

Mrs. Ww. Paul J. J. Guerard - - - - *Appellant*

v.

The Colonial Government of Mauritius - - - - *Respondent*

FROM

THE SUPREME COURT OF MAURITIUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 10TH FEBRUARY, 1939.

Present at the Hearing :

LORD THANKERTON.

LORD ROMER.

LORD PORTER.

[*Delivered by* LORD ROMER.]

This is an appeal from a judgment dated the 2nd September, 1937, of the Supreme Court of Mauritius nonsuiting the appellant as suppliant in a petition of right presented by her against the respondent, the Colonial Government of Mauritius. In its statement of defence to the petition the respondent contended *in limine litis* that even assuming for the sake of argument that all the facts disclosed and averments made in the petition were true, which the respondent in fact denied, those facts and averments only disclosed a tort or *faute délictuelle* on the part of an officer of the Treasury. It is admitted by the appellant that if this contention should succeed her petition must necessarily fail, inasmuch as no action in tort lies against the Colonial Government. In these circumstances both parties requested the Supreme Court to decide the preliminary issue thus raised upon the assumption that all the allegations of fact contained in the petition could eventually be proved. The Supreme Court acceded to such request and the point was in due course argued before them. In the result it was decided in favour of the Government and the appellant was nonsuited with costs. It is from that decision that this appeal is with the leave of the Supreme Court now brought before His Majesty in Council. But, in view of the circumstances above stated, the facts which give rise to the appeal and which must now be set forth will necessarily include many facts of which the truth has not been established but which are merely assumed to be true for the purposes of the appeal.

In or about the month of September, 1929, the Receiver General of Mauritius caused to be issued a series of debentures charged upon the general revenues and assets of

the Colony, such issue being authorised by "The Sugar Industry Loan Ordinance No. 14 of 1929." Inasmuch as one of the questions to be decided upon this appeal is the question whether any and, if so, which of the provisions of the Ordinance are to be regarded as being incorporated in and forming part of the contract between the Government and the debenture holders, it is necessary to set out in full so much of those provisions as are material for the purpose. They are as follows:—

" 2.—(1) It shall be lawful for the Governor for and on behalf of the Colony to raise upon debentures, as provided by this Ordinance, a loan of Rs. 3,300,000

" (2) Such debentures shall be reimbursed in thirty years provided that it shall be lawful for the Governor after twenty years to order that all or such of them as shall be drawn by lot in such manner as the Governor in Executive Council shall determine be reimbursed on such day as the Governor shall fix and cause to be notified in the Gazette.

" 3.—(1) Every debenture shall be for the sum of one hundred, five hundred, one thousand, five thousand or ten thousand rupees, payable to bearer or to any person in whose name the debenture has been issued and shall bear interest at a rate not exceeding five per cent. per annum payable half-yearly. Every debenture shall be secured upon the general revenues and assets of the Colony.

" (2) Every debenture shall be signed on behalf of the Colony by the Receiver General.

" 4. Every debenture shall bear a printed consecutive number and, before being issued, shall be registered in Register Books to be kept for that purpose in the Office of the Receiver General.

" 5. To every debenture there shall be attached at the time of the issue thereof coupons for the payment of the interest to become due in each half-year upon the principal sum secured by the debenture.

" 6. It shall be lawful for the Receiver General upon the application of the holder of a debenture payable to bearer to register such debenture in the name of the holder in the books of the Receiver General by means of an entry to be made in a register kept for that purpose. Such entry shall state the nature of the application, its date, the name of the holder, and the number of the debenture. Each entry shall be signed by the holder and by the Receiver General or Assistant Receiver General, and mention of the debenture having been registered shall be inscribed on the back thereof and signed as above.

" The debenture thus registered shall be transferable only by means of an assignment to be entered in a register and to be signed by the transferor and the transferee, or by the holders of their power of attorney, and by the Receiver General or Assistant Receiver General: mention of the transfer shall be endorsed on the debenture and signed as above, and the transferee shall thereby become entitled to receive the principal moneys and interest respectively, secured or represented by the debenture and the coupons attached thereto.

" Provided that any debenture in a holder's name may be converted into a debenture payable to bearer. Such conversion shall be effected by means of an entry in the aforementioned manner.

" 8. The interest upon the principal moneys secured by each debenture shall commence at and from a day to be named in that behalf in the debenture and shall be paid in the Office of the Receiver General half-yearly on the days to be named in that behalf in the debenture.

" 9. On the day fixed for the repayment of the debentures or of such of them as may have been drawn by lot as hereinbefore enacted, the Receiver General shall, on demand, pay to the holders of the debentures the principal moneys secured by the debentures with all interest due or payable thereon up to that day.

" 10. From and after the day fixed as aforesaid for the repayment of the debentures, all interest on the principal moneys secured by the debentures shall cease and determine whether payment of the principal shall have been demanded or not.

" 11. Upon payment of the principal moneys secured by any debenture, such debenture with all the coupons thereto belonging shall be delivered to the Receiver General forthwith who shall cancel the same.

" 12. In case any debenture issued under this Ordinance is by accident defaced, it shall be lawful for the Governor to cause a new debenture to be made and delivered to the bearer and cause the defaced debenture to be cancelled.

" The new debenture shall bear the same interest and be subject to the same rules as the original debenture.

" 13. The Governor, on proof to his satisfaction that any debenture issued under this Ordinance has by accident been lost or destroyed before the same has been paid off, may, if the number and amount of such debenture are ascertained, and on due security being given, to his satisfaction, for indemnifying the Colonial Government for any loss to which the said Government may at any time be subjected by reason thereof, issue a new debenture corresponding in all respects with the debenture so lost or destroyed; or, if any debenture when so lost or destroyed is overdue, the Governor may cause the money due thereupon to be paid off and discharged on security being given as above.

" 15. From the date of issue of the debentures, contributions to a Sinking Fund shall be made out of the general revenues and assets of the Colony. Such contributions shall be remitted to the Crown Agents to be invested in the names of trustees to be appointed by the Secretary of State. The trustees shall also invest the dividends, interests or proceeds arising from such investment, so that the same may accumulate by way of compound interest and be applied towards the final extinction of the debt.

" 16. All sums paid to the account of such Sinking Fund and the interest thereon shall be invested in such securities as may be approved by the Secretary of State.

" 17. In case the Sinking Fund shall be insufficient to provide the necessary funds for the redemption of the debentures when they shall have become due, the deficiency shall be made good out of the general revenues and assets of the Colony."

The debentures themselves were all in the following form:—

" MAURITIUS: THE SUGAR INDUSTRY LOAN, 1949-59.

" AUTHORISED BY ORDINANCE NO. 14 OF 1929.

" The Governor of Mauritius is authorised by 'The Sugar Industry Loan Ordinance No. 14 of 1929' to cause this debenture to be issued, and the General Revenues and Assets of the Colony secure, in accordance with the provisions of the above Ordinance, the payment of the capital sum of this debenture with the interest accruing thereon, and due provision for the redemption of the debenture is prescribed by the said Ordinance.

" Series..... No..... Rs.....

" The undersigned, the Receiver General of Mauritius, for and on behalf of the said Colony, does hereby acknowledge that the Colony of Mauritius is indebted unto
or the bearer of the present debenture in the sum of RUPEES
..... repayable in thirty years, provided that it shall be lawful for the Governor, after twenty years, to order that

such debenture, as shall be drawn by lot in such manner as the Governor in Executive Council shall determine, be reimbursed on such day as the Governor shall fix and cause to be notified in the Gazette. From and after the day appointed for the repayment of any so drawn debenture, all interest on principal moneys secured by the said debenture shall cease; and upon payment of the principal moneys secured by any debenture, such debenture with all the coupons thereto attached shall be delivered to the Receiver General.

“ The General Revenues and Assets of the Colony are pledged as security under the provisions of The Sugar Industry Loan Ordinance No. 14 of 1929.

“ The said sum shall bear interest at the rate of five per cent. per annum payable on the 10th of March and 10th of September, the first payment to be made on the 10th March, 1930.

“ Given under my hand, at the Treasury, Port Louis, this 10th day of September, 1929.

Receiver General.”

Sixty coupons were attached to each debenture and were in the following form (p. 44):—

<i>THE SUGAR INDUSTRY LOAN</i>	Rs.
Ord. 14 of 1929	
Six months interest due	
10th March 1930	Series
On Deb. for Rs. . . . payable at TREASURY	No.
Receiver General	
The holder of this coupon is requested to deposit it three clear days before payment for purpose of examination.	10 MR. 1930

Of the debentures so issued, 37 debentures for Rs.1,000 each stood registered in the name of the appellant upon the 4th July, 1934. Their Lordships have no information as to the history of these debentures before that date. But it is plain that originally they must have been in the form set out above—that is to say debentures payable to bearer—and that they were subsequently converted into debentures payable to the registered holder in pursuance of the power conferred upon the Receiver General by section 6 of the Ordinance. On the 4th July, 1934, the Receiver General, purporting to act in pursuance of the proviso to the said section, converted 25 of the appellant's debentures into debentures to bearer. He similarly converted seven more on the 25th September, 1934, and the remaining five on the 24th January, 1935. All these conversions were effected upon the application of one Bernard Herchenroder who had no authority from the appellant to make any such application or to make use of her debentures for that purpose. Herchenroder thereafter in fraud of the appellant pledged or otherwise disposed of the whole of the 37 debentures. In the result the appellant has received no interest upon her debentures since the conversions, and the respondent claims that its indebtedness to the appellant under each debenture ceased as from the date of the debenture's conversion. In these circumstances the appellant filed her petition of right. In such petition she alleged that the Colonial Government had no right to effect the said conversions; that acting upon Herchenroder's illegal dealings with the debentures the

Government refused to acknowledge its indebtedness to the appellant; and that by acting as aforesaid the Government had committed a breach of its contract with the appellant "which said contract" she alleged "was a contract in respect of a loan to be reimbursed in 30 years under the conditions enumerated on the said debentures and in the Ordinance." It would appear from this that the appellant was charging the Government with three alleged breaches of contract, namely (1) the wrongful conversion of her debentures into bearer debentures, (2) their failure to pay her the accrued interest on the debentures and (3) their repudiation of all other liability to her under the debentures. Now the Government by its statement of defence contended that the only contractual obligations resulting from the debentures issued under the authority of the Ordinance are those enumerated in the debentures themselves. If this contention should prevail, the conversion of the appellant's debentures would not be a breach of her contract with the Government, but would be merely a tort on the part of the Receiver General in respect of which the Government could not be made liable. But in order to establish the alleged breaches of contract numbered (2) and (3) above it is in no way incumbent upon the appellant to show that the provisions contained in section 6 of the Ordinance form part of the contract between herself and the Government; for she was until the unauthorised conversion the registered holder of the debentures and was as such the person to whom the Government were under a contractual obligation to pay the principal sum secured when it should fall due. This contractual obligation was contained in the debentures themselves, inasmuch as the fact that they had been registered had been recorded on the back of them in accordance with the provision in that behalf contained in section 6 of the Ordinance. None of the debentures was produced to their Lordships, nor have their Lordships been furnished with a copy of the endorsement upon them; but it is plain that the effect of the mention on the back of a debenture of the fact that it had been registered was to convert the contract contained in the debenture to pay the bearer into a contract to pay the registered holder. The Government contends that it has by means of the conversion of the debentures been released from this obligation. It must, therefore, in the words of article 1315 of the French Civil Code, "prove payment or the fact which has caused the obligation to be wiped out." It is not, of course, suggested in the present case that there has been payment of the principal sum secured by the appellant's debentures, and, unless the Government can justify the conversion, its repudiation of liability to her in respect of that sum entitles the appellant at once to sue the Government for damages in respect of breach of contract.

These observations would seem to be equally applicable to the failure to pay the interest accrued under the debentures. While the debentures were bearer debentures the interest was no doubt payable from time to time to the

bearer of the relative coupon. But after conversion into a registered debenture the interest was payable to the registered holder alone. For the only obligation to pay interest expressed in the debenture is that created by the words, "The said sum shall bear interest at the rate of five per cent. per annum payable on the 10th March and 10th September, the first payment to be made on the 10th March, 1930." The interest would therefore be payable prima facie to the person to whom the principal money was payable, that person after conversion being the registered holder, and though it is possible that this prima facie construction would not have prevailed had the interest coupons being expressed to be payable to bearer such is not the case. It is no doubt stated in each coupon that the holder of it is requested to deposit it three clear days before payment for purpose of examination, but after endorsement on the debenture of mention of the debenture having been registered the whole debenture including the coupons must be construed in the light of this fact, and there would be nothing on the coupon when so construed to suggest that the holder of the coupon might be someone other than the registered holder of the debenture.

For these reasons their Lordships are of opinion that the appellant's claim against the Government, so far as it was based upon its repudiation of all liability to her under her debentures after their wrongful reconversion into bearer debentures, was a claim founded solely upon alleged breaches of contract and that the appellant should not have been non-suited.

This view of the matter was not unfortunately the one that was presented by the appellant when her case was before the Supreme Court. Upon that occasion her only contention appears to have been that the Government committed a breach of its contract with her by reason of the unauthorised conversion by the Receiver General of her registered debentures into debentures payable to bearer. The only question therefore that was argued and decided was the question whether the provisions of section 6 of the Ordinance No. 14 of 1929 form part of the contract between the appellant and the Government. In view of the conclusion already expressed at which their Lordships have arrived, it is not in strictness necessary to decide this question. But at the trial of the petition which must now take place it may be urged on the part of the Government that the appellant has not suffered any damage by reason of its repudiation of all liability to her under her debentures, inasmuch as she could never call upon the Government to pay either the principal or the interest secured by the debentures except on delivery up of the debentures or coupons as the case may be, and that her inability to do this will have been caused not by any breach of contract on the part of the Government but by a tort or *faute délictuelle* on the part of the Receiver General for which it cannot be made responsible. Whether this contention would be sound assuming that the unauthorised conversion

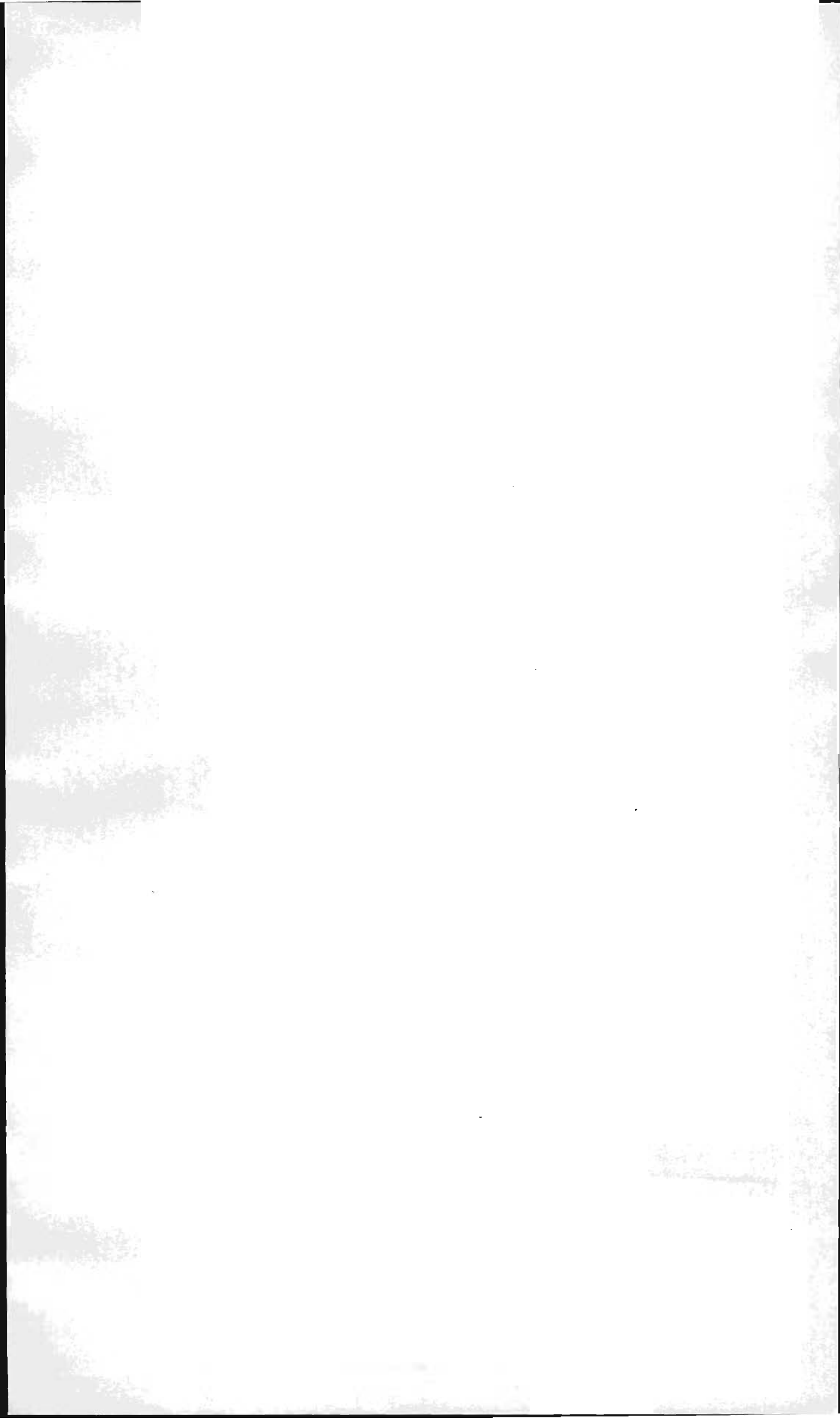
of the debentures was merely a tort and not a breach of contract is not a matter upon which their Lordships need express any opinion: for with all respect to the Supreme Court their Lordships are of opinion that the unauthorised conversion, if proved, was a breach of the contract between the Government and the appellant. Their reasons for arriving at this conclusion are as follows.

Each debenture states that the Governor of Mauritius is authorised by the Sugar Industry Loan Ordinance No. 14 of 1929 to cause the debenture to be issued and that the general revenues and assets of the Colony secure the payment of the capital sum of the debenture with the interest accruing in accordance with the provisions of that Ordinance. It states that due provision for the redemption of the debenture is prescribed by the Ordinance, and it further adds that the general revenues and assets of the Colony are pledged as security under the provisions of the Ordinance. Nothing further is said in the debenture itself either as to the manner in which the charge on the general revenues and assets is to be constituted or how such revenues and assets are to be made available for payment of the debenture. Nor is anything said about the redemption of the debenture except that due provision for its redemption is prescribed by the Ordinance. But the terms on which the security is constituted and may be given effect to and the terms upon which the security may be redeemed are essential terms of every contract relating to a secured debt, and the fact that in order to ascertain these terms the debenture holder is by the debenture expressly referred to the Ordinance, inevitably points, in their Lordships' opinion, to the conclusion that sections 9, 10 and 11 of the Ordinance which deal with the redemption of the debentures and sections 15, 16 and 17 which deal with the constitution of the security for the debentures form part, and an essential part, of the contract between the Government and the debenture holder. Their Lordships are therefore unable to agree with the Supreme Court in holding that the Ordinance does no more than create administrative powers and duties which Government officials have to perform and that its provisions cannot in any way form part of the contractual obligations of the Government towards the debenture holders. This is no doubt true of some of its provisions, but it is not true of the provisions contained in the six sections just mentioned, and in their Lordships' opinion it is not true of the provisions contained in section 6. The contract contained in the debenture itself is a contract to pay the bearer. Upon its conversion into a registered debenture that contract became, as already pointed out, a contract to pay the registered holder. But it only became so by virtue of the mention endorsed upon the debenture that it had been registered. In order to ascertain what results flowed from such registration the debenture holder would necessarily have to refer to section 6 of the Ordinance. All the terms of the contract with the registered holder are not therefore to be found in the debenture. A transferee

from the registered holder, for instance, desiring to enforce his debenture could not succeed on mere production of the debenture. He would have to prove a transfer to himself and a registration of his transfer made in accordance with the provisions in that behalf contained in section 6, and the contract between himself and the Government that he would be seeking to enforce would be a contract arising partly under that section and partly under the debenture, endorsed with mention of the fact that it had been registered. That endorsement must necessarily mean that it had been registered under section 6 of the Ordinance even if it did not specifically refer to that section.

For these reasons their Lordships are of opinion that the order of the Supreme Court of the 2nd September, 1937, non-suiting the appellant with costs should be discharged, and that the appeal should be allowed with costs here and below. They will humbly advise His Majesty accordingly.

Their Lordships desire to add that they express no opinion as to the precise nature of relief to which the appellant is entitled should she succeed upon the hearing of her petition.



In the Privy Council

MRS. WW. PAUL J. J. GUERARD

v.

THE COLONIAL GOVERNMENT OF
MAURITIUS

DELIVERED BY LORD ROMER

Printed by His Majesty's Stationery Office Press,
POCOCK STREET, S.E.1.

1939