYS BANK LIMITED
GOVERNMENT ROAD.

8th October, 1960.

Messrs. Dharamshi Vallabhji & Bros.,
P.O.Box 5816,
Nairobi.

Dear Sirs, 30

We shall be glad if you will arrange to repay the overdraft in your account which now stands at debit Sh.154,658-41.

Please also advise us what steps are being taken to sell the stocks held by us.

Your early reply to this letter will be appreciated.

Yours faithfully,

SUB-MANAGER.

Exhibits

C.7

Letter Defendant to Plaintiffs, 8th October 1960 Continued

EXHIBIT C.8

LETTER PLAINTIFFS TO DEFENDANT DATED 19TH OCTOBER 1960

C.8

Letter, Plaintiffs to Defendant, 19th October 1960

DHARAMSHI VALLABHJI & BROS.,
P.O.Box 5816, Nairobi.

10 19th October, 1960.

The Manager,
Messrs. National & Grindlays Bank Ltd.,
Government Road,
Nairobi.

Dear Sir,

PLOT NO: 2490/10, NGARA ROAD.

This is to inform you that we have on 15th September, 1960, we have given a three months option to Messrs.Jesang Popat & Co, of
20 P.O.Box 3349 Nairobi to purchase or sell the abovementioned property for a sum of Shillings One hundred and eighty thousand (Shs. 180,000/-).

We know that Messrs. Jesang Popat & Co are trying to get a petrol station user from the City Council on the said plot and have no objection to this. We further confirm that when the transfer of this plot is made Messrs. Jesang Popat & Co have been duly authorised by us to deposit the purchase price with your bank against our overdraft
30 facilities and the amount due to you from us.

Thanking you,
Yours faithfully,
for and on behalf of
Dharamshi Vallabhji & Bros.
(sd) K.D. Vaghela.

Exhibits

C.10

Letter, Defendant to Plaintiffs, 24th October 1960

EXHIBIT C.10

LETTER DEFENDANT TO PLAINTIFFS DATED 24TH OCTOBER 1960

NATIONAL AND GRINDLAYS BANK LIMITED,
GOVERNMENT ROAD.

24th October, 1960.

Messrs. Dharamshi Vallabhji & Bros,
P.O.Box 5816,
Nairobi.

Dear Sirs, 10

We enclose a copy of the letter which we have written to Messrs. Jesang Popat & Co. regarding their exercising the option to purchase your property, L.R.No:2490/10, Ngara Road, for Shs. 180,000/-.

We shall be glad if you will advise us what progress you have made to reduce the overdraft, pending finalisation of the sale of the above property.

Please note that if satisfactory arrange- 20 ments are not made by 31st instant, we shall have proceed to sell the stocks held by us and apply the proceeds towards reduction of the overdraft.

Yours faithfully,

(sd) ????
SUB-MANAGER.

EXHIBIT C.11

Exhibits

C.11

Letter, Defendant to Jesang Popat & Co., 24th October 1960 (Copy to Plaintiffs)

LETTER DEFENDANT TO JESANG POPAT & CO. DATED 24TH OCTOBER 1960 (COPY TO PLAINTIFFS)

NATIONAL AND GRINDLAYS BANK LIMITED,
GOVERNMENT ROAD.

24th October, 1960.

Messrs. Jesang Popat & Co.,
P.O. Box 3349,
10 Government Road,
Nairobi.

Dear Sirs,

Plot No.2490/10, Ngara Road,
M/s. Dharamshi Vallabhji & Bros.

We are in receipt of your letter of 19th October, and confirm that we shall take no action in disposing of the above plot until 15th December 1960, when your option to purchase the plot expires.

20 You will no doubt keep us advised of the developments.

Yours faithfully,

SUB-MANAGER.

c.c. Messrs. Dharamshi Vallabhji & Bros.,
P.O. Box 5816,
Nairobi.

Exhibits

C.12

Letter, Shah Gautama Maini & Patel to Plaintiffs' Creditors, 25th October 1960

EXHIBIT C.12

LETTER SHAH GAUTAMA MAINI & PATEL TO PLAINTIFFS' CREDITORS DATED 25TH OCTOBER 1960

SHAH GAUTAMA MAINI & PATEL,
ADVOCATES
Many House,
Government Road,
NAIROBI.

P.O.Box 2217 25th October, 1960. 10
Telephone: 23676)
20453)

Dear Sir/s,

re: Dharamshi Vallabhji & Bros.

We have been instructed by our clients Messrs. Dharamshi Vallabhji & Bros of this city to act on their behalf generally in regard to their financial affairs in the following circumstances:-

Our clients are at present in a great financial difficulty owing to present general depression in trade and credit squeeze. Their outstandings are not coming in as expected and their resources for ready money have crippled for the time being. And as a result they are now not in a position to liquidate their debts to their various creditors owing to aforesaid and certain other unexpected circumstances beyond their control. 20

In view of the foregoing circumstances our clients have instructed us to call a meeting of all their creditors at our offices, which we hereby do, at 5 p.m. on Tuesday the 1st November, 1960, when we propose to place before such meeting their financial affairs with a view to soliciting the support and co-operation of their creditors in working out a suitable scheme acceptable to their creditors in the circumstances of the case. 30

Our clients state that they have always been favoured with your co-operation in the 40

past and this time they also expect your co-operation by attending the proposed meeting.

We shall be obliged therefore if you would kindly make it a point of attending the aforesaid creditors' meeting at our offices at the appointed time.

In the meantime we have to request you on behalf of our clients not to saddle them with unnecessary costs by taking any legal proceedings against them for your claim.

10

Yours faithfully,
SHAH GAUTAMA MAINI & PATEL.

To,

....

....

....

Exhibits

C.12

Letter, Shah Gautama Maini & Patel to Plaintiffs' Creditors, 25th October 1960 Continued

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EXHIBIT C.13

LETTER D.N. & R.N.KHANNA TO DEFENDANTS DATED 28TH OCTOBER 1960

C.13

Letter, D.N.& R.N. Khanna to Defendant, 28th October 1960

20

20101

Misc/D/60.

28th October, 1960.

The Manager,
National & Grindlays Bank Limited,
Government Road,
Nairobi.

Dear Sir,

We refer to the overdraft facility afforded to our clients Messrs. Dharamshi Vallabhji & Bros by the terms of which the Bank bound itself, not to press for or call in the overdraft pending completion of the sale of our clients' property L.R.No.2490/1 Ngara Road, pursuant to an option, a copy of which was duly provided to you. The sale is expected to be finalised within a reasonable

30

Exhibits

C.13

Letter, D.N.& R.N. Khanna to Defendant, 28th October 1960 Continued

time. It was contemplated between your Bank and our clients, that the overdraft should remain current till 30th April, 1961, to allow of the finalisation of the sale. This fact was confirmed by your letter to our client dated 13th May, 1960.

Contrary to the terms of the overdraft, and in breach of contract in relation thereto, it appears the Bank at 2-15 p.m. on the 6th instant, trespassed into the business premises of our clients, and wrongfully carried away, and are wrongfully detaining goods, furniture, and sewing machines and equipment, including items not covered hypothecation. 10

One of the firm's partners was made by the bank to sign an authority in favour of the Bank in signing which he was not a free agent, and obviously could not bind the other partners thereby, having no such implied authority.

The goods carried away were not listed in any inventory, and we understand are worth Shs. 225,000/-. 20

The sale price of Shs. 180,000/- when realised, within the period of the agreed credit for the overdraft as aforesaid, would be sufficient to clear the same. The Bank holds an equitable mortgage upon the property, which said mortgage is sufficient to ensure payment of the purchase price, or sufficient to pay off the mortgage to the Bank. 30

The bank seems to have acted arbitrarily in demanding reduction of the overdraft, before expiry of the agreed period of credit, by unilaterally reducing the period of credit first by letter of 24th October 1960 to 15th December 1960 and later by another letter of the same date to 31st October, 1960.

The Bank has laid itself open to large claim for damages.

Your bank has not furnished to our clients, copies of documents, held for the overdraft, including the so-called letter of hypothecation. We shall be glad to receive copies. 40

Exhibits

G.13

Letter, D.N.& R.N. Khanna to Defendant, 28th October 1960 Continued

The validity of the alleged letter of hypothecation is disputed, or of the action by the Bank, either pursuant to it or otherwise.

We trust it would be unnecessary to sue out an injunction to prevent threatened sale by the Bank, and that you would see your way to restoring the goods to our clients and to offering satisfaction in damages, to avoid action, which would have to be taken at once.

10

Yours faithfully,

for D.N. & R.N. Khanna.

EXHIBIT C.14

LETTER DEFENDANT TO D.N.& R.N. KHANNA DATED 16TH NOVEMBER 1960

C.14

Letter, Defendant to D.N.& R.N. Khanna, 16th November, 1960.

NATIONAL AND GRINDLAYS BANK LIMITED.
Government Road,
Nairobi.

16th November,1960.

Messrs. D.N.& R.N.Khanna,
20 P.O.Box 1197,
NAIROBI.

Dear Sirs,

Dharamshi Vallabhji & Bros.

With reference to your letter of 28th October 1960 No: Misc/D/60, we have to reply as under.

We agree that it was contemplated that the overdraft facility made available to the above should remain outstanding until 30th April 1961 provided, of course the account was conducted to the
30 satisfaction of the bank or that your clients did not commit an act of bankruptcy in the meantime, in either event immediate repayment would be called for.

As it had come to our notice that your clients were making arrangements, without our knowledge, to

Exhibits

C.14

Letter,
Defendant to
D.N.& R.N.
Khanna,
16th November,
1960
Continued

satisfy other creditors in a manner which was likely to prejudice our position it was essential that steps should be taken to obtain repayment of the overdraft and to protect the interests of the bank. Your clients by their letter of 16th October, 1960, admitted that they were not in a position to reduce the overdraft as promised. We deny that we agreed not to press for or call up the overdraft pending completion of the sale by your client of Plot L.R. No: 2490/10 as alleged.

Although authority was obtained in our favour to take over the firm's stocks it will be apparent to you that under the terms of the Letter of Hypothecation no such separate authority to seize the goods was in law required. The authority was signed by two partners and not by one, as stated by you, and the goods may be listed under our supervision by your clients at any time to suit our mutual convenience. The stocks described in the Letter of Hypothecation are specifically held to secure the overdraft. However, if Plot No: 2490/10 is sold, we would have no objection to receiving the proceeds of the sale thereof to liquidate the overdraft outstanding at the date of sale and we would then be prepared to release the goods.

We are acting in accordance with our legal rights and the goods will be retained unless and until some satisfactory arrangement can be reached with your clients to meet the amount due to us.

We enclose a copy of the letter of Hypothecation dated 9th May 1960 together with a copy of Supplementary Letter of Hypothecation dated 6th October, 1960 and form F.216(b) dated 6th October, 1960 whereby your clients deposited with us the title deeds of their abovementioned plot to secure the overdraft. There is no dispute as to the validity of the Letter of Hypothecation or our actions in this matter and, therefore, no claim for damages exists against this bank.

We are only prepared to restore the goods upon terms which would satisfy us that our overdraft would be liquidated by your clients and we invite your co-operation to achieve this aim.

Yours faithfully,

(sd) ???????????
SUB-MANAGER.

WH.

Exhibits

C.14

Letter, Defendant to D.N.& R.N. Khanna, 16th November, 1960 Continued

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EXHIBIT P

LETTER DEFENDANT TO PLAINTIFFS DATED 8TH AUGUST 1961

P.

Letter, Defendant to Plaintiffs, 8th August 1961

NATIONAL AND GRINDLAYS BANK LIMITED,
GOVERNMENT ROAD.

8th August, 1961.

REGISTERED.

Messrs. Dharamshi Vallabhji & Bros.,
P.O. Box 5816,
NAIROBI.

Dear Sirs,

We refer you to our broker's various calls on you in the past requesting you to call on us with a view to making an inventory of the stocks and furniture seized by us, and to come to a satisfactory arrangement for repayment of your indebtedness to the Bank. We regret to advise that as you have ignored our requests we are no longer prepared to continue your indebtedness to the Bank.

Please therefore note that if you do not liquidate your entire indebtedness to us by the 14th instant, we shall sell the stocks and furniture held by us without further reference to you, and hold you responsible for the shortfall, if any.

Yours faithfully,

SUB-MANAGER.
(J.R. Williamson)

Exhibits

Q.

Letter, Khanna & Co. to Defendant, 14th August 1961

EXHIBIT Q

LETTER KHANNA & CO. TO DEFENDANT DATED 14TH AUGUST 1961

KHANNA & COMPANY
Advocates

BARING ARCADE.
STANDARD STREET,
P.O. BOX 1197,
NAIROBI.

14th August, 1961.

Messrs. National & Grindlays Bank Ltd.,
Government Road, 10
Nairobi.

Dear Sirs,

re: Dharamshi Vallabhji & Bros.

We refer to the writer's telephone conversation with Mr. J.R.Williamson regarding your letter dated 8th August 1961 when we informed you that the matter was now in our hands for advice regarding court action for damages and asked you to take no precipitate action as threatened in your letter under reply 20 but to preserve the status quo as otherwise the position would be more complicated from everyone's point of view.

Yours faithfully,

for KHANNA & COMPANY

EXHIBIT A

LETTER HAMILTON HARRISON & MATHEWS TO A.S.G.KASSAM DATED 17TH APRIL 1962

Exhibits

A.

Letter, Hamilton Harrison & Mathews to A.S.G.Kassam, 17th April 1962

HAMILTON HARRISON & MATHEWS
Advocate and Notaries Public
Stanvac House
Queensway

Private Bag
NAIROBI

10 Our Ref: 12/5/125/1 Date 17th April,1962.

A.S.G.Kassam, Esq.,
Advocate,
Sheikh Building,
Victoria Street,
Nairobi.

Dear Sir,

S.C.C.C. No.1516 of 1961.
Dharamshi Vallabhji & Brothers vs.
National and Grindlays Bank Limited.

20 As you are no doubt aware, the above suit has been listed for hearing on the 2nd, 3rd and 4th May, 1962.

We should be glad if you would let us have within the next seven days certain Further and Better particulars of the allegations contained in paragraphs 2 and 3 of the Reply filed herein. The further and better particulars requested are as under :-

(a) As to paragraph 2 of the Reply :-

30 1. The date when the alleged agreement referred to in the line 3 was made.

2. The name of the person who entered into this alleged agreement on behalf of the Defendant bank.

Exhibits

A.

Letter, Hamilton Harrison & Mathews to A.S.G.Kassam, 17th April 1962 Continued

3. The place where the alleged agreement was entered into.

(b) As to paragraphs 3(a) of the Reply:-

1. Please let us have full particulars of the "up country cheques" which it is alleged were paid in on or about 3rd October 1960.

2. The date when the alleged agreement was made pursuant to which the Plaintiff was allegedly allowed to draw cheques up to the amount of the said "up country cheques" the name of the person who entered into this alleged agreement on behalf of the Defendant Bank, and the place where the same was entered into. 10

Kindly forward these particulars within the period stipulated herein, failing which our instructions are to apply to the Court for an order for the production of the same. 20

Yours faithfully,
for HAMILTON HARRISON & MATHEWS,

(Sgd.) THOMSON ROUSTON.

EXHIBIT B

LETTER A.S.G.KASSAM TO HAMILTON HARRISON AND MATHEWS DATED 27TH APRIL 1962

Exhibits

B.

Letter, A.S.G.Kassam to Hamilton Harrison & Mathews, 27th April 1962

27th April, 1962.

Messrs. Hamilton Harrison & Mathews,
Advocate,
Esso House,
Queensway,
NAIROBI.

10 Dear Sirs,

S.C.C.C. No.1516 of 1961
Dharamshi Vallabhji & Bros.
vs. National & Grindlays
Bank Limited.

I thank you for your letter of the 17th instant.

The following are the particulars you require.

(a) Para 2 of the reply: The agreement for a
20 further short-term loan of Shs. 10,000/- was made in the following manner:

(i) On 23rd September, 1960, or thereabouts, the Defendant agreed to grant to the Plaintiffs a short-term overdraft of Shs. 5,000/- repayable on 8th October, 1960.

(ii) On or about 26th September, 1960, the Defendant agreed to grant a further short-term overdraft of Shs. 5,000/-
30 repayable at the same time as the above loan of Shs. 5,000/-, i.e. on 8th October, 1960. The two short-term loans, therefore, amounted to Shs. 10,000/-. The person who entered into this agreement on the Defendant's behalf was one Prabhudas S. Patel, an employee of the Defendant.

Exhibits

B.

Letter, A.S.G.Kassam to Hamilton Harrison & Mathews, 27th April 1962 Continued

The agreement was made at the Defendant's premises in Government Road, Nairobi.

(b) Para 3a of the Reply: Please note that an application will be made on behalf of the Plaintiffs at the hearing of this suit to amend Para 3(a) of the Reply as follows:-

Delete all the words appearing after the words "in answer to paragraph 8 of the Defence" and substitute therefore the following words. "On or about 26th September, 1960, the Defendant through its employee, Prabhudas S. Patel, further agreed that the Defendant would honour the Plaintiffs' cheques drawn against up-country and deferred cheques of other persons banked by the Plaintiffs prior to their clearance. Further, on or about 3rd October, 1960, at the request of the Plaintiffs made through the above-named Bachulal Dharamshi, the Defendant through its employee, Mr.Nagesh, agreed that, in addition to all the aforesaid loans and/or overdraft facilities, the Defendant would honour cheques which the Plaintiffs had drawn and issued to an extent not exceeding Shs. 3,000/- and that such amounts shall be repaid to the Defendant by the Plaintiffs along with the said loan of Shs. 10,000/- on the 8th day of October, 1960. The overdraft did not exceed the sum of Shs. 153,000/- (being the amount of the total overdraft facility plus the amount of the said up-country and deferred cheques to which the Plaintiffs were, as shown above, entitled) on the 3rd and 6th October, 1960, the excess over the said sum of Shs.153,000/- alleged by the Defendant being due to a sum of Shs.1,815/60 debited on 6th October, 1960 to the Plaintiffs' account by the Defendant because of a local bill which had been paid into the Plaintiffs' account some months previously having been dishonoured on or about the said 6th October, 1960.'

Yours faithfully,

A.S.G.KASSAM.

No.49 of 1964

IN THE JUDICIAL COMMITTEE OF THE 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
(Defendant) Appellant

- and -

DHARAMSHI VALLABHJI,
KESHAVJI DHARAMSHI,
BACHULAL DHARAMSHI,
MORARJI DHARAMSHI and
RAGHAVJI DHARAMSHI
trading as "DHARAMSHI VALLABHJI
& BROS." (Plaintiffs) Respondents

RECORD OF PROCEEDINGS

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

MERRIMAN WHITE & CO.,
3, Kings Bench Walk,
Inner Temple,
London, E.C.4.
Solicitors for the Respondents.