Privy Council Appeal No. 49 *of* 1964

National and Grindlays Bank Limited – – – – – *Appellant*

v.

Dharamshi Vallabhji and others – – – – – – *Respondents*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENTS OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH MAY 1966

Present at the Hearing:

LORD MORRIS OF BORTH-Y-GEST

LORD PEARCE

LORD PEARSON

(*Majority Judgment delivered by* LORD PEARSON)

This is an appeal by the defendant bank, by leave of the Court of Appeal for Eastern Africa, from a judgment of that Court given at Nairobi on the 2nd September 1964, allowing the plaintiffs' appeal from a judgment of the Supreme Court of Kenya (Wicks J.) given on the 31st May 1963. The action is for damages for a trespass alleged to have been committed by the defendant bank on the 6th October 1960 in taking possession of and removing the plaintiffs' stock-in-trade under a letter of hypothecation which had been given to the defendant bank by the plaintiffs as security for their overdraft. The trial proceeded on the basis that only the issue of liability was to be determined initially. Wicks J. decided in favour of the defendant bank, holding that, although the letter of hypothecation was wholly void for lack of attestation of the grantors' signatures, nevertheless no trespass had been committed, because the plaintiffs had on the 6th October 1960 given a consent to the acts of the defendant bank in taking possession of and removing the plaintiffs' stock-in-trade. The Court of Appeal, while agreeing with him that the letter of hypothecation was wholly void, reversed his decision on the ground that no fresh consent, independent of the letter of hypothecation, had been given on the 6th October 1960.

In this appeal it has been conceded that, if the letter of hypothecation was valid as between the parties, the acts of the defendant bank were justified under a clause in the letter of hypothecation. The only issues in this appeal are (1) whether the letter of hypothecation was valid as between the parties, and (2) if not, whether some fresh consent, independent of the letter of hypothecation, was given by the plaintiffs on the 6th October 1960.

There is not now any dispute as to the facts found by Wicks J., which were summarised in the judgment of Newbold J. A. in the Court of Appeal as follows:—

> " On the 4th April 1960, the plaintiffs opened a banking account with the bank and the bank undertook to provide overdraft facilities 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 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 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 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 voluntarily 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."

The letter of the 6th October 1960, as set out in the Record, was as follows:—

" The Manager,
National and Grindlays Bank Limited
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.

Yours faithfully,
Dharamshi Valabhji & Bros.
(Sgd.) K. D. Vaghela
(Sgd.) Dharamshi Vallabhji
(in Gujerati) "

The second issue can be quickly disposed of. Their Lordships agree with Newbold J. A. that " as the bank has seized the goods of the plaintiffs, then the bank is liable in trespass unless it can justify the seizure ". It is clear from Bullen and Leake's Precedents of Pleading (3rd ed. pp. 414–5 and 740 and 11th ed. pp. 637–9, 1046, 1119–20) that it is not for the plaintiffs to prove that the seizure was against their will: they prove the seizure, and it is for the defendant bank to show that the seizure was by leave and licence of the plaintiffs. *Kavanagh v. Gudge* (1843) 7M. and G.316 illustrates the sequence of pleadings under the old system. If the letters of hypothecation were wholly void they conferred no effective leave or licence. *Marshall v. Green* (1875) 1.C.P.D.35, 38 per Lord Coleridge C. J. Their Lordships further agree with Newbold J. A. that the letter of 6th October 1960 " 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 ".

The sole remaining issue is as to the validity as between the parties of the letter of hypothecation, which had no attestation of the signatures of the plaintiffs as grantors. The plaintiffs contend that by reason of the absence of attestation the letter of hypothecation was wholly void under section 15 of the Chattels Transfer Act, 1930 of Kenya (which may conveniently be called " the Kenya Act "). The defendant bank contends that, though the letter of hypothecation may have been invalid for the purposes of registration under the Kenya Act, it was valid as between the parties.

The choice between these two rival contentions depends upon the construction of the latter part of section 15 of the Kenya Act. The express provisions of the section, its context and the scheme of the Act have to be considered. Decisions of New Zealand Courts on similar provisions in a New Zealand Act have to be taken into account. Also the English and New Zealand Acts relating to bills of sale may have some relevance as precursors of the Kenya Act.

The context of section 15 is important and it is necessary to set out the principal provisions.

" *Registration*

4. All persons shall be deemed to have notice of an instrument and of the contents thereof when and so soon as such instrument has been registered as provided by this Ordinance: . . . . .

5. Registration of an instrument shall be effected by filing the same . . . . . and an affidavit in the form numbered (1) in the First Schedule hereto or to the like effect, in the office of the Registrar.

6. (1) The period within which an instrument may be registered is twenty-one days from the day on which it was executed. . . . . .

Effect of Non-Registration

13. (1) Every instrument, unless registered in the manner hereinbefore provided, shall upon the expiration of the time for registration, or if the time for registration is extended by the Supreme Court, then upon the expiration of such extended time, be deemed fraudulent and void as against —

(a) the official receiver or trustee in bankruptcy of the estate of the person whose chattels or any of them are comprised in any such instrument;

(*b*) the assignee or trustee acting under any assignment for the benefit of the creditors of such person;

(*c*) any person seizing the chattels or any part thereof comprised in any such instrument, in execution of the process of any court authorizing the seizure of the chattels of the person by whom or concerning whose chattels such instrument was made, and against every person on whose behalf such process was issued;

so far as regards the property in or right to the possession of any chattels comprised in or affected by the instrument which, at or after the time of such bankruptcy, or of the execution by the grantor of such assignment for the benefit of his creditors, or of the execution of such process (as the case may be), and after the expiration of the period within which the instrument is required to be registered, are in the possession or apparent possession of the person making or giving the instrument, or of any person against whom the process was issued under or in the execution of which the instrument was made or given, as the case may be. . . . . .

14. No unregistered instrument comprising any chattels whatsoever shall, without express notice, be valid and effectual as against any bona fide purchaser or mortagee for valuable consideration, or as against any person bona fide selling or dealing with such chattels as auctioneer or dealer or agent in the ordinary course of his business."

" *As to Instruments Generally*

15. 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.

16. Every instrument shall be deemed to be made on the day on which it is executed, and shall take effect from the time of its registration.

17. Every instrument shall contain or shall have endorsed thereon or annexed thereto a schedule of the chattels comprised therein, and, save as is otherwise expressly provided by this Ordinance, shall give a good title only to the chattels described in the said schedule, and shall be void as against the persons mentioned in sections 13 and 14 of this Ordinance in respect of any chattels not so described.

18. Save as is otherwise expressly provided by this Ordinance, an instrument shall be void as against the persons mentioned in sections 13 and 14 of this Ordinance in respect of any chattels which the grantor acquires or becomes entitled to after the time of the execution of the instrument.

21. Nothing in this Ordinance shall be deemed to affect any law for the time being in force —

(*a*) prescribing any formalities to be observed on or about the execution of instruments within the meaning of this Ordinance; or

(*b*) conferring or securing any rights or claims under or in respect of any such instrument."

" *Form of Instruments*

23. Where an instrument is executed after the execution of a prior instrument which has never been registered, and comprises all or any of the chattels comprised in such prior instrument, then if such subsequent instrument is given as a security for the same debt as is secured by the prior instrument, or for any part of such debt, it shall, to the extent to which it is a security for the same debt or part thereof, and so far as respects the chattels comprised in the prior instrument, be void as against the persons mentioned in sections 13 and 14 of this Ordinance, unless it is proved to the court having cognizance of the case that the subsequent instrument was bona fide given for the purpose of correcting some material error in the prior instrument, and not for the purpose of evading this Ordinance."

" *Entry of Satisfaction*

34. (1) In the case of an instrument, upon the production to the Registrar of a memorandum of satisfaction in the form numbered (5) in the First Schedule hereto or to the like effect, signed by the grantee thereof or his attorney, discharging the chattels comprised in such instrument or any specified part thereof from the moneys secured thereby or any specified part thereof, or from the performance of the obligation thereby secured or any specified part thereof, and on production of such instrument and payment of a fee of five shillings, the Registrar shall file such memorandum and make an entry thereof in the register book on the page where the instrument is registered.

(2) The execution of such memorandum shall be attested by at least one witness, who shall add to his signature his residence and occupation and shall be verified by the affidavit of that witness."

Section 15 of the Kenya Act imposes a requirement that every execution of an instrument shall be attested. It can be called a " mandatory " provision because it imperatively requires that something shall be done. But the section does not say what the consequence is to be if the thing is not done. It does not say what purposes will fail to be achieved if there is no attestation. Thus the consequence of non-attestation has to be ascertained by implication from the context and the scheme of the Act.

In the immediate context, the wording of the first part of the section and the word " but " introducing the second part suggest that the consequence of non-attestation is invalidity, but the invalidity may be a total invalidity for all purposes or a limited invalidity for some special purposes only.

Section 21 is important, because it tends to show that neither part of section 15 is to be understood in an unrestricted sense. The first part, providing that " sealing shall not be essential to the validity of any instrument," only means that no requirement of sealing is imposed for the purposes of this Act: it does not exempt an instrument from any requirement of sealing which may be imposed by any other law for the time being in force. That seems to be the effect of section 21 (a) in its impact upon the first part of section 15. The second part of section 15 does not mean by implication that an unattested instrument is invalid for all purposes: some other law for the time being in force may confer or secure rights or claims under or in respect of it. That seems to be the effect of section 21 (b) in its impact on the second part of section 15. There is a probable conclusion that for an unattested instrument the invalidity which is to be implied from section 15 is not a total invalidity for all purposes but a limited invalidity for some special purposes only. The nature of the special purposes must be gathered from the context and the scheme of the Act.

It was contended on behalf of the plaintiffs that section 21 should not be taken into account in the construction of section 15, because section 21 (though it is said to have been referred to in the argument of a previous case *Dodhia v. National and Grindlays Bank Limited*) was not specifically relied upon or referred to in the present case in the argument before Wicks J. and the Court of Appeal or in their judgments or in the appellants' case in this appeal. Certainly it would have been most helpful to have the assistance of Wicks J. and the Court of Appeal in considering the bearing of section 21. It would, however, be too artificial, in considering the context of section 15, to ignore section 21 as though it did not form part of the relevant context, which it plainly does, being in the same group of sections. The relevance of section 21 for purposes of construction does not depend upon the existence or nature or contents of any particular " law for the time being in force " of a description referred to in paragraph (a) or paragraph (b) of the section. The elucidation of such matters would require detailed knowledge of the laws of Kenya. The relevance of the section for purposes of construction depends solely on the saving for any such law that there may be, and this saving is plain on the face of the section and could not properly be ignored when the context of section 15 is being taken into account for purposes of construction.

There are of course other relevant parts of the context in addition to section 21.

Section 5 provides that registration of an instrument is to be effected by filing it together with an affidavit in the form numbered (1) in the First Schedule. That form of affidavit contains paragraph 5 " The name subscribed in the said instrument as that of the witness attesting the due execution thereof by the said [name of grantor] is in the proper hand writing of me this deponent ". Thus it is necessary for the scheme of registration that there shall be an attesting witness. That could be left to inference, but it is more natural to have an express provision in the Act, and such express provision is to be found in the second part of section 15, which thus completes the scheme of registration. That is a sufficient explanation of the second part of section 15: an instrument has to be attested as otherwise it cannot be registered. No wider consequence of non-attestation needs to be implied.

Registration is needed in order to make the instrument effective against persons who are not parties to it, but without registration it can be effective as between the parties to it. That appears by necessary implication from sections 13 and 14. Then the provision of section 16 that " every instrument . . . . . shall take effect from the time of its registration " must be given

a limited meaning, i.e. that the instrument takes effect as a registered instrument, good as against persons who are not parties to it, from the time of its registration. That is in harmony with the limited meaning which may be ascribed to section 15.

More generally it can be said that section 15 is surrounded by sections 13, 14, 16, 17, 18 and 19, and all of these are concerned with registration and show that the absence of registration affects only relations with persons who are not parties to the instrument and does not affect the relations between the parties to the instrument. It is natural to attribute to section 15 an effect which is connected and in harmony with the surrounding sections. If the implied invalidity of an unattested instrument is limited to purposes of registration, this result is achieved.

The argument that there is a contrast between the limited invalidity imposed by the surrounding sections and a supposed total invalidity imposed by section 15 breaks down because it involves a *petitio principii.* Section 15 does not by its express terms impose any invalidity. The invalidity is only implied, and the extent of it has to be inferred from (inter alia) the surrounding sections, and the natural inference from them is that the invalidity is limited.

Section 23 also provides for limited invalidity. Sections 34–37 are part of the scheme of registration, providing for the termination of the rights conferred by registration. Under section 34 (2) the memorandum of satisfaction, which is to be filed and entered in the register, is required to be attested, and the wording of the requirement is the same as that used in the second part of section 15. Both provisions seem to belong to the scheme of registration.

In the absence of any express provision in section 15 as to the consequence of non-attestation of an instrument, the natural implication from the provisions of section 15 and its context and the scheme of the Act is that an unattested instrument is valid between the parties but incapable of registration and so ineffective against other persons.

This construction of the Kenya Act is supported by cases decided in New Zealand. Owing to the statutory history these cases are relevant to the construction of the Kenya Act and may reasonably be regarded as having considerable persuasive authority for that purpose.

In New Zealand the bills of sale legislation began in 1856 with an " Act for preventing frauds upon creditors by secret bills of sale of personal chattels ", modelled on the English Act of 1854 with the same title. There were numerous later Acts in both countries. Under the English Act of 1878 it was held that upon the true construction of sections 8 and 10 an unattested instrument was not invalidated as between the parties. *Davies v. Goodman* 5 C.P.D. 128. The English Act of 1882 contained in sections 8 and 9 new provisions whereby non-compliance with certain requirements rendered a bill of sale given by way of security invalid even as between the parties. These new provisions were not adopted in New Zealand. There was in New Zealand an Act of 1889 called the Chattels Transfer Act 1889—" An Act to consolidate and simplify the law relating to transfer of chattels ". Section 49 of that Act provided that " Sealing shall not be essential to the validity of any instrument: but any execution of an instrument or memorandum of satisfaction shall be attested by one witness, to whose signature shall be added the residence and occupation of such witness ".

Three cases were decided in New Zealand under that section 49 of the Chattels Transfer Act 1889.

The first was *Te Aro Loan Co. v. Cameron* (1896) 14 N.Z. L.R. 411. The particulars of claim alleged that by instrument by way of security from the defendants to the plaintiff company, and by virtue of the covenants implied therein by the Chattels Transfer Act, 1889, the defendants covenanted to pay to the plaintiff company a certain sum and interest. The witness who attested the defendants' signatures to the instrument described

himself as " J. Brown, law clerk, Wellington ". The magistrate non-suited the plaintiff company on the ground that the occupation and address of the attesting witness were not sufficiently set out to comply with section 49 of the Act; that the document was therefore not a valid instrument under that Act, and no covenants were therefore implied in it by virtue of the Act; and that the plaintiff company could not, therefore, sustain the action. The plaintiff company appealed to the Supreme Court. Williams J. allowed the appeal on the ground that the occupation and address of the attesting witness were sufficiently set out. Therefore it was not necessary for him to decide, and he did not decide, what the position would have been if the attestation had been defective. He made these observations, after holding that the attestation was sufficient:—" If this were not so, still, the evidence showed that the defendant was indebted to the plaintiff company in the amount claimed, though possibly not in covenant. It may be that this section 98 of the Magistrates Courts Act 1893 " (which gave a limited power of amendment) " would prevent the magistrate from giving judgment if a simple contract debt only were proved. If that is so, it would be a great misfortune; but I am certainly not prepared to decide that such is the law ".

The second New Zealand case was *Regina v. Dibb Ido* (1897) 15 N.Z. L.R. 591. It was a criminal appeal by way of case stated. The prisoner had bought and taken delivery of a bicycle on the 24th December 1896 at a price of £22.10.0., giving a bill of sale for £17.10.0. and promising to pay £5 on the 28th December. The bill of sale was not attested. The prisoner made no payment, and on the 30th December he pledged the bicycle with a pawnbroker for £8.10.0., having stated in answer to a question from the pawnbroker that the bicycle was his. He was prosecuted and convicted on two counts (1) for having fraudulently obtained the sum of £8.10.0. by false pretences (2) under section 52 of the Act for having, as grantor of an instrument by way of security, defrauded the grantor. In the appeal counsel for the prisoner contended that as the bill of sale had not been attested it was not an " instrument by way of security " within the meaning of the Act, and so no offence had been committed under section 52. He also contended that, as the document was not an instrument by way of security, the bicycle was the prisoner's and he made no false pretence. In the course of the argument Edwards J. said " There cannot be any doubt that at common law this document would have passed the property back to the vendors. The whole question is, as I understand it, whether this Chattels Transfer Act takes away the rights which these parties would have had at common law." A little later Williams J., who presided, said " We are satisfied as far as the first count is concerned ", and the argument proceeded only on the second count. The judgment of the Court (consisting of Williams, Denniston, Conolly and Edwards JJ.) was delivered by Conolly J., who said " The 52nd clause of the Chattels Transfer Act 1889, being a penal clause, must be read strictly and its provisions should not be held to extend to instruments which are not clearly within its scope. In our opinion it only applies to valid instruments by way of security under the Act. The document given by the prisoner is not such an instrument, since section 49, which is imperative, has not been complied with. The conviction under the second count of the indictment was therefore bad. But, as we intimated on the hearing, the conviction under the first count of the indictment was good; and the conviction is therefore affirmed." Thus the reasoning of the appeal court for upholding the conviction on the first count was not fully set out, but it can be inferred to have been that, although the bill of sale was not a valid instrument for the purposes of the Act, it was nevertheless valid as between the parties and had the effect of re-vesting the ownership of the bicycle in the sellers. That interpretation of the decision in the *Dibb-Ido* case is confirmed by the headnote in that case and also by the judgment of Denniston J. (who had been a member of the appeal court in *Dibb-Ido*) given in the third New Zealand case. This was *Lee v. The Official Assignee in Bankruptcy of the property of J. F. Parke, a bankrupt* (1903) 22 N.Z. L.R. 747. There were several points in issue between the assignee in bankruptcy and the holder of a bill

of sale granted by the bankrupt. It will be sufficient for the present purpose to set out extracts from the first paragraph of the judgment.

> " In my opinion non-compliance with . . . . . the provision in section 49 requiring every instrument to be attested by one witness in the manner therein provided, does not invalidate such instrument as between the parties. There is nothing in the Act which declares that such non-compliance shall . . . . . have such effect. The result of such non-compliance would seem only to make the instrument incapable of registration under the Act, or, if registered, to deprive the grantee of the benefit of such registration. Under the English Act of 1882 the consequence of non-registration is to avoid the instrument even between grantor and grantee: there is no such provision in the New Zealand Act. In *Davies v. Goodman* it was held that non-compliance with the provision which required attestation by a solicitor did not render the instrument void as between grantor and grantee. In *Reg. v. Dibb Ido* the Court of Appeal held that an unattested instrument given by way of security was effectual as between the parties to transfer the property to the grantee. And see *Te Aro Loan Company v. Cameron.*"

That is a clear statement of the *ratio decidendi* of the Court of Appeal of New Zealand in the *Dibb Ido case*. Apparently there has not been any later case in New Zealand on this point after the judgment in *Lee's* case, which may thus be said to have held the field for more than sixty years.

The New Zealand Act of 1889 and certain other Acts were consolidated by the Chattels Transfer Act, 1908. Section 49 of the Act of 1889 was replaced by two provisions in the Act of 1908. Section 17 provided that " 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." Section 37(2), referring to a memorandum of satisfaction, provided that " The execution of such memorandum shall be attested by at least one witness, who shall add to his signature his residence and occupation, and shall be verified by the affidavit of that witness." Those provisions were repeated verbatim in sections 20 and 42(2) of the Chattels Transfer Act 1924 (another consolidating Act) of New Zealand and in sections 15 and 34(2) of the Kenya Act under which the question at issue in this appeal arises. It is not disputed that the Kenya Act was modelled on the New Zealand Act of 1924. It seems clear that the decisions in the New Zealand cases of *Dibb Ido* and *Lee* to which reference has been made must apply to section 20 of the New Zealand Act of 1924 and so be relevant authorities for the construction of section 15 of the Kenya Act, and may properly be considered important authorities for that purpose.

Counsel for the defendant sought to attribute a greater effect to the New Zealand decisions. Reference was made to passages in Craies on Statute Law, 6th edition, at pp. 139, 141, 172. At p. 139 there is a citation from an Australian case *d'Emden v. Pedder* 1 C.L.R.91, 110 cited in *Webb v. Outrim* [1907] A.C. 81 at p. 89. " When a particular form of legislative enactment which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the legislature to bear the meaning which had been so put upon them ". As there are other grounds for the decision of this appeal, it is not necessary to go into this point at length. It is enough to say that prima facie it seems unsafe to assume that, when the Kenya Act of 1930 was originally made as an ordinance modelled on the New Zealand Act of 1924, the ordinance-making authority must necessarily be supposed to have intended to import into Kenya the case-law of New Zealand decided under a previous New Zealand Act.

Newbold J. A. said in the course of his judgment: " I accept that when Kenya adopts the legislature 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 ".

No fault is to be found in this statement of principle, but in the view of the majority of their Lordships it was not correctly applied in the present case, because examination of the New Zealand decisions shows there was no inconsistency or variance in them and their construction of the relevant provisions was correct.

For the reasons which have been given the appeal will be allowed and the case will be remitted to the High Court of Kenya for judgment to be entered in favour of the defendant bank. The plaintiff respondents must pay to the defendant appellant its costs of the action and of the appeal and cross-appeal to the Court of Appeal for Eastern Africa and of this appeal.

(*Dissenting Judgment by* LORD MORRIS OF BORTH-Y-GEST)

I have the misfortune to differ in my conclusion from that which has been reached by the majority of the Board. With diffidence I feel that I must express my view though I can do so quite shortly.

It seems clear that the seizure by the bank of the plaintiff's goods would constitute trespass unless the bank were permitted and entitled to act as they did. In agreement with the majority of the Board and in agreement with all the members of the Court of Appeal I consider that the events which took place in the month of October 1960 did not by themselves give such entitlement.

On the basis of that view the only asserted justification of the seizure was that clause 9 of the letter of hypothecation gave a right to seize. The bank relied therefore upon the letter of hypothecation. Without it they had no answer to a claim in trespass. Within the definition contained in section 2 of the Chattels Transfer Ordinance the letter of hypothecation was unquestionably an " Instrument ". It gave a licence to take possession of chattels as security for any debt. It was precisely that license which the bank exercised. It was vital therefore for the bank to have a valid instrument.

In a section (section 15) of the Ordinance which was the first section in a group of sections under the heading "As to Instruments Generally " it was provided that " 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." That section deals with validity. In my view it lays down that though sealing is not essential to validity attestation is. The word " but " points to that conclusion. So in my view does the word " shall ". That word is imperative. There is a mandatory requirement that an instrument must be attested. There must be at least one witness. Furthermore there is a mandatory requirement that a witness must add his signature and also his residence and also his occupation. In contrast to something that is not " essential " those mandatory requirements are essential. Even if the word " essential " did not by itself convey its own meaning it is made plain that the word is used in the sense of being essential to validity. An unattested instrument is therefore not a valid instrument. Though the Ordinance contains provisions for registration (and prescribes the effect of non-registration) the path to registration does not and cannot begin until there is a valid instrument. Whether in the present case if the bank had secured a valid instrument they would or would not have had an instrument that could take some effect before registration (see section 16) and whether registration would in this particular case, having regard to the terms of the instrument and to the provisions of section 18, have been of much or only of limited advantage, are questions which in my view need not now be considered.

The Chattels Transfer Ordinance which was dated the 13th June 1930 was "An Ordinance to make Provision Relating to Chattel Securities and the Transfer of Chattels ". It is clear that it was modelled upon New Zealand legislation which in turn was considerably derived from English legislation. Section 15 of the Ordinance may be seen to correspond to certain sections in the New Zealand Acts of 1924 and of 1908 which in turn derive from section 49 of an earlier New Zealand Act of 1889. That section however had no ancestry in the English Acts.

Though it is interesting and valuable to study the legislation which was undoubtedly used as a guide and basis by those who drafted the Kenya Ordinance the problem which now arises is essentially one of interpreting the Kenya Ordinance as enacted. I do not think that it should be assumed that the Ordinance was enacted on the basis that there was full knowledge of and full acceptance of any decisions in the Courts of the country whose legislation was being used as a guide and basis in drafting. When problems of construction arise any such decisions will however naturally be studied in a search for guidance and will be considered with special respect. I have endeavoured so to consider the New Zealand cases cited to the Board.

The present case depends in my view upon the construction of the words in section 15. I do not find any assistance from a consideration of section 21 (the effect of which section does not appear to have been canvassed in the Court of Appeal). That section is a saving clause. There is a saving of the effect of " any law for the time being in force " prescribing formalities concerning the execution of instruments or securing rights under them. It was not suggested that there was any such law that called for consideration.

In my view the words in section 15 are mandatory and obligatory. The section enacts that every execution of an instrument " shall be attested " in a particular way. It so enacts in the context of " validity ". I do not think that it would be reasonable to read into the section some words to the effect that in certain circumstances an instrument that has not been attested as directed (and which therefore lacks validity) may nevertheless (e.g. as between the parties) be regarded as only partially invalid. There are no such words. Nor are there any words to the effect that the section is only to apply to instruments which it is proposed to register. In *The Liverpool Borough Bank v. Turner* 1 J. & H.159 Vice-Chancellor Page Wood said (at p.169)— " 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." On appeal (2 DeG.F. & J.502) the Lord Chancellor (Lord Campbell) in approving the judgment of the Vice-Chancellor said (at p.507)—" No universal rule can be laid down for the construction of statues as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the Statute to be construed." In regard to section 15 where there is a mandatory direction in a section dealing with the validity of instruments I consider that the provision as to attestation is a positive and obligatory one: failing obedience to it an instrument is not a valid instrument. That being so it seems to me that in failing to have the instrument attested the bank failed to secure a valid instrument. When the time came that they wished to depend upon a clause in an instrument in order to protect themselves from an act that, if done without permission, would be trespass they only had an instrument which by reason of non-compliance with the law was an invalid instrument. The Courts ought not in my view in defiance of the law to give recognition to it. I agree therefore with the Judgment of Wicks J. in regard to this point and on this and on all other points with the three Judgments in the Court of Appeal.

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In the Privy Council

NATIONAL AND GRINDLAYS
BANK LIMITED

v.

DHARAMSHI VALLABHJI
AND OTHERS

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