Judgment 13, 1968

(13)

IN THE PRIVY COUNCIL No. 37 of 1966

ON APPEAL
FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :

UNITED DOMINIONS CORPORATION (JAMAICA) LIMITED (Defendant)
Appellant

- and -

MICHAEL MITRI SHOUCAIR (Plaintiff) Respondent

R E C O R D O F P R O C E E D I N G S

SIMMONS & SIMMONS,
14, Dominion Street,
London, E.C.2

Solicitors for the Appellant

DRUCES & ATTLEE,
82, King William Street,
London, E.C.4

Solicitors for the Respondent

IN THE PRIVY COUNCIL No. 37 of 1966

ON APPEAL
FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :

UNITED DOMINIONS CORPORATION (JAMAICA) LIMITED (Defendant) Appellant

- and -

MICHAEL MITRI SHOUCAIR (Plaintiff) Respondent

R E C O R D O F P R O C E E D I N G S

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IN THE PRIVY COUNCIL No. 37 of 1966

ON APPEAL
FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :

UNITED DOMINIONS CORPORATION (JAMAICA) LIMITED (Defendant) Appellant

- and -

MICHAEL MITRI SHOUCAIR (Plaintiff) Respondent

R E C O R D O F P R O C E E D I N G S

In the Supreme Court of Jamaica

No. 1

Endorsement on Writ of Summons.

No. 1

ENDORSEMENT ON WRIT OF SUMMONS.

Suit No. C.L. 258 of 1962

In the Supreme Court of Judicature of Jamaica

In the High Court of Justice

COMMON LAW

BETWEEN MICHAEL M. SHOUCAIR PLAINTIFF

AND UNITED DOMINIONS CORPORATION (JAMAICA) LIMITED DEFENDANT

The Plaintiff's claim is against the Defendant for:-

1. A declaration that the Mortgage made between the parties on the 22nd day of April 1961 and varied in writing on the 31st day of July 1961 is unenforceable having regard to Section 8 of The Moneylending Law Chapter 254 of the Revised Edition (1953) of the Laws of Jamaica.

2. Cancellation and delivery up of the

In the Supreme Court of Jamaica

No. 1

Endorsement on Writ of Summons

(Contd.)

Instrument of Mortgage dated the 22nd day of April 1961 and of the letter dated the 31st day of July varying the Mortgage.

3. An Injunction to restrain the Defendant from taking any steps to take possession of, sell or otherwise dispose of the lands of the Plaintiff mortgaged to the Defendant and more particularly described in the Instrument of Mortgage mentioned in (2) above.

4. An Order for the discharge from the Certificates of Title to the Plaintiff's lands of the Mortgage in favour of the Defendant endorsed on them.

A. E. BRANDON & CO.

Per:- C.B.M.Lopez (SIGNED)

Solicitors for the Plaintiff.

No. 2

Statement of Claim

NO. 2

STATEMENT OF CLAIM.

1. By an Instrument of Mortgage under the Registration of Titles Law, and made between the Plaintiff as "Mortgagor" and the Defendant as "Mortgagee", on the 22nd day of April 1961, in consideration of the sum of £55,000 loaned by the Defendant to the Plaintiff and for better securing the payment of the said loan moneys, the Plaintiff being registered as the proprietor of an estate in fee simple in the lands hereinafter described MORTGAGED to the Defendant all his estate and interest which he is entitled to transfer and dispose of in ALL THOSE parcels of land as follows:-

(1) All that parcel of land known as 172C Upper Orange Street in the Parish of Kingston and comprised in Certificate of Title registered at volume 440 Folio 76.

(2) All that parcel of land known as 172D Upper Orange Street in the Parish of Kingston and comprised in Certificate of Title registered at Volume 87 Folio 74.

(3) All that parcel of land part of Beechwood in the Parish of Saint Andrew and comprised in Certificate of Title registered at Volume 183 Folio 79

2. By paragraph 1 (a) of the said Instrument of mortgage the Plaintiff covenanted (inter alia) to pay to the Defendant the said sum of £55,000 on demand together with interest thereon at the rate of £9 (nine pounds) per centum per annum.

3. By an agreement in writing made between the Plaintiff and Defendant, and dated the 31st day of July 1961, it was agreed that the said rate of interest under the said mortgage should be increased to 11% per annum, effective as from the 26th July 1961

4. The Plaintiff having defaulted in payment of interest under the said Mortgage, by letter dated the 5th day of October 1961, in exercise of their powers under the said Mortgage, the Defendant gave notice to the Plaintiff that the said lands would be sold unless the principal sum and accrued interest amounting to £58,005.18.5 was paid by the 14th day of October 1961.

5. On the failure of the Plaintiff to pay the said sum as demanded by the Defendant, the latter proceeded to advertise the said lands for sale on the 3rd day of November 1961 in purported exercise of their powers under the said mortgage.

6. The Plaintiff says that the contract for payment of the said sum of £55,000 and interest and the said security given by the Plaintiff is unenforceable as no note or memorandum of the contract was made or signed by him, nor was any copy of any note or memorandum given or sent to the Plaintiff as

In the Supreme Court of Justice

No. 2

Statement of Claim

(Contd.)

required by section 8 of the Moneylending Law Chapter 254 (1953) Revised Edition of the Laws of Jamaica.

7. Further and/or alternatively, the Plaintiff did not sign a note or memorandum of the said contract of loan before the said money was lent or the said security given. By reason thereof the said loan and security does not comply with the provisions of section 8 of the Moneylending Law and is unenforceable.

8. Further and/or alternatively, there was no note or memorandum in writing, made and signed by the Plaintiff in compliance with the provisions of the said Law.

AND the Plaintiff claims:

(1) A declaration that the Mortgage made between the Plaintiff and Defendant on the 22nd April 1961 and varied in writing on the 31st day of July 1961 is unenforceable having regard to section 8 of the Moneylending Law, Cap. 254 of the Revised Edition (1953) of the Laws of Jamaica.

(2) Cancellation and delivery up of the Instrument of Mortgage dated the 22nd day of April 1961 and of the letter dated the 31st day of July 1961 varying the said Mortgage.

(3) An injunction to restrain the Defendant from taking any steps to take possession of, sell or otherwise dispose of the said lands of the Plaintiff mortgaged to the Defendant.

(4) An Order for the discharge from the Certificate of Title to the Plaintiff's lands of the Mortgage in favour of the Defendant endorsed thereon.

Settled, SIGNED. R.Mahfood

.....

Richard Mahfood

Filed and Delivered the 11th day of May 1962 by A.E.Brandon & Co. of 45 Duke Street, Kingston, the Solicitors for the above named Plaintiff.

In the Supreme Court of Jamaica

No. 3

Statement of Defence

26th June 1962

NO. 3
STATEMENT OF DEFENCE.

1. Save that the Defendant denies that the accrued interest referred to in their letter of demand of the 5th of October 1961, or any portion represents interest upon the principal sum at the rate of 11% per annu paragraph 1, 2, 4 and 5 of the Statement of Claim herein are admitted.

2. As to paragraph 3, the Defendant admits that on or about the 31st day of July 1961, they addressed a letter to the Plaintiff advising him that owing to the increase of the Bank of England rate by 2%, interest on his loan would be computed at 4% above the then prevailing Bank of England rate, as a temporary measure effective as from the 26th of July 1961, and the Plaintiff signified his agreement to this proposal by signing and returning a copy of the said letter to the Defendant.

3. At the date of the said letter, the Plaintiff was indebted to the Defendant in respect of sums other than the sums secured by the mortgage referred to in paragraph 2 of the Statement of Claim, and the rate of interest on these loans was variable.

4. In the premises the Defendant will contend that the said letter of the 31st of July 1961, did not apply, and/or could not reasonably be understood to apply to the rate of interest of £9 per centum per annum fixed by the instrument of mortgage of the 22nd of April 1961, and which instrument contained no provision for a variation of the said interest rate.

5. If, which is denied, the said letter and the Plaintiff's confirmation of the term therein contained applied to the said mortgage, there was no consideration moving from the Defendant for the Plaintiff's promise to pay the increased rate of interest on the

In the Supreme Court of Jamaica

No. 3

Statement of Defence

26th June 1962

(Contd.)

principal sum thereby secured, and no contract for the repayment of the principal sum of £55,000 with interest thereon at the rate of 11% per annum was thereby created.

6. Further or in the alternative, the agreement referred to in paragraph 3 of the Statement of Claim was a contract concerning an interest in lands, tenements or hereditaments, and Section 4 of the Statute of Frauds has not been complied with in that there is no note or memorandum in writing of the said agreement as required by Section 4 of the aforesaid Statute. In the premises the agreement referred to in the aforesaid paragraph was ineffective to vary the instrument of mortgage described in paragraph 1 of the Statement of Claim.

7. Further or in the alternative, if the said agreement was effective to vary the instrument of mortgage referred to in paragraph 1 of the Statement of Claim, the Defendant denies that the provisions of Section 8 of the Money-lending Law Cap. 254 were not complied with.

8. If, which is denied, the provisions of the Money-lending Law were not complied with, the failure to comply therewith made the agreement referred to in paragraph 3 of the Statement of Claim ineffective to vary the original instrument of mortgage of the 22nd of April, 1961.

9. Further or in the alternative, the Defendant say that they are a Limited Liability Company empowered by the Companies Law to carry on such business as is stated by their Memorandum of Association. Their said Memorandum enables them to lend money, and they will rely on the provisions of Section 13 (1) (c) of the Money-lending Law as exempting them from the provisions of the said Statute.

10. In any event at the date of the Writ herein the Bank of England rate was 6 per cent and by reason of the terms of the letter of the 31st July 1961, the contents of which are more particularly described in paragraph 2

hereof, no contract for the repayment of money at a rate of interest in excess of 10% per annum was then in existence.

11. Save as is hereinbefore expressly admitted the Defendant denies each and every allegation contained in the Statement of Claim as if the same were herein specifically set forth and traversed seriatim.

12. In the premises the Defendant says that the Plaintiff is not entitled to the relief claimed in his Statement of Claim, or any part or portion thereof.

SETTLED: V.O.BLAKE Q.C.

FILED AND DELIVERED by MILHOLLAND ASHENHEIM & STONE of No. 5 Port Royal Street, Kingston, Solicitors for and on behalf of the above-named Defendant, on the 26th day of June 1962.

NO. 4

JUDGE'S NOTES OF EVIDENCE

5th November, 1962

Mr. Coore, Q.C. with Mr. Mahfood for Plaintiff

Mr. Blake, Q.C. and Mr. George for Defendant Company

Mr. Blake:

Applies for amendment of para. 2 of Defence - at line after returning insert word "a copy of" - No objection - amendment as prayed.

Admits - that sum of £3,005.18.5 demanded by the Defendant in their Notice of 5th October, 1961, represented interest on £70,000 for the period March to 30th September 1961, and that that portion of the said sum which represented interest for period 1st August to 30th September, 1961, was calculated at the rate of 11% per annum.

In the Supreme Court of Jamaica

No. 4

Judge's Notes of Evidence

5th November 1962.

(Contd.)

Para. 3 and 4 of Defence - Defendant calculated interest at 11% including that on sum secured. Defendant abandons paragraphs 3 and 4 of Statement of Defence.

Mr. Mahfood opens:

Relief claimed. Company - Michael M. Shoucair Ltd. started doing business with Defendant in December, 1959, - financing of hire purchase transactions and stocking facilities. September, 1960 Company started dealing with plaintiff personally with loan to buy land - later loans to put up building. May, 1960 - plaintiff borrowed £14,000 to buy land; September, 1960 - further £4,000 - subsequent loan. Plaintiff deposited titles to 172C and 172D.

April, 1961, Defendant asked plaintiff to execute mortgage to secure loan - mortgage on 172C and 172D Orange Street and 34 Beechwood Avenue.

Para. 1 of mortgage - "this day" ... "interest ... computed from date thereof inaccurate - accrued interest included. Mortgage repayable on demand. Letter of 3rd June, 1961 - asking for further sum. Letter of 16th June - last paragraph - letter of 31st July - Notice to Mortgagee (page 24) letter of Solicitors of Plaintiff to the Company (page 26) - Statement of Claim - paragraphs 6, 7, 8.

Moneylending Law, Ch. 254 - Sec. 8 and Sec. 13

Section 8 - applies to all loans which do not come within exemption of Sec. 13. Cohen v. Lester (1938) 4 ALL E.R. 188 - plaintiff seeking recovery of jewellery - page 192 -- F - H page 193 - G - H.

Meeston Law relating to Moneylenders - 7th edn. page 99-102 - re Sec. 6 - page 100 c.f. Statute of Frauds on recovery of money lent. John W. Graham v. Ingram (1955) 2 All E.R. - C.A.320 - licensed Money Lender - copy of memo not sent to each borrower personally. Parker L.J. page 332-B-F.

Defence:

Para. 5 - There was good consideration moving from the promisee.

1. Having regard to the fact that mortgage loan was repayable on demand and the fact that defendant required plaintiff to agree to an increase in the interest payable under the mortgage - the law infers that, but for the fact that plaintiff agreed to the increase of the rates of interest the defendant could have taken action which they refrained to take on the strength of the agreement, and their forbearance is good consideration for the plaintiff's promise.

Law infers that Defendant would take this course - in fact that is what defendant did three months later as a matter of fact, three months forbearance where*obtained as a result of signing the agreement. (* sic)

Alternatively:

Having signed agreement of 31st July, 1961, the plaintiff did in fact enjoy some degree of forbearance and the circumstances necessarily involve the benefit to the plaintiff of a certain amount of forbearance in fact, which he would not have derived if he had not signed the agreement.

Alliance Bank v. Broom (1864) 2 D & Sm. 289 - 62 E.R.631 - customer called on to give security - forbearance of bank sufficient consideration Page 292 - if an application for security being made, consequence would have been that creditor would have demanded payment of the debt.

Fullerton v. Prov. Bank of Ireland (1903) A.C.309 - overdraft. Page 313-314 Judgment of Lord Davey page 315-316. Inference of promise to forbear or consideration arising from the fact that plaintiff in fact enjoyed some degree of forbearance resulting in what he did.

Wigan v. English & Scottish Law Life (1909) 1 Ch. 291 - Lord Parker's judgment page 297-298 Glegg v. Bromley (1912) 3 K.B. 474 - Vaughan Williams judgment page 479 - Fletcher Moulton J. page

In the Supreme Court of Jamaica

No. 4

Judge's Notes of Evidence

5th November, 1962.

(Contd.)

486 - 487 - Re Wethered (1926) 1 Ch. 167 p. 176. Combe v. Combe (1951) 1 All E.R.767. Denning L.J. p. 770.

Para. 5: - Defendant cannot take the point of consideration in this case because they have approbated the variation agreement, exercised rights under it and proceeded to exercise those rights under hypothesis that the agreement is valid and binding. Put up premises for sale on basis that interest due at rate of 11% 15 Halsbury 3rd edn. page 171-172 para. 340. Verchures Creameries v. Hull & Netherlands Steamship Co. (1921) 2 K.B. 593 page 608 - Banks L.J. page 610-611. By demanding interest at 11% defendant has exercised rights on hypothesis that they were entitled to exercise their rights under a valid contract. The King v. Taylor (1915) 2 K.B.593 page 603. Gandy v. Gandy (1885) 30 Ch.D.57 Bowen L.J. page 82.

Para. 6:

Point under Statute of Frauds cannot be taken -

(1) because of approbation doctrine

(2) because authorities show that Statute of Frauds is only relevant in proceedings brought to enforce the agreement, when it is pleaded as a defence by the person against whom the agreement is being enforced.

(3) Statute does not affect validity of agreement, it only makes it unenforceable and there is still in existence, an agreement sufficient to evoke the operation of Section 8 of the Moneylenders Law - Statute procedural.

8 Halsbury 3rd edn. page 89 para. 154

(4) there are at least three sets of documents which constitute good memoranda within the Statute of Frauds -

(a) Mortgage document and letter of 31st July, varying it,

(b) Letter of Solicitors dated 6th November 1961 referring to notice of 5th October, which refers to mortgage.

(c) Statement of Claim.

G. Randell v. Bass (1920) 2 Ch. 787 - Farr Smith v. Messer (1928) 1 R.B. 397 - 8 Halsbury 3rd edn. page 96 - para. 167 - in regards (b) implied reference.

12.35 adjournment

2.10 p.m. resumed

Mr. Mahfood continues:

Para. 7:

(a) No memorandum as required by Ch. 254 - mortgage document cannot constitute a memorandum within the law.

(b) If the mortgage document and letter can constitute a memorandum, it is in breach of section 8 in numerous respects including the following:-

(a) does not state the true date when the advance was made -

(b) not signed before the advance was made

(c) does not clearly set out facts in respect of prior advances leading up to execution of mortgage

(d) acknowledges receipt of loan money

(e) copy of mortgage was never given to plaintiff contrary to section 8. Copy not exact - one of terms of mortgage endorsed on original not on the copy - that mortgage subject to caveat.

In the Supreme Court of Jamaica

No. 4

Judge's Notes of Evidence

5th November, 1962.

(Contd.)

Mortgage document cannot constitute memorandum - law contemplates a memorandum quite distinct from mortgage documents. Meeston 4th edn. - law relating to moneylenders page 101 - quote Scottish case - Colin Campbell v. Christie. In this connection it is interesting to note that the Straits Settlements Moneylenders Ordinance 1935, contains a provision which states terms a promissory note which contains all the terms of a moneylending contract may in itself constitute a note or memorandum of the contract. That however is not the case under Section 6 of the Moneylenders Act, 1927. Meeston, p.103, 104 - page, 134, 135.

Central Advance v. Marshall (1939) 2 K.B. 781 Clanson*L.J. p. 789 Meeston page 142. Tooke v. Bennett (1940) 1 K.B. 150 - 7 Halsbury page 318, 319 - para 599 - Gaskell v. Askwith 45 T.L.R. 566. Memo date stated inaccurately. Temperance Loan Fund v. Rose (1932) 2 K.B. 522. Scrutton L.J. page 526 - renewal of old loan - must set out what was in fact done. Greer L.J. page 532. Allighan v. London etc. (1940) All E.R.530. Meeston - memo must be exact copy.

(* sic)

Para. 8:

Where contract varied by oral agreement which does not comply with Statute of Frauds, oral agreement unenforceable and original agreement may be enforced. Cheshire v. Fifort 3rd Edn.* page 137 - commencing on Statute of Frauds.

(* sic)

Distinction:-

(a) There were cases where original agreement was in writing and were required to be in writing by Statute of Frauds.

Section 8 operates after legal relationship of the parties has been established on the basis of the agreement as varied. What statute attacks is not the variation of agreement but the agreement as varied. Leroux v. Brown (1852) 12 C.B. 801. Goss v. Nugent (1832) 2 L.J. K.B.127 page 129. "But we think that the object of the Statute of Frauds was to exclude all oral evidence as to contracts for the sale of lands and that any contract which is sought to be enforced must be

proved in writing only."

In the Supreme Court of Jamaica

No. 4

Judge's Notes of Evidence

5th November, 1962. (Contd.)

Para. 9:

Limited Liability Co. not empowered by Companies Law to lend money - its power must come from their memorandum and articles.

Para. 10:

Quite false to say that no contract for payment of interest in excess of 10% was in existence - letter of 31st July. Rate of interest not variable - to talk of Bank of England interest goes to motive and intention, nothing more. Even if it can be contended successfully that interest is variable under this letter (31st July, 1961) Defendant still cannot bring themselves within section 13(e) i.e. if interest variable above 10%.

5th October, 1961)
2nd November, 1961)

Variations not taken into account in demands by defendant company.

3.40 p.m. adjourned.

6th November, 1962

6th November, 1962

10.12 a.m. resumed:

MICHAEL MITRI SHOUCAIR sworn:

Plaintiff in this action, living at 24 Trafalgar Road, Kingston 10. I am employed at present to Motor Sales and Services Co.

Up to June-July, 1962, I was Managing Director of Michael M. Shoucair Ltd. now in liquidation. In the year 1959 I was Managing Director of Michael M. Shoucair Ltd. In latter part of that year - sometime in December, 1959, my Company began doing business with Defendant Company. My Company sold new and old cars and had a rent-a-car service. M.M.Shoucair Ltd. used to do business with Defendant Company. They discounted Hire Purchase billing and loaned the

In the Supreme Court of Jamaica

No. 4

Judge's Notes of Evidence

6th November, 1962.

(Contd.)

Company some money too.

Following year, I, in my own right - in May, 1960, started doing business with Defendant. I borrowed £14,000 from them that was to purchase lands, 172C-D Orange Street. Right after that in June or July 1960, I got another loan from them. It was September, 1960, I borrowed £4,000 to pay contractors to start erecting that building. Purpose of purchasing land and erecting buildings was to provide premises for M.M.Shoucair Ltd. to carry on business. I also on my name purchased land - Beechwood Avenue - that was in 1960, before I bought Orange Street premises. Beechwood Avenue premises was for rent-a-car service. I deposited titles with U.D.C. 1

Between September, 1960, and April, 1961, U.D.C. advanced me various sums from time to time to complete building and for use in business of Michael M. Shoucair Ltd. These loans were made to me personally. In April, 1961, they totalled £55,000. These loans were made on demand notes on each loan, interest were 9% on all the loans. In April, 1961, I executed a mortgage under registration of Titles Law to secure £55,000 to Defendant Company. That £55,000 represented total of monies lent up to that time. At same time U.D.C. advanced £15,000. to Michael M. Shoucair Ltd., which I guaranteed personally. No other security I know of beside my personal guarantee. I was given a copy of this mortgage tendered (Admitted in evidence Ex. 1). 2 3

Exhibit 1

At time I executed mortgage, 22nd April, 1961, interest was due. I think last payment of interest was February or March. After executing mortgage, I was not able to keep up to date with mortgage payments. By early June, 1961, I began to find myself in some difficulty. Around that time there was a change of management of U.D.C. I had interviews with the new manager. I wrote to parent company of U.D.C. - U.D.T. in England (tendered admitted as Exhibit 2). I received a reply dated 9th June, (admitted as Ex.3). I got a letter from Mr. Neal on 16th June 1961 (admitted as Exhibit 4). 4

Exhibit 2

Exhibit 3

Exhibit 4

I got a circular letter dated 31st July 1961.

This is it. A copy came along with it. I signed and returned attached copy. At that date I was not up to date with my interest payments. Letter increased rate of interest. I signed it because I had no choice. If I hadn't signed it they would have pressed for payment. I was not then able to repay £55,000 and outstanding interest. (Letter admitted as Exhibit 5).

From and after signing and returning letter, I regarded myself as liable to pay interest at the rate of 11% per annum. On 17th August, I got another letter from U.D.C. This is a letter to my Company from the Defendant. Subsequent to that letter no further loan was made to me or my Company. On 17th August, loan was made to me by U.D.C. of £1,800. At the time I was putting up building, I required a lift. Bank opened a letter of credit on strength of a letter from U.D.C. that when lift came they would pay. Lift arrived and cheque sent to the Bank. (Letter admitted as Exhibit 6). After that I got a notice of Default dated 5th October, 1961. This is it (admitted as Exhibit 7) that called on me to pay £58,005.18.5. I was not able to pay. I attempted to try to pay it. I couldnt raise the money. I consulted my Solicitor. Defendant caused mortgaged premises to be advertised for sale in Daily Gleaner on 3rd November, 1961. I handed my Solicitor notice of Default and Copy mortgage. I gave my Solicitor certain instructions. In consequence they wrote a letter dated 6th November, 1961 to Defendant Company (letter admitted as Exhibit 8). Thereafter this action commenced.

Exhibit 5

Exhibit 6

Exhibit 7

Exhibit 8

Apart from Mortgage which I signed and copy letter I signed, I received no other document from U.D.C. setting out terms of loan to me. I have received no memorandum setting out terms of loans made by U.D.C. to me. My Solicitor obtained from Defendant Company a copy of their Ledger Account relating to the transaction. These are copy accounts subject to correction in comparison with original. (no objections by Defendant), (admitted as Exhibit 9).

Exhibit 9

I have never received any notification from Defendant Company advising me that that rate of

In the Supreme Court of Jamaica

No. 4

Judge's Notes of Evidence

6th November, 1962.

(Contd.)

interest has been reduced. On 31st July, 1961, I owed U.D.C. no capital sum other than £55,000 secured by a mortgage.

XXD. - Mr. Blake:

Beechwood Avenue premises purchased for £7,000. Premises had on a house at the time. Between date of purchase and April, 1961, it was after April, 1961, I put on a shed at the back to store new cars. I renovated the house at Beechwood Avenue before April, 1961, After April, 1961, I added shed. I valued shed at £1,500. At end of additions, premises at Beechwood Avenue valued at £10,000. £1,500 capital gain. I bought it in 1959. £10,000 valuation is as of today. In June, 1961, Beechwood Avenue premises worth £8,000 - £9,000.

Defendant provided money to buy land at Orange Street. Also provided some of money necessary to put up buildings at Orange Street. In addition they provided other sums for the purpose of the business - e.g. stocking facilities. These transactions took place and were approved by Mr. Harvey then Manager of Defendant Company.

Before Mr. Harvey left Jamaica, £55,000 had been made available to me for use by my Company. Before Mr. Harvey left there were discussions about making available a further £30,000 to me. The Defendant Company up to that time had been extraordinary generous to me. Mr. Harvey left in late April, 1961.

Shortly before he left, my Company received £15,000 of £30,000 which I hoped to get for stocking facilities. I never personally charged Beechwood Ave. with that £15,000. (Solicitors for Defendant give undertaking to stamp document and pay penalty). This is my signature on document dated 16th May, 1961 on that date mortgage had been made. Title of Beechwood Avenue was at that time in hands of the Banks. U.D.C. asked me to sign it over to them. If for any reason the Company failed, they would call on me for the money. (Court reads letter of charge returned to Defendant'sSolicitors for

stamping before admission in evidence.)

£55,000 secured on 172C-D Orange Street and 34 Beechwood Avenue. In addition U.D.C. had lent my Company £15,000 on which they held a charge on my premises at 34 Beechwood Avenue. (Witness sees Exhibit 2). At that stage I was complaining that Mr. Harvey having promised to make £30,000 available to me for stocking facilities, only £15,000 had been advanced. At that date the new Manager Mr. Neal had advised me that no further advances would be made.

Reply to my letter was 9th June, 1961. In letter of 16th June, 1961, Mr. Neal was saying that Company would not reverse into decisions not to afford me further advances. I received exhibit 5 along with a copy. On face of it was a circular letter. I would not regard myself as the only person to whom it had been sent. I dont remember dating the copy I returned. It must have been a couple of days after I received it. I returned it by bearer, one of our messenger boys. I dont remember his name. He used to work with us. There was a delivery book at the time. Letter would be entered into a book. I didnt know if Company's Secretary entered it. It was a personal matter. She might have entered it into the book.

When it was a personal matter, she had a discretion to enter or not to enter. I wouldnt say it is not so that letter was returned by me to Company until 7th September, 1961. This is my signature on this document. (marked 'A' for identity) I received the letter dated 31st July, 1961 on 31st July or 2nd August.

Betweer 22nd April, 1961, and 5th October, 1961, I made no payment except three sums in September in respect of interest.

6th September, 1961 - I paid £150
15th " 1961 - I paid £150
19th " 1961 - Company discounted some hire purchase

transactions and credited Company's account for £350. Between those dates all I ever paid was £650.

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On 5th October, a large portion of amount owing was interest at 9%. Although I considered myself liable to pay interest at 11%. I did pay a month's instalment at 11%. I didn't get a chance to pay a full month's instalments at 11%. I was paying £150 per week to pay off arrears of interest. I considered myself liable to pay 11% from date stated in the letter. I was in arrears with instalments and Mr. Neal called me. Discussions - as I dont know when. It was in presence of Mr. Carmichael, I cant remember if this was before or after I received letter of 31st July.

I think it was after I got the circular letter. Yes, it was. I was to pay £150 and they would discount what stocks we would give them and they would give us credit. Between time I got letter of 31st July and 5th October, I received no communications from defendant apart from letter addressed to Michael M. Shoucair Ltd. which they were honouring on undertaking given to the bank.

Meeting with Mr. Neal took place before I made payment on 6th September. It was a couple of days before the 6th September. I signed the letter of 31st July, 1961 because I felt that if I didn't sign they would press for payment.

ReXd:

I have no recollection now of when I received letter dated 31st July. I have a clear recollection of signing it and giving it to my secretary to return within a day or two. If Company didnt receive it I can't contradict that. I sent it. Exhibit 6 signed by Mr. Sinclair. I think he was the Defendant Company's secretary. Mr. Coore asks whether there was in fact a conversation with Mr. Sinclair. Blake objects - does not arise from Crown's XXN. Coore refers to quote about 'no communication'.

By the Court: Question allowed.

There was such a conversation with Mr. Sinclair. The £150 was for interest in arrears and interest on the loan - for everything. It was to take

care of interest in arrears and interest accruing. In addition they were going to appropriate sums for hire-purchase agreements to bring it up. All those things were discussed at that meeting.

Mr. Coore:

Mr. Blake advises that Mr. Neal of U.D.C. will be coming to Jamaica to give evidence if necessary. I consent to the recall of Mr. Shoucair for further XXN when Mr. Neal arrives and Mr. Blake gets further instructions.

JOHN GORDON CAMPBELL sworn:

I live at 10 Kings Avenue, Kingston 10. Employed at office of Registrar of Titles. I produce certain documents - 172D Orange Street - certificate of Titles is Vol. 87 Folio 74. 172C Orange Street Certificate of Titles is Vol. 440, Folio 76. I produce certificate of title in Vol. 187, Folio 79, part of Beechwood Avenue in parish of St. Andrew.

I produce instrument of mortgage No. 151585 registered between M.M.Shoucair Ltd. to U.D.C. mortgage endorsed on certificate of Titles I produced. Mortgage registered 24th May, 1961. I produce caveat 34126 against dealings with and comprised in title aforementioned. Tendered together as exhibit 10. (Admitted as exhibit 10) Exhibit 10

10A - mortgage

10B - Caveat and papers

10C - Vol. 440, Folio 76

10D - Vol. 87, Folio 74

10E - Vol. 183, Folio 79

No objection to Volume being kept by Registrar of Titles XXD - Mr. Blake.

No question.

- C A S E -

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Defence:

Mr. George opens defence. Only fact in issue is that of consideration.

Alliance Bank v Broom (1867) 2 Drs. Sm. 289 facts - if no security given would take steps to collect debt. Inherent in demand for security is demand for payment. In all the cases following Alliance Bank, it is maintained that there is a demand for payment for security. Crears v. Hunter (1887) 19 Q.B.D. 341 - 57 L.T. 554 3 T.L.R. 756 - forbearance to sue father a good consideration. Whynne. Hughes (1872) W.R. 628 - demand undertaken to pay £x. Plaintiff forborne for three weeks - good consideration - Bramwell B-629 Kelly C.B.629 Fullerton v. Provincial Bank (1903) A.C. 309 - Judgment of Lord McNaughton page 313.

Submits -

If there is to be circumstances from which it can be inferred that there is a request for forbearance there must be a demand or an implied demand. Miles v. New Zealand Alford Estates Co. (1886) 32 Ch.D 266 - Bowen L.J. page 288.

Submission in authority of above

In all the cases, there has always been a demand by the creditor for payment of the debt or for security which has been treated synonymously as a demand for payment followed by a promise on the part of the debtor either to give the security requested or to make payment at some future time - promisee always followed by forbearance to sue on the part of the creditor. Courts have held that forbearance exercised for valuable consideration. Glegg v. Bromley (1912) 3 K.B. 474 - demand for more security. Vaughan Williams page 481 - must be immediately referable to an agreement which gives rise to a forbearance. Fletcher-Moulton - page 486 - dictum unnecessary from case Glegg v. Bromley there was a request for further security.

12.35 p.m. adjourned.

2.05 p.m. resumed

Glegg v. Bromley - Parker, J. page 491. - "I think that where a creditor....." Re Wethered (1926) 1 Ch. 167 page 176 - Lawrence J. "In the circumstances....." forbearance referrable to deposit of notes - it obviously operated on the mind of the creditors that because these particular notes were deposited with him, he would forbear; - if notes not given for this purpose, it could not be so assumed in the absence of evidence that it was intended so to be. Wigan v. English & Scottish Law Life Assoc. (1909) 1 Ch. 291 - Parker L.J. page 297 and page 298. "On the strength of that security"; - only where it is established as a matter of fact that on the strength of that security there has been a forbearance that it can be established on the authority that there is consideration, only here can ex post facto consideration arise - must be casual relationship - the only inference being that.

Combe v. Combe (1951) 1 All E.R. 767 - absence of proof of any request no consideration for husband's promise. Lord Denning's judgment - page 770 - H - act must be done at request of promisee expressed or implied. Verchures Creameries v. Hull & Netherlands Steamship Co. (1921) 2 K.B. 608 - Facts - waiving the tort - Atkin, J. page 612. Instant case is based on contract. Our contention is that there is no contract in existence. The fact that he mistakenly thinks that there is a contract in existence is a matter of law. The King v. Taylor (1915) 2 K.B. 593 - page 603 - Lord Reading C.J. - question of fact.

The defendant's action in putting up the premises for sale mistakenly thinking that there was a valid contract varying the interest rate cannot in fact create a contract if it does not exist in law - because of the absence of consideration. Gandy v. Gandy (1885) 3 Ch.D 57, Brown L.J. page 82 - cannot get advantage of putting forward diametrically opposed case. Facts relevant to question of consideration.

About April, 1961, Mr. William Geo.

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Carmichael became executive director of Defendant Corporation. Corporation started to look into its accounts a little more carefully - decided that no further advances to be made to plaintiff. £15,000 alleged to have been promised by Mr. Harvey withheld.

Plaintiff tried to put Parent Company to him - defendant reviews the matter. That attempt was unsuccessful. Made clear to plaintiff that no further advances to be made to him - letter of 16th June, 1961, - thereafter situation watched - meanwhile circular letter sent out on 31st July, 1961, in form of Exhibit 5 - sent out as a matter of routine. Quite unconnected with state of any account with Corporation - to all customers or debtors - no demand or pressure put on plaintiff between June, 1961 or before that, and on 31st July, 1961, when circular letter sent out. No demand, no pressure can be imported into language of circular letter. Plaintiff signified approval received by defendant on 7th September, 1961.

During this time no one took any action to get plaintiff to sign copy of letter of 31st July. Nothing paid towards outstanding arrears dating as far back as March, 1961. General Manager of Defendant's Corporation at that time was Raymond Neal. He was away on leave from 7th August to 27th August, 1961. On his return there was a discussion between plaintiff and Mr. Neal concerning state of plaintiff's account. They agreed that plaintiff pay £150 weekly towards arrears of interest and in addition proceeds of any hire-purchase transaction discounted would be applied to his account. Plaintiff then proceeded to make two payments of £150. First on 6th September, second on 15th September. Plaintiff defaulted thereafter.

At that stage, decision taken to realise the security under the mortgage given by plaintiff to defendants dated 22nd April, 1961. Letter of 31st July, 1961, had absolutely nothing to do with staving off or forbearing to realise security.

31st July and before that date, defendant already forbearing in hope that payments position would improve. They continued to forbear after

despatch of letter. They forbore after receipt of acceptance on 7th September, not because he agreed to pay a higher rate of interest but because of the completely unrelated arrangement made prior to receipt of plaintiff's acceptance of letter of 31st July.

3.20 p.m. adjourned.

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10.05 a.m. - Resumed.

Mr. George continues:

Para. 8:

Mr. George - letter of 31st July, 1961, i.e. exhibit 5, was in fact sent out on the 22nd August.

Para. 8:

Attempts rendered unenforceable by Statute of Frauds to vary terms of an existing contract are considered ineffective to vary the terms of the existing contract in exactly the same way that attempts rendered unenforceable by Money-lending Law to vary terms of existing contract must be considered ineffective to vary terms of existing contract. Moneylending Law and Statute of Frauds procedural - both make agreement which do not comply with their terms unenforceable not void. Chitty page 74 - S.152 - Cohen v. Lister (1938) 4 All E.R.188 - Court held contract unenforceable - exact pattern of unenforceability in pursuance of Statute of Frauds. Section 8 deals with formalities of a contract Principles to be applied to consequence of unenforceability under Statute of Frauds must be applied to unenforceability under the Moneylending Law. Morris Baron (1918) A.C.1 page 25 - original contract remains in force - variation. Left to be considered whether variation caught by Statute or not, page 26.

Noble v. Ward L.R. 1 Ex. 117 - L.R. 2 Ex.135, Bramwell B. page 122 Wiles on approval page 137 and 138 - in instant case "temporary measure". Memorandum must be signed by person to be

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charged therewith.

Para. 9:

Ch. 254, S. 13 (i) (c) - Corporation has power to lend money under memo. of Association - power derives from fact that it is registered under Companies Law. English act mentioned 'special statute'.

Para. 10:

Purely a question of fact.

GLORIA WHITTINGHAM sworn:

I live at 2H Camp Road, Kingston 5. Stenographer employed to U.D.C.

In year 1961, I was employed to corporation as stenographer and attached to Accounts Department, that is section which deals with loans secured by mortgage, secured by demand notes.

I remember receiving from Mr. Lennon a draft, typed of a letter. I received it, it could have been later part of July. Mr. Lennon gave me instructions. Apart from typed draft, he gave me the ledger cards of persons who had loan accounts with defendant at that time. I cut a stencil of the letter. My department had a duplicating machine. Miss Naldi Ridge was operator. She is not now employed to the Corporation.

After I cut the stencil, I gave it to Miss Ridge for duplication. I required over fifty letters. Miss Ridge subsequently returned the duplicated letters to me. I proceeded to address them on basis of cards. I typed on names of addresses, home address and reference number, I typed envelopes. After that, I passed letters to Mr. Lennon for approval. He subsequently returned them to me approved. I know Miss Hilda McCallum. She was then working with the Corporation. She still is. She was the despatch clerk. I handed the envelope and letters in envelope unsealed to Miss McCallum. I would say I gave stencil to Miss Ridge same day or day after I cut it. I have no idea when Miss Ridge returned letters to me. I

kept them. I cant say how long after I got them back from Miss Ridge.

No time elapsed between the time Mr. Lennon gave me the letters and time I passed them to Miss McCallum. It was same day or day after. I recognised Exhibit 5. It is one of letters made from stencil. This is a letter I addressed.

XXD - Mr. Coore:

I did not receive the copies which were returned. I cannot off hand say how many replies were received. I only recall this letter of this type which I sent out varying rate of interest. I have not sent out another letter varying rate of interest.

In November of the same year he wrote a letter referring to this letter.

ReXd: Mr. Blake:

When incoming letters are received, I have nothing to do with their receipt.

HILDA McCALLUM sworn saith:

I live at 16 Langard Avenue, Kingston 13. Employed to U.D.C. I joined staff of Corporation on 2nd March, 1961, as filing and despatch clerk. Up to present time I have been performing these duties.

As despatch clerk when letters are going to be sent out by post, letter is given to me. If letter is not sealed I read the contents. I write name of addressee in a book which I have. Book is called Outgoing Mail Book. I write also subject matter of the letter, I note contents i.e. cheques or documents. I seal letter and stamp it and give it to the messenger to be posted. Book shows date on which I despatch letters. When letters come to me sealed for despatch by mail, I just write in my book the addressee and I leave a dash for contents. Date in my book shows date I give the messenger to post. This is the Outgoing Mail Book - 8th August - 20th October, 1961 - I keep it.

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I dont remember in August, 1961, getting a large batch of letters over fifty - all at once. I look at date 22nd August, 1961, in my book. That day book shows large number of letters despatched. 'Contents' column showed 'rate of interest'. Among those letters is one noted as addressed to M.M.Shoucair. (Admitted as Exhibit 11)

XXD: Mr. Coore - No questions.

JEWEL JOHNSTON sworn saith:

I live at 3 Lucern Avenue, Kingston 10. Presently employed to U.D.C. as Secretary to the General Manager. In 1961, I worked for the Secretary of the Corporation who was then Mr. I.H. Sinclair. Some time in 1961, I was put in charge of the receipt of incoming letters from June until September, 27th. Mrs. Snaith took over from me.

During that period, letters came in by hand or by mail. When letters come in by hand, they were signed for at front desk by telephone Operator. She would phone me that they were there or she would bring them down herself. Before close of each day I checked with Operator whether there was any mail. Mail came from Post Office in sealed bag. I received them in presence of another clerk. I stamped them with date stamp and send into the Secretary. Letter marked 'A' for identity was dealt with by me in accordance with system I described. Has date stamp received

Exhibit 12 7 September, 1961 (Admitted as exhibit 12).

XXD - Mr. Coore:

I can't recall seeing this particular letter. No record kept of incoming letters. Only my assistant and I handled date stamp.

ReXd: - Mr. Blake:

Up to 27th September, no record of incoming mail. After that there is a book. Customer complained he had posted letter before.

11.40 a.m. - adjourned on application of Mr. Blake Mr. Neal not having arrived.

By consent, costs of Thursday reserved to the plaintiff in any event.

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10.05 a.m. resumed

STANLEY WELDON PAYTON sworn saith:

I live at Long Acres, Norbrook Road, Kingston 8. Governor of Bank of Jamaica.

On 25th July, 1961, Bank of England rate changed from 5% to 7%. In October, 1961, it was reduced to 6½%. In November, 1961, it was reduced to 6%. In March 1962 it was reduced to 5½%. A second change in March, 1962, brought it to 5 %. In April, 1962, it was reduced to 4½% current rate

XXD: - Mr. Coore:

Reduction to 6½% was on 7th October, 1961.

ReXd: No question.

Mr. Blake tenders letter of charge (admitted as exhibit 13). Exhibit 13

RAYMOND AUBREY NEALE sworn saith:

I reside at the Croft Woodland Road, Dodford, Worcestershire. At present employed as regional manager, West Midlands, U.D.T.Ltd. That is parent body of U.D.C.

In year 1961, I was employed to U.D.C. from just before end of April, 1961. I remained till May, 1962. My predecessor was Mr. G.M.Harvey. Before I assumed as General Manager, I spent two to three weeks sitting in with Mr. Harvey. I know Mr. William George Carmichael. Just around that time I took over as Manager, Mr. Carmichael joined Corporation as Executive Director.

In particular, when I took over, my attention was drawn to the accounts of customers in excess of £5,000. There were, I think fifty-six such accounts. Those loans were secured in various ways - some by mortgages some by letters of charge. Of these secured by mortgage some were repayable on demand.

Of accounts which were over £5,000, was

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included account of plaintiff. I know plaintiff. On 16th June, 1961, I wrote exhibit 4, letter to plaintiff. Before I wrote exhibit 4, I had received a copy of letter plaintiff had written to parent company. Before I wrote, I discussed plaintiff's position with Mr. Carmichael. Decision was taken that no further moneys should be advanced to plaintiff. We considered that his liability was too high as it was. I was concerned about his business generally and his ability to discharge his liability. Plaintiff was engaged in the motor trade, prior to June, 1961.

Mr. Coore - Mr. Blake and I are informed by Mr. Payton that as regards change to 6½%, he should have said 5th October, not 7th October.

Prior to June, 1961, there was credit restriction on hire-purchase transactions. Government in previous October had introduced a control order restricting initial payments and deposits and also we ourselves felt that much closer control was necessary. In June, 1961, Government's order and our own policy together had a very marked effect on motor trade. I produce Gazette Supplement of 1st October, 1960, No. 189 (admitted as exhibit 14). The effect was to restrict sales.

Exhibit 14

In June, 1961, plaintiff had loan of £55,000 on his own rights and £15,000 advanced to M.M. Shoucair Ltd. which he had given his personal guarantee. In order to pay interest alone, he would have to clear £6,300 to pay interest charges alone. My Corporation was committed to extent of £70,000. I felt that plaintiff had a very difficult job ahead of him because I could see that a motor trader in Jamaica would probably be going out of business. If plaintiff was not to do so, his business had to be conducted on sound possible lines and therefore we decided to do all we could to nurse him along and advise him as and when necessary.

My Corporation did not at any time from 16th June and 28th August, 1961, press Mr. Shoucair for settlement of his loan. During this period the attitude of my Company was reasonable and tolerant. We were prepared to wait a reasonable time.

In August, 1961, I went on leave to the United

States. I went on the 11th August. I returned to office the Monday after the 28th August. I first examined all department. In particular I looked at the Case book - which contains all main proposals coming in to see what commitment had been received during my absence. I discovered a commitment involving the plaintiff. It was for £1,800 which involved a lift. U.D.C. had advance £1,800 to Barclays Bank in connection with lift at 172 Orange Street. That advance was secured by a demand note by plaintiff personally.

Prior to seeing that, I was not aware that any undertaking had been given by my company to advance this sum. I discussed the commitment with Mr. Carmichael. This means U.D.C. was in for an additional £1,800 in addition to £70,000. In June, I was aware plaintiff was in arrears of interest. After discussions with Mr. Carmichael, I got in touch with plaintiff to come in to see me.

I looked at account, I saw a new commitment, I saw that he was in arrears. I thought it was time for a heart-to-heart talk with plaintiff to see if we could get the thing put on proper basis. This is the demand note - dated stamped 24th August, 1961. (Admitted as exhibit 15). Exhibit 15
I invited plaintiff around to my office. I had a discussion with him. I dont know the exact date, but it was during week I returned from leave. I went back to office the 28th August which was a Monday. Discussion was some time during week beginning 28th August.

After discussion, plaintiff promised to pay £150 per week starting the following week towards his loan and in addition to that he agreed that we should retain the balance financed on any hire-purchase transactions submitted by him and credit him those amounts to his account. His £150 was to be applied firstly to interest, whether arrears or not and secondly to principal.

At the date of that interview, I had no knowledge that a request had been made on plaintiff to agree to an increase of interest rates. After that interview and that agreement, I gave instructions that plaintiff's account was to be watched closely and I was to be advised if these payments of £150

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per week were not received.

6th September, 1961, plaintiff paid £150.

16th September, another £150.

19th September, £350 credited as proceeds of hire-purchase transactions discounted. Under agreement he should have paid £150 on September 22nd or thereabout. It was brought to my attention that plaintiff had not paid anything for third instalment. I took no action. I decided to wait for the next week. I was hoping that £300 would come that next week.

In fourth week I was advised that nothing had come. I decided in view of the firm manner in which the promise had been made and accepted that plaintiff must be made to understand that we did mean business. Therefore I issued instructions that he was to be shaken up by being placed on demand. I gave instructions to put him on demand. Exhibit 7, I signed that. That is notice of demand. I gave instructions immediately after fourth week when £150 had not been received. Before I signed notice, I made no check of the facts on the figures. The loans officer prepared it. Exhibit 5 - letter sent out by Company to plaintiff and other persons about increase of interest rates. I did not know anything about it. I gave instructions about increasing rates of interest. Bank of England rate went up on 25th July, 1961, from 5% to 7%. I gave instructions to the Loans Officer that in all those cases wherein the instrument so provided, but only in those cases the rate of interest was to be viewed by a like amount, namely 2% p.m.

Up to time I signed notice of 5th October, 1961, I was not aware that any such letter had been sent to plaintiff in respect of his mortgage loan. I am not aware that any letter had been sent to any person whose loan instrument did not provide for increase of interest

I discovered a week or so after demand notice had been sent that I saw a gentleman talking to my Loans Officer and when he left I asked who he was

and I think his name was Lopez, Mr. Shoucair's Solicitor.

I signed notice of 5th October, 1961, it was sent for despatch to Post Clerk. My delay in clamping down on plaintiff had nothing to do with increases of interest. I didn't know about this at the time.

XXD - Mr. Coore:

I discovered plaintiff had got letter increasing interest about a week after notice of the 5th. It would certainly, I think have been in month of October. Having made that discovery that plaintiff had been sent a letter asking for 11%, I instructed Loans Officer that he should be charged 9%. Loans Off icer told me that he had only been charged 9%.

For period 1st October to 23rd October, I was aware that a calculation had been at 11%. I questioned Loans Officer about it. His reply was ..... In figures given to Mr. Lopez, due credit had been given for the overcharge, so that he was in fact only charged 9%. I clearly understood that in effect plaintiff was only charged 9%.

6th November, 1961, letter was written by plaintiff's solicitors to my company. I was general manager on that date. Shoucair matter had achieved important proportions. I did see this letter.

I cannot remember if my Company replied. We consulted our Solicitors. Contention in para. 2 of letter of 6th November, 1961, was passed on to our Solicitors who were told to get on with it. I knew it was not in accordance with the facts, that was why it was placed in the hands of our Solicitors. Loans officer, Mr. Lennon, is here. Mr. Lennon signed 31st July, 1961 on behalf of Mr. Sinclair, the Secretary.

Letter of 31st July, was an important document from point of view of general business of the Company. Letters sent out to all and sundry. A number, I believe paid at 11%. I cant speak with any certainty. If it had been improperly charged,

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it would have been credited. I dont know in fact whether any has been paid back. Any senior officer of the Company looking at the record would know. I never checked the exact figures. I was under impression that all the instructions I gave were carried out. I realised long before now they were not carried out. Upon my instructions, letters were sent by registered post to all those who were sent letters of 31st July, 1961, cancelling that letter as being sent in error.

I do not know if any such letter was sent to plaintiff. I gave those instructions that day I saw Mr. Lopez in the office. I know that such letters were sent out. I drafted it. It was sent out. I dont know the date of those letters. This is on such letters dated 15th November. That letter was sent after I saw Mr. Lopez in my office. I telephoned my solicitor to say what I was proposing to do. Letter was dated 15th November. Letter from A.E.Brandon & Co. would have been sent down to my Solicitors by 10th November.

Suggestion that letter of 15th November an ex post facto attempt to restore the position after money-lending point had been taken is not so. It had nothing to do with it. Letter of 15th November admitted as exhibit 16. Plaintiff's loan payable on demand. Mortgage instrument stated it as payable on demand. It was not a loan for a fixed period of time. Loan payable on demand not unusual for my company. One of our advantages of this type of loan is that we have a very tight control on the borrower. Our advantage is not that we vary your rates of interest at any time. Money borrowed from a bank fluctuates. You would be told what the rate of interest is. Borrowed from a bank, they are always payable on demand. Banks alter these rates from time to time. It has nothing to do with terms of repayment. From time to time bank will send advice that rates have changed. Suggestion is that if one refused to pay increased rate the bank would call in the loan. When the bank said in my experience as Manager of one of our company, that they were increasing rates, I said I would not pay, and they said they wouldn't. We were a substantial customer.

Exhibit 16

As borrower, if lender has a demand note and

it is provided for in the instrument and interest increased, I would have to pay increased rate. If it is on demand note, if lender doesn't like the colour of my eyes, he can call in the loan. Reason why banks can fluctuate rates of interest is not because they lend on demand notes.

When I heard Bank of England rate raised to 7%, I gave instructions that some customers were to have rates raised for simple reason we were not making a profit. We would be lending at rates lower than rates we were paying to the banks locally. If it is just a loan to loan at 9% when bank rate is 7% is not very good business. I accept that when we loaned plaintiff at 9% bank rate was 5%. Policy of company was to lend at 4% above bank rate. We consider each proposal on its merits. Letters of 31st July, said 4% above Bank of England rate.

At that time, this Corporation agreed in principle to lend a large amount of money to a corporation in Kingston at 9%. Rates set out in letter of 31st July, were stated on my instructions. 4% above Bank rate was what I regarded as a fair and reasonable rate on which we could make a profit. When Bank rate was 7%, local bank rate was 8%.

Apart from special circumstances, my company would not wish to lend at 9% when local bank rate is 8%. It had been the policy in the past to lend money for this purpose or that purpose, it was decided on my arrival that certain type of lending should be discontinued. We decided that we had too much money out on this sort of thing.

In July, 1961, my Company had money on loan from England. We had money on loan from parent company who had money on loan from banks. Any increases that parent company had to meet in England were generally passed on to us. In a particular situation they might not. We would seek to pass on this increase to our customers.

From my experience when Company has loan outstanding from a bank, and bank proposes to increase rate of interest, bank sends a notice or it may be purely automatic under the original

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agreement. Notices from Bank to increase I will accept if you tell me are sent out.

In July, August and September, 1961, the plaintiff was in arrears. . Up to the time I started to look into plaintiff's accounts, I would say that U.D.C. treated plaintiff unduly generous. We decided he should get no more money, we adopted a policy of wait and see. By 28th August, 1961, I considered plaintiff was treated in a very favoured way. After I came back, I decided that I should discuss the matter with him. If he hadn't made promise on 28th August, I am unable to surmise what would have happened. I hadn't thought what would have happened if he hadn't made those promises. We were up to that time on the best of terms. If talk had not been satisfactory I would have reported it to my board. He promised to pay £150 per week. I said if you can manage that we will be satisfied. He told me he could. I knew at the time that plaintiff's record as a payer was poor. I knew he was in arrears.

28th August, 1961, plaintiff's paying in accordance with his obligations had not been what I had hoped - letter of 16th June, 1961 last paragraph. Frame of mind in week of 28th August not similar to that expressed in letter of 16th June. Before my discussion I had a perfectly open mind. I say that in spite of letter of 16th June.

In August, I was prepared to give plaintiff a chance to honour his financial promises. I didn't discuss with plaintiff what would happen if he didn't pay £150. Plaintiff owed my company a good deal of money, he was in arrears, I summoned him. It was not in my mind that if he didn't do something, I would take steps. When I said heart-to-heart talk I meant seeing if he clearly understood the position and how he was going to liquidate his liability

I knew what his liability was at that time. I was speaking in terms of the £70,000. I don't know what I did. Not necessarily that I looked at his card. It would be reasonable that I took some steps to find out how much he was in arrears and his interest. £150 per week was offered by plaintiff.

I went over with him how much his interest was costing him. I pointed out that £6,300 a year was £120 per week without touching the principal. He offered £150 per week. Suggestions figure of £150 per week chosen because it bore some relation to interest at the rate of 11%.

A. As far as I am concerned similarity of figure of interest or amount at 11% has nothing to do with it. I discussed 9% at that meeting. That was to arrive at the figure of £6,300 a year. Suggestions - the records clearly show and it is admitted that they show that from 1st August to 30th September, that plaintiff being charged 11%. You must have seen records or information on those records must have been communicated to you at time you had conversation with Mr. Shoucair.

A. No. Not information, you now tell me it is.

Suggestion - At time of conversation with plaintiff, you knew that all your customers were paying rates at 11% except those who had loans for a fixed term.

A. No.

Suggestion - you would have known that Mr. Shoucair would have been charged 11%.

A. No. Mr. Carmichael was not present at conversation with Mr. Shoucair.

ReXd: Mr. Blake - (Ledger cards shown witness)

Entries in this record do not disclose rate of interest.

Entry of September 6 is red ink - a credit entry in respect of £150. Below that debit entry for August interest. I cant say whether debit is entered up after September 6 entry. That would depend on loans officer getting through those things - I cant say.

12.40 p.m. - adjourned.

2.15 p.m. - resumed.

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Judge's Notes of Evidence

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DAVID MICHAEL COPP sworn saith:

I live at 10 Norbrook Road, St. Andrews. Secretary of U.D.C. Document shown me in Court is original stamped memorandum of Association of the Company. (Admitted as Exhibit 17).

I have had occasion to examine all loan accounts in existence with my company on 31st July and 22nd August, 1961. Some of these loan accounts were for a fixed period. On these particular dates, expiring dates for those particular loans had not been reached. Some were not in arrears. These accounts on those days were not therefore subject to immediate call.

Documents now shown me refer to one of such loans. Terms of this loan on document securing loan is a mortgage for a fixed period at a fixed rate of interest. On 31st July or 22nd August, 1961, expiring date had not been reached. It was not in arrears on either of those dates (Admitted as Exhibit 18). There were also on those dates other loans payable on demand but were not in arrears. I produce such an account. This is account of Commodity Service Ltd. (Admitted as exhibit 19) I found loans payable on demand which were in arrears.

Exhibit 18

Exhibit 19

Mr. Mahfood: - Evidence irrelevant - do not touch on issues in this case.

Mr. George: - Issue is that letter of 31st July sent to all persons with accounts. Mr. George does not press the question.

Exhibit 18 relates to account is M.M.Alexander Ltd.

XXD - Mr. Mahfood - No question

- Case for Defendants -

2.35 p.m. adjourned

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J U D G M E N T

In these proceedings the Plaintiff seeks relief in respect of a mortgage of certain premises in this Island made between the Plaintiff and the defendant corporation (hereinafter referred to as "U.D.C.") on the 22nd April, 1961. He asks for a declaration that the mortgage is unenforceable having regard to the provisions of Section 8 of the Money-lending Law, Chapter 254, an order for cancellation and delivery up of the Instrument of Mortgage and the letter varying it, an injunction to restrain the taking of any steps by U.D.C. to take possession of, sell, or otherwise dispose of the premises, and an order for the discharge from the Certificate of Title to the Plaintiff's lands of the mortgage endorsed thereon.

2. U.D.C. is a limited liability company registered under the Companies Law. It is empowered under its Memorandum of Association to make advances and to lend money upon the security of real or personal property of every description or upon personal security.

3. In the month of December, 1959, U.D.C. started doing business with Michael M. Shoucair Limited, a company of which the Plaintiff was the Managing Director. The Company was in the motor trade and discounted hire-purchase agreements with, and borrowed money from, U.D.C.

4. During the year 1960, the Plaintiff started doing business with U.D.C. on his own account. He borrowed in May, the sum of fourteen thousand pounds in order to purchase lands at 172C and 172D Orange Street in Kingston. In September, he borrowed a further four thousand pounds for the purpose of financing the erection of a building on the lands he had bought at Orange Street. Between the months of September, 1960 and April 1961, U.D.C. advanced to the Plaintiff from time to time various sums to complete the building at Orange Street and for use in the business of Michael M. Shoucair Ltd.

5. The loans mentioned above were made on demand notes and by April, 1961, totalled fifty-five

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thousand pounds. In that month the Plaintiff executed a mortgage under the Registration of Titles Law to secure the sum of fifty five thousand pounds to U.D.C. The mortgage instrument provided for the payment on demand of the principal sum secured and for the payment of interest at the rate of nine pounds per centum per annum, together with the usual mortgagor's covenants and the mortgagee's power of sale upon default in the payment of the loan moneys or interest or upon any breach of covenant. 1

6. Even prior to the execution of the mortgage instrument of the 22nd of April 1961, the Plaintiff seems to have experienced difficulty in meeting his obligations to U.D.C., largely, no doubt, as a result of a general recession in the motor trade In the previous October the Government had imposed credit restrictions and the Minister under an Order published in the Gazette Supplement of the 1st of October, 1960, had fixed the minimum initial deposit payable in hire-purchase transactions and had regulated the period over which payments might extend. At about the same time the finance companies operating in the Island had in their own interests moved to restrict credit. By June 1961, the combined effect of the Government's policy and the voluntary restricting of credit by the Companies, produced a marked decline in sales in the motor trade. 2

7. The advances mentioned above had been made to the Plaintiff with the approval of Mr. G. M. Harvey, the then Manager of U.D.C., with whom the Plaintiff seems to have established and maintained a business relationship based on mutual confidence. Until Mr. Harvey's departure in April, 1961, U.D.C. had been very generous to the Plaintiff, and there had been discussions about a further thirty thousand pounds being made available to the Plaintiff or to Michael M. Shoucair Limited. Shortly before Mr. Harvey left, the Plaintiff's Company received fifteen thousand pounds of a loan of thirty thousand pounds which the Plaintiff was negotiating with U.D.C. for stocking facilities. 3 4

8. In April, 1961, Mr. R. A. Neal assumed duty as General Manager of U.D.C., and so far as the Plaintiff's dealings with the Corporation were

concerned, there was a change of climate. On the 3rd of June, 1961, the Plaintiff wrote to United Dominions Trust Limited in the United Kingdon, U.D.C.'s parent company, reminding them of the arrangements made with Mr. Harvey for the additional fifteen thousand pounds for stocking facilities and asking that those arrangements be honoured. The parent company declined to interfere and, on the 16th of June, 1961 Mr. Neal, to whom the Plaintiff had sent a copy of his letter to United Dominions Trust Limited, wrote to the Plaintiff stating that it was not proposed to make any further advances and continuing -

> ".....It is not necessary for me further to dwell on the subject of your current and very heavy liability since I expressed my views on the matter quite clearly at our last meeting. Nevertheless, I think I should reiterate the fact that I was astonished at some of the proposals submitted to me by your Company during your recent absence. In addition to this, the fact that your instalment of £543.15.0 on transaction 1861/16 which was due on the 15th April, and instalments amounting to a total of £164 in respect of your air-conditioned Chrysler motor car which were due on the 29th April, and the 29th May have not been received, hardly tends to inspire confidence".

9. On the 25th of July, 1961, the Bank of England rate rose from 5% to 7%. It is to be recalled that the Plaintiff was liable to pay interest at £9 per centum per annum on his loans from U.D.C. By letter dated the 31st of July, 1961, U.D.C. gave the Plaintiff notice of an increase in the rate of interest payable on his loans in the terms following:-

> 31st July, 1961
>
> Mr. Michael M. Shoucair
> 172C & 172D Orange Street
> Kingston.
>
> Dear Sir/Madam,
>
> Owing to the increase in the Bank of

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England rate by 2% we have to advise you that we also will have to increase our rate of interest by a corresponding amount. As a result, interest on your loan will be computed at 4% above the Bank of England rate which is at present 7%. This change will take effect as from 26th July, 1961.

We trust that this will only be a temporary measure.

Please acknowledge receipt and confirm by signing and returning the attached copy.

Yours faithfully,

UNITED DOMINIONS CORPORATION (JAMAICA) LTD.

(sgd.) ? Lennon

For I. H. Sinclair

Secretary.

In accordance with the requirements of this letter the Plaintiff signed and returned the enclosed copy shortly after he received it. A great deal of evidence was led by the Defendant in regard to the despatch of the letter and the receipt of the signed copy. From that evidence it appears that the letter, though dated the 31st of July, was not sent out until the 22nd of August, and that the Plaintiff's signed acknowledgment reached U.D.C.'s offices on or about the 7th of September.

10. Sometime before these events, during the regime of Mr. Harvey, U.D.C. had agreed to finance the cost of installing a lift at the Plaintiff's business premises at Orange Street. This has been by way of undertaking given to Barclay's Bank and in late August or during the first few days of September 1961, U.D.C. honoured that undertaking and thus the Plaintiff's indebtedness with U.D.C. increased by an additional one thousand eight hundred pounds.

11. Apparently, this was too much for Mr. Neal.

He says he thought it was time for a "heart-to-heart" talk with the Plaintiff, to see, as he puts it, "if we could get the thing put on a proper basis". He invited the Plaintiff round to his office and there a discussion took place as to the state of the Plaintiff's account with U.D.C. Mr. Neal says he went over with the Plaintiff the amount that the Plaintiff's interest was costing him. He stated that he pointed out that interest alone was costing the Plaintiff six thousand three hundred pounds a year, or one hundred and twenty pounds a week. Mr Neal further states that the discussion proceeded on the basis that the Plaintiff was liable to pay interest at the rate of £9 per centum and no more, and indeed he says that that is how he arrived at the figure of six thousand three hundred pounds a year. Of course, this would support Mr. Neal's contention that the sending of the letter of the 31st of July to the Plaintiff was unintentional and that it was never intended that the Plaintiff should pay interest at the rate of £11 per centum per annum and that in fact he was never charged interest at that rate.

12. I entirely reject Mr. Neal's evidence that the rate of £9% for interest was discussed at his meeting with the Plaintiff. It was not put to the Plaintiff who made no mention of any rate of interest being discussed, nor, indeed, was it led in Mr. Neal's examination-in-chief, but only emerged during the witness's cross-examination by Mr. Coore. I accept the Plaintiff's version of the discussion and I am satisfied that no mention of £9% as the rate of interest payable was made.

13. The upshot of this discussion which took place, it seems, in late August or early September, 1961, was that the Plaintiff agreed to pay U.D.C. the sum of one hundred and fifty pounds per week on his account and it was further agreed that U.D.C. should retain to the credit of the Plaintiff the amounts discounted on any transaction introduced by him.

14. The Plaintiff failed to keep up the payments. On the 6th of September, he paid one hundred and fifty pounds. On the 15th or 16th of September he paid a further one hundred and fifty pounds. On the 19th of September, in accordance with the

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agreement mentioned above, U.D.C. discounted and retained to the Plaintiff's credit sums in respect of hire-purchase transactions amounting to three hundred and fifty pounds. Thereafter nothing was paid by the Plaintiff in respect of either interest or principal owing to U.D.C.

15. From the foregoing it is clear that the Plaintiff had been required by U.D.C. to pay the increased interest prior to the discussion of late August or early September. He says that from the date of the receipt of U.D.C.'s letter dated the 31st of July, he felt bound to pay interest at the rate of £11%. It is difficult to see how he could have felt otherwise. He had U.D.C.'s letter and he had acknowledged it. He had been called in and he had agreed to pay one hundred and fifty pounds per week, which amount approximated the interest payable on his advances when calculated at £11%. At no stage was the letter withdrawn, nor was anything said to him by U.D.C. waiving its requirements. Finally, when demand was made on him by U.D.C. for the principal sums advanced and for interest owing thereon, that demand was made on the basis that interest for August and September, 1961, was calculated at £11%.

16. By early October, Mr. Neal had decided, that, as he puts it, the Plaintiff "was to be shaken up by being placed on demand." This demand was made by notice dated the 5th of October, 1961. The total sum demanded was fifty eight thousand and five pounds, eighteen shillings and five pence. The Plaintiff failed to pay. About a week after the sending of the demand notice, the Plaintiff's Solicitor, Mr. Lopez, called at U.D.C.'s offices. It was about this time according to Mr. Neal, that he discovered for the first time that the Plaintiff had been asked to pay interest at £11%. He states (this is unsupported by any other testimony) that he instructed the Loans Officer that the Plaintiff should be charged £9% and no more, and that the Loans Officer confirmed that the Plaintiff was being charged £9% only. In this aspect of the case, as in every area where he apparently thought his company's interests were at stake, I find Mr. Neal's evidence unreliable.

17. Although Mr. Neal says that he discovered in

October, 1961, that the Plaintiff had been asked to pay interest at £11%, he took no steps to withdraw that request nor in any way to correct this alleged mistake. On the 3rd of November, U.D.C. caused a notice to appear in the press setting up the Plaintiff's premises for sale under the power of sale contained in the mortgage instrument. On the 6th of November, the Plaintiff's solicitors wrote to U.D.C. pointing out that the mortgage loan bore a rate of interest of £11 per centum per annum and did not comply with the provisions of Section 8 of the Moneylending Law. The evidence does not however reveal that there was any reply to that letter.

18. A number of complicated issues were raised on the pleadings. The Plaintiff's case was that the contract for the payment of the principal sum of fifty five thousand pounds and interest thereon and the security given therefor is unenforceable, having regard to the provisions of Section 8 of the Moneylending Law, Chapter 254; that there was no note or memorandum of the contract of loan signed by him before the money was lent or the security given; and that there was no note or memorandum in writing made or signed by him, as required by the Moneylending Law.

19. For U.D.C. it was pleaded (1) that by the default notice of the 5th of October, the lender was claiming interest at £9 per centum and not at £11 per centum; (2) that it is admitted that U.D.C. advised the Plaintiff that as from the 26th of July, 1961, and as a temporary measure, his interest would be computed at 4% above the then prevailing Bank of England rate: (3) that the Plaintiff was indebted for sums other than the principal sum set out in the mortgage and these sums were at variable rates of interest; (4) that the letter of the 31st of July, 1961, did not apply to the Plaintiff's mortgage loan; (5) that if the letter of the 31st July did apply to the mortgage loan, then there was no consideration moving from U.D.C. for the Plaintiff's promise to pay increased interest, and therefore, no contract to pay interest at the rate of £11 per centum on the principal sum of fifty five thousand pounds was created; (6) that there was no note or memorandum in writing of the agreement to vary the mortgage

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(* sic)

instrument as required by the Statute of Frauds; (7) that if the agreement in respect of increased interest varied the instrument of mortgage, then it is denied that Section 8 of the Moneylending Law was not complied with; (8) that if the provisions of the Moneylending Law were not complied with, then the alleged agreement to pay increased interest was ineffective to vary the mortgage instrument; (9) that the U.D.C. was exempted from the provisions of the Moneylending Law by reason of Section 13(1)(c) thereof and (10) that at the rate*of the Writ, the Bank of England rate was 6% and therefore there was at that time no contract for the repayment of money at a rate of interest in excess of £10 per centum per annum.

20. At the commencement of the trial, Mr. Blake conceded that of the interest demanded in U.D.C.'s notice of the 5th October, 1961, the amount claimed for the period beginning the 1st of August, 1961, and ending the 30th of September, 1961, was calculated at £11 per centum per annum. He also abandoned defences (3) and (4) mentioned above. At the outset of his final address Mr. Blake stated that he would not contend that there was no note or memorandum in writing as set out in the defence at (6) above, nor would he argue the defence at (10). As regards defence (7), Mr. Blake conceded that if U.D.C. failed in the defences at (5), (8) and (9), then, it must fail in the defence at (7). As a result, the only issues to be determined are those raised by the defence at (5), (8) and (9) above and, perhaps (7).

21. The Moneylending Law does not apply to any transaction where the rate of interest is not in excess of £10 per centum per annum - that is the effect of Section 13(1)(e). Thus if U.D.C.'s letter of the 31st of July, 1961, and the Plaintiff's promise thereon to pay interest at £11 per centum per annum fail for any reason to vary the original terms of the loan agreement, then U.D.C. must succeed. In the light of this position learned Counsel on both sides made carefully reasoned submissions supported by numerous authorities as to whether there was valuable consideration for the Plaintiff's promise to pay interest at £11% per annum.

22. For the defence it is contended that in all the

cases there has always been a demand by the creditor for payment of the debt or for the giving of security followed by a promise on the part of the debtor either to give the security requested or to make payment at some future date. It is argued that only in these circumstances where the debtor's promise is followed by forbearance to sue on the part of the creditor, have the Courts held that the forbearance was exercised for valuable consideration.

23. For the Plaintiff it is urged that there was consideration moving from the promisee. It is said that having regard to the fact that this mortgage loan was repayable on demand and to the fact that U.D.C. required the Plaintiff to agree to an increase in the rate of interest payable under the mortgage, the law infers that, but for the fact that the Plaintiff agreed to the increase of the rate of interest, U.D.C. could have taken action which it refrained from taking on the strength of the agreement, and this forbearance is good consideration for the Plaintiff's promise. In the alternative, it is said that the Plaintiff having signed a confirmation of the letter of the 31st of July 1961, he did in fact enjoy some measure of forbearance and the circumstances necessarily involved the benefit to the Plaintiff of a certain amount of forbearance in fact which he would not have derived if he had not signed the agreement.

24. It has long been established that forbearance to sue, even though no definite time is allowed, is valuable consideration for a promise, provided that the promiseee has reasonable grounds for believing that he has a good cause of action. That was what was laid down in Alliance Bank v. Broom 2 Dr. & Sm. 289, in Fullerton v. Provincial Bank of Ireland (1903) A.C.309 and in Miles v. New Zealand Alford Estate Co. (1886) 32 Ch.D, 266.

25. Where, however, there was no communication of the assignment, no express agreement and no circumstance from which it could be implied that there was an agreement, as in Wigan v. English and Scottish Law Life Assurance Association (1909) 1 Ch. 291, it was held that no consideration had been given. At page 297 Parker J. stated the rule thus -

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"It appears to me to be reasonably clear that the mere existence of a debt from A to B is not sufficient valuable consideration for the giving of a security from A. to B to secure that debt. If such a security is given, it may of course be given upon some express agreement to give time for the payment of the debt, or to give consideration for the security in some other way, or, if there be no express agreement, the law may very readily imply an agreement to give time. It may not be a definite time, but to forbear for some indefinite time is consideration of the security being given. And further than that, if there is no express agreement, and no agreement can be implied at the time and under the circumstances at and under which the indenture giving the further security is executed, yet if that security be communicated to a person who could otherwise sue on the debt, and on the strength of that security he does in fact forbear to sue on the debt, he does give that time with the object of securing which the security is presumably given, and then I think it appears on the cases that there is sufficient consideration, though in a sense it is an ex post facto consideration, for the security which is given".

This statement of the Law was approved in Glegg v. Bromley (1912) 3 K.B. 474 and subsequently in Re Wethered (1926) 1 Ch. 167.

26. In Glegg v. Bromley, Mrs. Glegg owed her husband seven thousand pounds and was being pressed by him to give further security. She complied with her husband's request by assigning to him the proceeds of an action of slander which she was then bringing against the defendant. The Court of Appeal held that there was consideration for the promise to assign in the husband's forbearance. Arguing as he does that there must be a request as well as a promise to constitute a binding contract in this sort of case, Mr. Blake directed trenchant criticism at the following dictum (albeit obiter) of the Fletcher-Moulton L.J. -

"Now several cases, the most striking of which is the one which has been already referred to

by the President of the Court, namely Wigan v. English and Scottish Law Life Assurance Association establish that the mere existence of an antecedent debt is not good consideration for an assignment even by way of further security. If there has been pressure and in response to that pressure the further assignment is made, that suffices. But the cases also show that even if there has not been pressure, but there has been a further assignment, and it is known to the person who is the creditor and has the power to put pressure upon the debtor that a further assignment has been made, the law, will, if it possibly can, give effect to the probability that the fact that the security has been increased will have influenced the creditor and made him more forbearing. I go so far as to say that in the absence of evidence to the contrary I should presume that the increase of the security when known would be responded to by an increase of forbearance on the part of the creditor".

In my view this dictum seems to have been intended to be confined to assignments of future property - agreements to assign - with which the case was concerned. For the rest, Fletcher-Moulton L.J. was stating what inference of fact he would expect a Court to draw and he goes on to say that he was not uninfluenced by the fact that "after this increase in the security we find further advances made by the creditor to the debtor". That, it seems to me, is the sort of case the learned Judge had in mind.

27. As I see it, it is essentially a question of evidence. As Lord Esher pointed out in Crears v. Hunter (1887) 19 Q.B.D. 341. it was really a question of whether there was a sufficiency of evidence to entitle the jury to infer that the understanding between the parties was that which was argued for. I would only add that in weighing the evidence, the thing must be looked at in a business way, taking into account, so far as they are known, the normal usages of commercial life.

28. In the instant case, it must be borne in mind that the loan was payable on demand. When U.D.C. requested the Plaintiff to pay interest at £11%, nobody was under any illusion as regards U.D.C.'s

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power to call in the loan. To say that the Plaintiff had the option of deciding whether or not he would agree to pay the increased interest is hardly realistic. By the letter of the 16th June, U.D.C. had been pressing for the payment of instalments which in July and August remained unpaid. Further the Plaintiff had been told that his failure to pay instalments did not inspire confidence. The Plaintiff was a debtor in extremis so far as his ability to meet his obligations went, and for him it was a matter of complying with his creditor's requirements or having his loan called in. For U.D.C. it is said that the forbearance shown by U.D.C. was directly referable to the promise to pay one hundred and fifty pounds a week and did not stem from the promise to pay interest at £11%. I cannot view it in that light. I think that the only reasonable inference to be drawn from the conduct of the parties is that the agreement was that U.D.C. would not demand payment while the Plaintiff paid interest at £11 per centum and in addition, while he paid one hundred and fifty pounds per week on his account.

29. Inevitably, perhaps, the case of Combe v. Combe (1951) 1 All E.R. 767 was cited in the argument. The views there expressed by Denning L.J. (as he then was) had been earlier stated by him in Central London Property Trust Ltd. v. High Trees House Ltd. (1947) K.B. 130 where equitable principles were relied on to enforce a promise which was intended to be a legally binding, intended to be acted upon and in fact acted on. In another of these cases - Bob Guiness Ltd. v. Salomonsen (1948) 2 K.B. 42 the doctrine of forbearance as consideration was vigorously assailed. However this may be, I need only refer to one short passage in the judgment of Denning L.J. in Combe v. Combe to dispose of the argument that the Plaintiff may rely on quasi-estoppel in this case. The passage is this -

> "seeing that the principle never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side-wind....."

In my view, the Plaintiff having established that there was consideration, quasi-estoppel, which is really a defence, carries the matter no further.

30. For the Plaintiff it is further contended that it is not open to U.D.C. to take the point in regard to consideration because it has approbated the variation agreement, has exercised rights under it and has proceeded to exercise those rights on the hypothesis that the agreement was valid and binding. Gandy v. Gandy (1885) 30 Ch. D. 57, Verchures Creameries v. Hull and Netherlands Steamship Co. (1921) 2 K.B. 608 and the King v. Taylor (1915) 2 K.B. 595 were cited. If those cases turn on the gaining of advantage by the party repudiating, then they must depend for their relevance in this case on the very tenuous advantage enjoyed by U.D.C. in making a demand based on interest at £11 per centum per annum - a demand which has produced no result, except, of course, this present litigation. What the authorities show is, in the words of the Master of the Rolls in Banque des Marchands de Moscou v. Kindersley (1950) 2 All E.R. 549 ".....first, that the party in question is to be treated as having made an election from which he cannot resile, and secondly, that he will not be regarded, at least in a case such as the present, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his present action is inconsistent".

31. It is also submitted on behalf of the U.D.C. that any attempt, ineffective in itself by reason of its failure to comply with Section 8 of the Money-lending Law to vary the terms of a previously existing contract leaves the earlier contract unaffected and enforceable in the same way that such attempts, ineffective by reason of the Statute of Frauds, leave the earlier contract unaffected and enforceable. It is argued that there is no fundamental difference between Sections 4 and 17 of the Statute of Frauds on the one hand and Section 8 of the Moneylending Law on the other.

32. Section 8 of the Moneylending Law provides -

"No contract for the re-payment by a borrower

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of money lent to him or to an agent on his behalf after the commencement of this Law or for the payment by him of interest on money so lent and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract containing the particulars required by this section be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given as the case may be.

The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and the interest charged on the loan expressed in terms of a rate per centum per annum".

33. This section reproduces in terms Section 6 of the Moneylenders Act 1927 of the United Kingdom. Failure to comply with the requirements of the section renders a moneylending contract unenforceable. As was pointed out in Kasumu v. Baba-Egbe (1956) A.C. 539 the statute is directed to enforcing measures of control that have no concern with the intrinsic nature of the contract made. As Lord Radcliffe put it in that case -

"When the governing statute enacts that no loan which fails to satisfy any of these requirements is to be enforceable it must be taken to mean what it says, that no court of law is to recognize the lender as having a right at law to get his money back. That is part of the penalty which the statute imposes. There is no room to reform the terms of the loan, since the statute is not concerned with the vice of its content but with the vice of the conditions under which it was made."

34. Counsel cited Noble v. Ward (1867) L.R. 2

Exch. 135 and Morris v. Baron (1918) A.C.1 among other cases, in support of his contention. In the earlier case Willes J. delivering the judgment of a strong Court in the Exchequer Chamber, said -

> "When parties enter into a contract which would have the effect of rescinding a previous one, but which cannot operate according to their intention, the new contract shall not operate to affect the previously existing rights. This is good sense and sound reasoning, on which a jury might at least hold that there was no such intention."

The cases to which Willes J. referred were either cases involving the surrender of leases on the grant of new leases where the Courts found an intent in the parties to revert to their former rights on the failure of a new lease, or cases where the whole issue was whether the parties intended to rescind the original contract, and as is stated in the judgment, it would be at least a question for the jury, as to whether the parties did intend to rescind. This was one of the points stressed in the speech of Lord Finley L.C. in Morris v. Baron.

35. I cannot think that the Statute of Frauds and the Moneylending Law are, strictly speaking, analogous. The former rests squarely on the vagaries of the rules of evidence as they applied in the seventeenth century. The latter is a penal statute in protection of persons dealing with money-lenders. What the Statute of Frauds does, as part of the law of Jamaica, is to prevent a party proving certain contracts unless there is a note or memorandum in writing. Naturally, if the agreement put forward as varying another is incapable of proof, then that other remains unaltered. It is a matter of evidence. As Denman C.J. said in Goss v. Lord Nugent 5 B & Ad.58 at page 66

> "But we think the object of the Statute of Frauds was to exclude all oral evidence as to contracts for the sale of lands, and that any contract which is sought to be enforced must be proved by writing only",

Under the Moneylending Law, however, the Court will

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No. 5

Judgment

13th May, 1963

(Contd.)

construe the contract, and having done so, will say whether it is enforceable:

Eldridge and Morris v. Taylor (1931) All E.R. Rep. 542.

36. In my judgment, the original loan agreement between the parties was varied by the Plaintiff's promise to pay interest at £11 per centum per annum. By reason of the failure of U.D.C. to comply with the requirements of Section 8 of the Moneylending Law that agreement is unenforceable. Once that position is established, then in accordance with the statement of the law in Cohen v. J. Lester Ltd. (1938) 4 All E.R. 188 the Plaintiff is entitled to relief.

Lest it be thought that such a result is unusual, the same position was reached in Eldridge and Morris v. Taylor (1931) All E.R. Rep. 542, a case of a variation in a moneylending contract, and, to choose a case involving another statute, in French v. Patton (1808) 9 East 351. In French v. Patton, a policy of insurance originally underwritten on "Ship and outfit" was altered after the ship sailed, by consent of the parties to "ship and goods", but no new stamp was affixed. Lord Ellenborough, C.J. held -

> ".....the alteration was effectual to bind all the parties if a new stamp had been affixed on the instrument. The new agreement was complete as far as the will of the parties could make it so; and it only wanted a circumstance which the law requires to give it its full legal effect. But, though ineffectual as an instrument to sue on, it seems effectual to do away the former agreement which was thereby abandoned.....But is it not made a different policy by the memorandum, by which a different contract is substituted by the act of the parties in lieu of the former one, which they abandon? Is it less effectual to shew the intention of the parties because it is a fraud in law against the revenue. The Plaintiff's own act has made as far as he can make, the policy speak a different language from what he now insists that it does, and he must take the consequences".

37. Lastly, there is the question of the correct construction of Section 13 (1) (c) of the Money-lending Law. By its terms the Law shall not apply to "any body corporate, incorporated or empowered by a law of the Legislature of this Island to lend money in accordance with such Law". Mr. Blake contends that the sub-section must be construed in contrast to the United Kingdom equivalent which uses the term "special Law". He argues that since U.D.C. is registered under the Companies Law and its Memorandum of Association permits it to lend money, then it is exempt. I cannot accede to that contention. In my view, the exemption is limited to corporations established by statute for the purpose of lending money, or empowered by statute (and this must mean a specific statute conferring those powers) to lend money.

38. In the result, the Plaintiff is entitled to, and there will be, a declaration that the Mortgage made between the Plaintiff and U.D.C. on the 22nd of April, 1961, as varied is unenforceable; an order for the cancellation and delivery up of the Instrument of Mortgage dated the 22nd of April, 1961, and letter and confirmation varying same; an order for an injunction to restrain U.D.C. from taking any steps to take possession of, sell, or otherwise dispose of the lands mortgaged; and an order for the discharge of the mortgage in favour of U.D.C. endorsed on the certificate of Title of the Plaintiff's lands registered in Volume 440, Folio 76, Volume 87, Folio 74, and Volume 183 Folio 79 of the Register Book of Titles. And the Plaintiff will have the costs of his action.

Dated this 13th day of May 1963.

(Sgd) W. R. Douglas

JUDGE.

In the Supreme Court of Jamaica

No. 6

Order on Judgment

13th May, 1963

NO. 6
ORDER ON JUDGMENT

THE 13th day of May 1963.

THIS ACTION coming on on the 5th day of November 1962 before Mr. Justice Douglas for Trial before this Court in the presence of Counsel for the Plaintiff and for the Defendant and UPON READING the Pleadings and UPON HEARING the evidence an and what was alleged by Counsel for the Plaintiff and the Defendant THIS COURT DID ORDER that the said action should stand for Judgment AND THIS ACTION standing for Judgment this day in the presence of Counsel for the Plaintiff and for the Defendant THIS COURT DOTH ORDER AND DECLARE:

1. THAT the Instrument of Mortgage under the Registration of Titles Law made between the Plaintiff and the Defendant on the 22nd day of April 1961, as varied on the 31st day of July 1961 by an agreement in writing made between the Plaintiff and the Defendant whereby it was agreed that the rate of interest under the said Mortgage should be increased to 11% per annum, effective as from the 26th day of July 1961 is hereby DECLARED UNENFORCEABLE.

2. THIS COURT DOTH DECLARE AND ORDER that the said Instrument of Mortgage dated the 22nd day of April 1961 be cancelled and the letter and confirmation varying same dated 31st July 1961 be cancelled and delivered to the Plaintiff.

3. THIS COURT DOTH ORDER AND DECLARE that the Defendant be restrained from taking any steps to take possession of, sell, or otherwise dispose of the lands mortgaged being:-

(a) The lands comprised in certificate of Title registered at volume 440 folio 76

(b) The land comprised in certificate of Title registered at volume 87 folio 74

(c) The land comprised in certificate of Title registered at volume 183 folio 79.

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No. 6

Order on Judgment

13th May, 1963 (Contd.)

4. THIS COURT DOTH ORDER that the said mortgage dated 22nd April 1961 in favour of the Defendant endorsed on the Certificates of title of the Plaintiff's lands mentioned in paragraph four hereof be discharged.

AND THE PLAINTIFF TO HAVE THE COSTS OF THIS ACTION.

STAY OF EXECUTION GRANTED FOR SIX WEEKS FROM THE DATE OF JUDGMENT.

(Sgd) A. E. Brandon & Co.
OF No. 45 Duke St. Kingston.
Solicitors for the Plaintiff.

ENTERED by A. E. BRANDON & CO., of 45 Duke Street, Kingston, Solicitors for the Plaintiff.

In the Court of Appeal

No. 7

Notice of Appeal.

21st June, 1963

NO. 7
NOTICE OF APPEAL

IN THE COURT OF APPEAL

NOTICE OF APPEAL

C.A.No.14 of 1963

between

UNITED DOMINIONS CORPORATION (JAMAICA) LIMITED
DEFENDANT-APPELLANT

AND

MICHAEL M. SHOUCAIR
PLAINTIFF-RESPONDENT

TAKE NOTICE that the Court of Appeal will be moved so soon as Counsel can be heard on behalf of the above named Defendant-Appellant On Appeal from the whole of the judgment herein of the Honourable Mr. Justice Douglas given at the trial of this action on the 13th day of May 1963, whereby it was adjudged that the Plaintiff-Respondent was entitled to:-

1. A declaration that the mortgage made between the Plaintiff-Respondent and the Defendant-

In the Court of Appeal

No. 7

Notice of Appeal.

21st June, 1963 (Contd.)

Appellant on the 22nd of April 1961 as varied, was unenforceable.

2. An order for the cancellation and delivery up of the instrument of mortgage dated the 22nd of April 1961, and letter and confirmation varying the same.

3. An order for an injunction to restrain the Defendant-Appellant from taking any steps to take possession of, sell, or otherwise dispose of the lands mortgaged.

4. An order for the discharge of the mortgage in favour of the Defendant-Appellant endorsed on the Certificate of Title of the Plaintiff-Respondent's lands registered in Volume 440 Folio 76, Volume 87 Folio 74 and Volume 183 Folio 79 of the Register Book of Titles

5. Costs of the action.

For an Order that the said judgment be set aside and judgment entered for the Defendant-Appellant with costs - alternatively that a new trial be had between the parties, AND for an Order that the Plaintiff-Respondent do pay to the Defendant-Appellant the costs of and incident to this appeal.

AND FURTHER TAKE NOTICE that the grounds of this appeal are:-

1. The learned Trial Judge was wrong in holding that "the only reasonable inference to be drawn from the conduct of the parties is that the agreement was that U.D.C. would not demand payment while the Plaintiff paid interest at £11 per centum and in addition while he paid £150 per week on his account," and that therefore there was good consideration in the nature of forbearance moving from the Defendant for the Plaintiff's promise to pay the increased rate of interest, for the following reasons:-

   (a) The evidence established that:-

      (i) Prior to the Defendant receiving the

Plaintiff's signification of his willingness to pay the increased rate of interest on the 7th of September 1961, the Defendant through their Manager Mr. Raymond Neal had agreed with the Plaintiff that the Defendant would be content to accept weekly payments of £150 plus the amount discounted on any Hire Purchase transactions introduced by him, towards the liquidation of his existing debt to the Defendant.

(ii) Pursuant to the said agreement the Plaintiff made payments of £150 to the Defendant on the 6th and 16th of September 1961, and on the 19th of September 1961, permitted the Defendant to retain to the credit of his account £350 being the proceeds of amounts discounted on Hire Purchase transactions introduced by him.

(b) There was no evidence to indicate that at the time of the interview and agreement referred to in (a) (i) the Defendant's request for the payment of increased interest was discussed, or that a rate of interest of 11 per cent was mentioned either by the plaintiff or the Defendant's Manager the said Raymond Neal.

(c) The facts and circumstances referred to at (a) to (b) indicated that any forbearance shown to the Plaintiff between the date of the agreement referred to in (a) (i) and the 16th September 1961, was directly referable to the agreement to make the payments mentioned in the said agreement, and there was no evidence from which it could be inferred that the Defendant's forbearance between the 16th of September 1961, and the 5th of October, 1961, was referable to his promise of the 6th of September 1961, to pay interest at 11 per cent.

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21st June, 1963

(Contd.)

2. Alternatively, the only reasonable deductions that could be made from the evidence in the case on this question of forbearance, was that such forbearance as the Defendant had shown between the 7th of September 1961, and the 5th of October 1961, was referable either to the Plaintiff's promise to pay increased interest, or to the Defendant's undertaking to accept payments of £150 per week and the proceeds of Hire Purchase transactions, and the forbearance shown by the Defendant was as consistent with the one explanation as it was with the other.

3. To succeed in the action, the Plaintiff had to establish that there was good consideration moving from the Defendant for his promise to pay the increased interest. This meant that he had to prove that the Defendant's forbearance was exclusively-alternatively partly referable to his promise to pay increased interest, and the Learned Trial Judge misdirected himself in Law by failing to appreciate that the onus of proof in this respect lay on the Plaintiff.

4. In paragraph 15 of his Judgment the Learned Trial Judge stated:-

> "From the foregoing it is clear that the Plaintiff had been required by U.D.C. to pay the increased interest prior to the discussions of late August or early September. He says that from the date of the receipt of U.D.C.'s letter dated 31st of July, he felt bound to pay interest at the rate of £11%. It is difficult to see how he could have felt otherwise. He had U.D.C.'s letter and he had acknowledged it. He had been called in and he had agreed to pay one hundred and fifty pounds per week, which amount approximated the interest payable on his advances when calculated at £11%. At no stage was the letter withdrawn, nor was anything said to him by U.D.C. waiving its requirements. Finally, when demand was made on him by U.D.C. for the principal sums advanced

and for interest owing thereon, that demand was made on the basis that interest for August and September 1961 was calculated at £11%"

In paragraph 28 the Learn Trial Judge stated:-

"For U.D.C. it is said that the forbearance shown by U.D.C. was directly referable to the promise to pay one hundred and fifty pounds a week and did not stem from the promise to pay interest at £11%. I cannot view it in that light. I think that the only reasonable inference to be drawn from the conduct of the parties is that the agreement was that U.D.C. would not demand payment while the Plaintiff paid interest at £11 per centum and in addition, while he paid one hundred and fifty pounds per week on his account."

Paragraph 15 is a finding that the Plaintiff believed that the £150 per week which he was agreeing to pay was in respect of interest at 11 per cent. There was no evidence that the Plaintiff ever understood that he was required to pay a further £150 per week on his account. Paragraph 15 of the Judgment is therefore inconsistent with paragraph 28 to the extent that the latter finds as a fact that the Plaintiff agreed with the Defendants that they would forbear while he paid interest at 11 per cent (approximately £150 per week) plus a further £150 per week on his account.

5. Alternatively, if the Defendant was forbearing for the reasons stated in paragraph 28 of the Judgment, then inasmuch as the Plaintiff's mind was never addressed to the necessity for him to pay interest at 11 per cent plus an additional £150 per week on the account, the parties were never ad idem to the agreement found in paragraph 28.

6. In the further alternative, if paragraph 15 is a finding that both parties had agreed at the interview in late August or early September

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21st June, 1963

(Contd.)

that the £150 per week was interest at 11 per cent, the same is contrary to the evidence and unreasonable, and such a finding is in any event inconsistent with a paragraph 28, since the latter finds that an additional £150 per week was agreed to be paid.

7. The Learned Trial Judge was wrong in rejecting the evidence of Mr. Neal that interest at 9 per cent was discussed at the meeting with the Plaintiff on the grounds stated in paragraph 12 of his Judgment because:-

(a) It was never suggested by the Plaintiff in his evidence that the £150 per week agreed to be paid was based upon interest at the rate of 11 per cent on the loan.

(b) The Defendant's case was that the Plaintiff's agreement to pay interest at 11 per cent was never communicated to them until the 7th of September 1961, (several days after the date of the meeting at which the Plaintiff agreed to pay £150 per week).

(c) Mr. Neal stated in chief that the £150 was arrived at between the Plaintiff and himself after a discussion of the state of the Plaintiff's account, and that the same was to be applied to interest in arrear and then current, and any excess towards principal.

(d) Notwithstanding the facts as set out in (a) to (c) Counsel for the Plaintiff pressed Mr. Neal with a suggestion that the £150 per week was selected because it represented weekly interest at 11 per cent per annum, and this line of cross-examination evoked an explanation from the witness that in the discussion which led to the agreement to pay £150 per week a rate of 9 per cent for interest was mentioned.

(e) By reason of (a) to (d) it was unreasonable for the Learned Trial Judge to hold that the Plaintiff was not bound

by an answer which arose from this line of cross-examination, especially since if the answer had been that the £150 per week was based on interest at 11 per cent as was suggested, it would then be contended by the Plaintiff that since both parties were thinking of interest at 11 per cent and nothing else at the date of the said interview, the only reasonable inference that could be drawn was that it was agreed that the Defendants would forbear while interest at 11 per cent was paid.

8. The Learned Trial Judge was wrong in Law in holding the variation agreement of the 7th of September 1961, was effectual to vary the instrument of mortgage of the 22nd of April, 1961

DATED this 21st day of JUNE 1963.

V. O. BLAKE Q.C.

(Signed) Milholland, Ashenheim & Stone
SOLICITORS for the above named Appellant

To: The above named Respondent
Michael M. Shoucair

Or to: His Solicitors,
Messrs. A. E. Brandon & Co.,
45 Duke Street,
Kingston.

FILED by MILHOLLAND ASHENHEIM & STONE of No. 5 Port Royal Street, Kingston, Solicitors for the above named Appellant.

NO. 8

AMENDMENT TO GROUND 8 OF THE GROUNDS OF APPEAL

In the Court of Appeal

No. 8

Amendment to Ground 8 of the Grounds of Appeal.

25th January, 1965

UPON the application of Counsel for the Defendant Applicant on the 25th day of January 1965, Counsel for the Plaintiff/Respondent not objecting paragraph 8 of the Grounds of Appeal was amended to read as follows:-

"8. The learned Trial Judge was wrong in rejecting the contentions of the Defendant summarised in paragraph 31 of the Judgment and in particular was wrong in Law -

(i) in holding that the variation agreement of the 7th September 1961 was effective to vary the Instrument of Mortgage of the 22nd April 1961;

(ii) in holding that such variation (if any) prevented the Defendants from enforcing their rights under the original contract of loan;

(iii) in failing to direct himself that the material question was whether by the agreement of the 7th September 1961 the parties intended to extinguish or discharge the original contract."

That a new paragraph to be numbered 8 and reading as follows be inserted immediately after paragraph 8:-

"8. If and in so far as the Learned Judge held as a matter of fact that the parties did intend to extinguish or discharge the original contract such finding was against the weight of evidence."

In the Court of Appeal

No. 9.

Judgment of Duffus, P. (Dissenting)

18th April 1966

NO. 9

JUDGMENT OF DUFFUS, P. (DISSENTING)

January 25, 26, 27, 29
February 1, 2, 3 1965
and April 18, 1966

This is an appeal from the judgment of Douglas, J., delivered on the 13th May, 1963, declaring that a mortgage made between the respondent and the appellant was unenforceable and should be discharged.

The appellant is a limited liability company incorporated under the Companies Law of Jamaica engaged in the business of money-lending. The respondent is the Managing Director of Michael M. Shoucair Limited, a company also incorporated under the Companies Law. This company was engaged in the motor trade and in December, 1959, it started doing business with the appellant company, discounting hire purchase agreements on vehicles and borrowing money. During the year 1960, the respondent personally, started doing business with the appellant company (which company will be referred to hereafter as U.D.C.). In May, 1960, he borrowed a sum of £14,000 to purchase lands at 172C and 172D Orange Street in Kingston. In September he borrowed a further £4,000 for the purpose of financing the erection of a building on these lands. Between the months of September 1960 and April 1961, U.D.C. advanced to the respondent various sums to enable him to complete the building at Grange Street and to finance the business of Michael M. Shoucair Ltd. All these loans were made on demand notes and by April, 1961, amounted to £55,000. On the 22nd of April, the respondent executed a mortgage under the Registration of Titles Law to secure the sum of £55,000 to U.D.C. The mortgage instrument provided for the payment on demand of the principal sum secured and for the payment of interest thereon at the rate of 9% per annum. In addition to the aforementioned premises on Orange Street, premises situated on Beechwood Avenue were included in the mortgage. The manager of U.D.C. at the time the advances were made, was Mr. G.M.Harvey who left Jamaica in April 1961. He was succeeded as manager by Mr. R.A.Neal. Shortly before Mr. Harvey left the Island the respondent's

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No.9

Judgment of Duffus, P. (Dissenting)

18th April, 1966

(Contd.)

company had received a further sum of £15,000 by way of advance on a loan of £30,000 which the respondent was negotiating for stocking facilities. After Mr. Harvey had left, Mr. Neal who appeared to take a somewhat pessimistic view of the respondent's credit-worthiness declined to advance any further monies, other than a payment to Barclays Bank of £1,800 on the 17th August, 1961, on account of the cost of a shipment of lifts supplied pursuant to an arrangement with the Bank made with Mr. Harvey when he was manager. The respondent being dissatisfied with Mr. Neal's refusal to allow his company to have the further £15,000, which Mr. Harvey had apparently promised him, wrote to the parent company of U.D.C. in London, but this company declined to interfere with the business affairs of the Jamaica company. The respondent, at about this time, was not meeting his obligations to U.D.C., and on the 16th of June, 1961, Mr. Neal wrote to the respondent informing him that it was not proposed to make any further advances, and in his letter he stated as follows -

> "It is not necessary for me further to dwell on the subject of your current and very heavy liability since I expressed my views on this matter quite clearly at our last meeting, nevertheless I think I should reiterate the fact that I was astonished at some of the proposals submitted to me by your company during your recent absence. In addition to this, the fact that your instalment of £543.15/- on transaction 1861/16 which was due on the 15th of April, and instalments amounting to a total of £164 in respect of your air-conditioned Chrysler motor car which were due on the 29th April and the 29th May have not been received hardly tends to inspire confidence."

On the 25th July, 1961, the Bank of England rate rose from 5% to 7% and by a circular letter which was sent out by U.D.C. to its various borrowers, notice was given of their intention to increase the rate of interest payable on loans. The letter was as follows:-

> " 31st July, 1961.
>
> Owing to the increase in the Bank of England rate by 2% we have to advise you that

we also will have to increase our rate of interest by a corresponding amount. As a result, interest on your loan will be computed at 4% above the Bank of England rate which is at present 7%. This change will take effect as from 26th July, 1961.

We trust that this will only be a temporary measure.

Please acknowledge receipt and confirm by signing and returning the attached copy."

As requested, the respondent signed and returned to U.D.C. the copy of the circular letter thereby signifying his agreement to pay the increased interest. The evidence tendered on behalf of U.D.C., which was accepted by the learned judge, indicated that this letter was not sent to the respondent until the 22nd August, and his signed acknowledgment reached U.D.C. on or about 7th September.

At just about the same time, that is, late August or early September, the exact date not being certain, the respondent and Mr. Neal met and discussed the state of the account and it was arranged that the respondent would pay U.D.C. the sum of £150 per week and further that U.D.C. would retain for the credit of the respondent's account all amounts discounted on hire purchase transactions introduced by him. On the 6th of September, the respondent paid £150 and on the 15th or 16th September he paid a further £150. On the 19th of September, U.D.C. retained £350 discounts on hire purchase transactions. Thereafter, nothing was paid by the respondent.

In early October, U.D.C. served on the respondent a written notice, dated 5th October, 1961, requiring payment of £58,005.18.5 by the 14th of October and in default of payment threatened to exercise their powers of sale under the mortgage. Correspondence ensued between the respondent's solicitor and U.D.C. which culminated in the respondent's action seeking a declaration that the mortgage was unenforceable. The respondent's statement of claim in so far as is relevant to this appeal is as follows:-

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Judgment of Duffus, P. (Dissenting)

18th April, 1966

(Contd.)

"6. The plaintiff says that the contract for payment of the said sum of £55,000 and interest and the said security given by the plaintiff is unenforceable as no note or memorandum of the contract was made or signed by him, nor was any copy of any note or memorandum given or sent to the plaintiff as required by section 8 of the Moneylending Law, Chapter 254 (1953) Revised Edition of the Laws of Jamaica.

7. Further and/or alternatively, the Plaintiff did not sign a note or memorandum of the said contract of loan before the said money was lent or the said security given. By reason thereof the said loan and security does not comply with the provisions of section 8 of the Moneylending Law and is unenforceable.

8. Further and/or alternatively, there was no note or memorandum in writing, made and signed by the Plaintiff in compliance with the provisions of the said Law.

AND the Plaintiff claims:

(1) A declaration that the Mortgage made between the Plaintiff and Defendant on the 22nd April 1961 and varied in writing on the 31st day of July, 1961 is unenforceable having regard to section 8 of the Moneylending Law, Cap. 254 of the Revised Edition (1953) of the Laws of Jamaica.

(2) Cancellation and delivery up of the Instrument of Mortgage dated the 22nd day of April 1961 and of the letter dated the 31st day of July 1961 varying the said Mortgage.

(3) An injunction to restrain the Defendants from taking any steps to take possession of, sell or otherwise dispose of the said lands of the Plaintiff mortgaged to the Defendant.

(4) An Order for the discharge from the Certificate of Title to the Plaintiff's

lands of the Mortgage in favour of the Defendants endorsed thereon."

The statement of defence was of necessity somewhat lengthy but as some of the defences set out therein were abandoned at the trial and others were not argued before this court it is only necessary to set out those which are relevant to this appeal. They are as follows:-

"5. If, which is denied, the said letter and the Plaintiff's confirmation of the terms therein contained applied to the said mortgage, there was no consideration moving from the defendant for the Plaintiff's promise to pay the increased rate of interest on the principal sum thereby secured, and no contract for the repayment of the principal sum of £55,000 with interest thereon at the rate of 11% per annum was thereby created.

... ...

8. If, which is denied, the provisions of the Moneylending Law were not complied with, the failure to comply therewith made the agreement referred to in paragraph 3 of the Statement of Claim (that is, the agreement to pay 11%) ineffective to vary the original instrument of mortgage of the 22nd of April, 1961."

The learned trial judge in a considered judgment found against U.D.C. on both of these defences. He found that there was consideration for the respondent's promise to pay the increased rate of interest at 11% per annum, and that "the original loan agreement between the parties was varied by the respondent's promise to pay interest at 11% per annum" and that "by reason of the failure of U.D.C. to comply with the requirements of Section 8 of the Moneylending Law (Cap. 254) that agreement was unenforceable" and that the respondent was entitled to relief.

On appeal the appellant company sought an order that the judgment in the court below be set aside and judgment entered in its favour, alternatively that there be a new trial.

At the commencement of the trial in the court below it was conceded by learned counsel for U.D.C.

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Judgment of Duffus, P. (Dissenting)

18th April, 1966 (Contd.)

that a portion of the interest demanded in their notice of the 5th October, 1961, in respect of the months of August and September 1961, was calculated at £11 per centum per annum and it was conceded by learned counsel for U.D.C. to this court that the respondent would be entitled to the relief claimed if:-

(1) there was good consideration moving from U.D.C. for the respondent's promise to pay interest at 11%; and

(2) assuming that there was good consideration, it could be shown that the resulting agreement was effective to vary the mortgage instrument of the 22nd April, 1961.

Mr. Blake stated that "the critical issues for consideration before this court were therefore -

(i) was the learned judge right in finding that there was consideration for the respondent's promise to pay increased interest? and

(ii) if there was consideration, was he right in holding that the Variation Agreement could legally vary the registered legal mortgage?"

Mr. Blake made submissions in respect of the first issue and Mr. Littman made submissions in respect of the second issue. Mr. Blake summarised his submissions thus:-

(i) That on the facts of the case no reasonable inference could be drawn that any forbearance subsequent to the 7th September, 1961 (the date when U.D.C. received the respondent's signed acknowledgment of his willingness to pay increased interest) was referable in any way to the promise to pay increased interest. That finding, he submitted, could only be made if there was evidence which enabled the court to say that on a balance of probabilities there was some additional forbearance referable to that promise.

(ii) Any finding on the evidence that there was this additional forbearance was a matter of speculation and conjecture as distinct from legal inference.

(iii) In all the cases of forbearance the facts have been that there was a debt and that either upon security or additional security being given by the debtor the creditor showed forbearance. In all those cases the security or increased security conferred some benefit on the creditor rendering his position in respect of the debt safer than it was before. In the present case there was no additional security given, and what would flow as a natural result of the agreement to pay additional interest was that the amount of the existing debt would be increased without increasing the security and in these circumstances it would be unrealistic to draw an inference that there was forbearance, especially when it was clear that the increase was meant to be a temporary one only.

(iv) Although the letter of the 31st July, 1961 had been despatched prior to the interview between Mr. Neal and the respondent, there was no evidence to indicate that the payment of increased interest was discussed when they agreed that the respondent should pay £150 per week.

(v) The evidence indicated that U.D.C. had been forbearing prior to the receipt on the 7th September, 1961, of the respondent's consent to pay the additional interest and there was no valid reason for assuming that the appellant's forbearance down to the 5th October, 1961 (the date of the notice requiring payment under the mortgage) was influenced in any way by the promise to pay the increased interest

(vi) That the learned judge was wrong in rejecting the evidence of Mr. Neal that interest at 9% was discussed at the meeting.

Mr. Blake's submissions were followed by Mr. Littman's submissions, but it is more convenient at this stage to set out Mr. Coore's reply on the issue of "consideration" dealt with by Mr. Blake, and to deal later on in this judgment with Mr. Littman's submissions on the other issue.

Mr. Coore summed up his submissions on the

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No.9

Judgment of Duffus, P. (Dissenting)

18th April, 1966

(Contd.)

"consideration" issue thus -

(i) When the creditor has made some request of the debtor which the debtor has promised to honour, and where the promise by the debtor is followed by some period of time in which the creditor allows the loan to remain outstanding, the inference is that the forbearance by the creditor is directly attributable to the debtor's promise. On the authorities the only case in which that inference was held to be rebutted was a case in which what the debtor did or promised to do was not communicated to the creditor.

(ii) In the instant case the debtor's promise was communicated to the creditor and there was thereafter a period of forbearance for approximately four weeks, and this was sufficient to give rise to the inference of a nexus between promise and forbearance. U.D.C. had failed to refute the inference because the fact on which they relied - that is, the promise made at the interview on or about the 28th August, 1961, is a fact which is consistent with the inference that had the respondent refused to pay 11% the loan would have been immediately called in.

I shall now proceed to an examination of the evidence in order to decide whether the learned judge was right when he decided that there was valuable consideration for the respondent's promise to pay interest at 11%. In paragraph 27 of his judgment he says:-

> "As I see it, it is essentially a question of evidence. As Lord Esher pointed out in Crears v. Hunter (1887) 19 Q.B.D.341, it was really a question of whether there was a sufficiency of evidence to entitle the jury to infer that the understanding between the parties was that which was argued for. I would only add that in weighing the evidence, the thing must be looked at in a business way, taking into account so far as they are known, the normal usages of commercial life",

and in paragraph 28 he sets out his findings thus:-

" In the instant case, it must be borne in mind that the loan was payable on demand. When U.D.C. requested the plaintiff to pay interest at 11%, nobody was under any illusion as regards U.D.C.'s power to call in the loan. To say that the plaintiff had the option of deciding whether or not he would agree to pay the increased interest is hardly realistic. By the letter of the 16th June, U.D.C. had been pressing for the payment of instalments which in July and August remained unpaid. Further the plaintiff had been told that his failure to pay instalments did not inspire confidence. The plaintiff was a debtor in extremis so far as his ability to meet his obligations went, and for him it was a matter of complying with his creditor's requirements or having his loan called in. For U.D.C. it is said that the forbearance shown by U.D.C. was directly referable to the promise to pay one hundred and fifty pounds a week and did not stem from the promise to pay interest at 11%. I cannot view it in that light. I think that the only reasonable inference to be drawn from the conduct of the parties is that the agreement was that U.D.C. would not demand payment while the plaintiff paid interest at £11 per centum and in addition, while he paid one hundred and fifty pounds per week on his account".

The findings of the learned judge were based on inferences drawn from proved facts and this court is in as good a position to evaluate the evidence as the trial judge and shoulld form its own independent opinion, though giving weight to the opinion of the trial judge (vide Benmax v. Austin Motor Co.Ltd /1955/ 1 All E.R.326).

I find myself unable to accept the inference drawn by the learned judge that the letter from U.D.C. to the respondent of the 16th June (supra) indicated that U.D.C. had been pressing for the payment of overdue instalments. The reference to unpaid instalments was not made in connection with pressure for payment but was concerned specifically with the appellant's refusal to advance a further sum of £15,000 for stocking facilities, which Mr. Harvey had promised to make.

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The finding that the respondent was a debtor in extremis is certainly not supported by the evidence. On the contrary the respondent's letter of the 3rd June 1961 to U.D.C.'s parent company in London refers to a sound financial concern, expanding its business, securing new motor car agencies and about to launch into the furniture market, and the letter of the 17th August 1961 from U.D.C. to the respondent's company, informing that company that a cheque for £1,800 was being sent to Barclays Bank in connection with the shipment of lifts (supra) could not be regarded as the sort of letter that would be sent to a debtor who was in extremis. In that letter the U.D.C. requested the respondent's company to forward their cheque for £542.9.4 to the Bank to settle the balance on the lift transaction. Obviously U.D.C. must have thought that the respondent's company's financial position at that time was such that it could meet this commitment. Also, it must not be lost sight of that the request for payment of interest at 11% was clearly intended to be of a temporary nature only, and there is no evidence to indicate that it was made at a time when any pressure for payment had been brought against the respondent. The evidence indicates that it was not until the meeting between Mr. Neal and the respondent at the end of August that any suggestion of pressure was made. It seems fairly certain that at the time of this meeting the respondent had already received the letter requesting payment of increased interest but that he had not yet despatched his acceptance. It is true that the respondent said - "If I had not signed it they would have pressed for payment. I was not then able to repay £55,000 and outstanding interest", but it seems to me that the learned judge placed far too much reliance on this statement in support of his finding that "for him it was a matter of complying with his creditor's requirements or having his loan called in". Mr. Neal's evidence negatived absolutely any suggestion that if the respondent did not agree to pay interest at 11% the loan would be called in, but the learned judge rejected Mr. Neal's evidence finding that it was unreliable; therefore I have examined carefully the respondent's evidence and nowhere does he say that pressure had actually been brought against him. In his account of the interview with Mr. Neal at the end of August, when it was arranged that he

would pay £150 per week, he does not say a single word about pressure to pay, nor, what is perhaps of even greater significance, does he say that the rate of interest was discussed. Surely, if the payment of interest at 11% instead of 9% was of such importance that it was to be the vital factor in the matter of the creditor forbearing and giving time, it would have been mentioned, but if the respondent's account of the talk is correct, it was not discussed. The respondent merely said that he considered he was liable to pay interest at 11% and that was that. In my view this is most unrealistic. Surely the natural reaction of a debtor whose debt was secured by a first mortgage of real estate with interest at a fixed and certain rate would have been to query any attempt by the creditor suddenly to increase the rate of interest, even more so when the increase proposed was as much as 2%.

I am unable to say the learned judge was wrong to have rejected the evidence of Mr. Neal when he said that interest at 9% was discussed at the meeting as the learned judge had the opportunity of seeing and hearing Mr. Neal, and no cogent reason has been shown why this court should say that the learned judge was wrong, but no matter how unreliable Mr. Neal's evidence might have been, I can see no sound basis for accepting the respondent's assumption, that if he had not acceded to the request for additional interest he would have been pressed for payment, and I am satisfied that, apart from the respondent's assumption, which was purely speculative, the rest of the evidence does not support the inference drawn by the learned judge that there was an "agreement that U.D.C. would not demand payment while the plaintiff paid interest at 11% per annum."

It is quite correct that there was a period of forbearance for 28 days from the 7th of September to the 5th of October, the date of the notice requiring payment, but this was not the only forbearance shown. The appellant's accounts which were in evidence indicate that forbearance was being shown to the respondent from April when he commenced to fall behind in the payments of interest and this forbearance continued to be shown to the end of August, when

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the respondent and Neal made arrangements for future payments. Further forbearance was then shown while the respondent made payments toward the reduction of the arrears of interest, the greater part of which had accrued prior to the agreement to pay 11%. Was this further forbearance to be regarded as consideration for the promise to pay interest at 11% or was the further forbearance given merely an as extension of that already shown from April to August and with the expectation that the arrears of accrued interest would be paid in the manner arranged between Neal and the respondent? In the court below and before this court the question arose as to the burden of proof. Was it for U.D.C. to show that there was no consideration for the promise to pay the additional interest or was it for the respondent to show that there was good consideration? It was conceded by Mr. Coore that the initial burden of proof was on the respondent and this meant he had to prove that there was a binding second contract which would have had the effect of making the original contract contained in the registered mortgage unenforceable, but Mr. Coore submitted on the authority of Glegg v. Bromley [1912] 3 K.B. 474, and other cases referred to in that case, that the debtor's burden of proof was sufficiently discharged if he was able to show that some forbearance, even though it were for a very short period, followed the debtor's promise to pay the increased interest, and it would then be for the creditor to prove affirmatively that the forbearance shown was not related to the promises.

Glegg v. Bromley and the cases referred to therein, in particular, Alliance Bank v. Broom 2 Dr. & Sm. 289, and Fullerton v. Provincial Bank of Ireland [1903] A.C. 409, were all cases in which security on additional security were given and the courts held that "it is not necessary that there should be an arrangement for forbearance for any definite or particular time. It is quite enough, if you can infer from the surrounding circumstances that there was an implied request for forbearance for a time and that forbearance for a reasonable time was in fact extended to the person who asked for it," (per Lord Macnaghten in Fullerton's case at p.313, cited with approval by Vaughan Williams, L.J. in Glegg v. Bromley at p.481). This proposition of law was laid down in

respect of cases where the security held by the creditor for his debt was increased and the surrounding circumstances made the inference the obvious one to draw. There may be instances where the proposition could be properly applied to payment of increased interest where there was no increase of the creditor's security, but, in my view, the inference of an implied request for forbearance in cases of this kind ought only to be drawn where the surrounding circumstances clearly warranted it. In the instant case the surrounding circumstances were such that I think it would be wrong to draw the inference and I would say that the onus rested squarely on the respondent of proving affirmatively that the four weeks forbearance shown was directly related to his promise to pay interest at 11%. The learned judge found that the respondent had proved that there was good consideration for his promise. With this finding, with the utmost respect to the learned judge, I do not agree for the reasons which I have indicated. In my view, there was no consideration for the respondent's promise to pay interest at 11% and U.D.C. is therefore entitled to succeed on the first main issue.

I shall now proceed to an examination of the second main issue as argued by Mr. Littman. Mr Littman's submissions were alternative to those made by Mr. Blake and were based on the assumption of a finding against U.D.C. that there was good consideration for the promise to vary the interest under the mortgage from 9% to 11%. The question was whether the effect of the subsequent agreement, itself unenforceable under the Moneylending Law, was such as to make the original enforceable contract incapable of enforcement. There was no question as to the validity and enforceability of the original contract contained in the mortgage as the Moneylending Law had no application thereto, the rate of interest being less than 10% per annum, and it was common ground that the purported agreement of the 31st July which increased the interest to 11% would be unenforceable as the terms of section 8 had not been complied with.

It is convenient to set out here the relevant provisions of the Moneylending Law, Cap. 254, with which this case is concerned. They are as follows:-

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Sec. "8. (1) No contract for the re-payment by a borrower of money lent to him or to any agent on his behalf after the commencement of this law or for the payment by him of interest or money so lent and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract containing the particulars required by this section be made and signed personally by the borrower, and, unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given as the case may be.

(2) The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and the interest charged on the loan expressed in terms of a rate per centum per annum.

... ...

Sec. 13. (1) This law does not apply to -

... ...

(e) Any loan or contract or security for the repayment of money lent at a rate of interest not exceeding ten per centum per annum."

It would seem that in a case of this kind the vital question is whether the new agreement was simply intended to vary some particular term of the original contract or was it intended to abrogate or discharge the original contract and to substitute a fresh contract containing some of the old terms and the new terms. The learned judge came to the conclusion that the original loan agreement was varied by the plaintiff's promise to pay interest at 11%. He did not in so many words say that the original contract was abrogated and a fresh contract substituted but that was the effect of his finding that "by reason of the failure of the U.D.C. to comply with the

requirements of sec. 8 of the Moneylending Law that agreement is unenforceable."

In the court below, counsel for U.D.C. relied on the decisions in Noble v. Ward (1867) L.R. 2 Exch. 135 and Morris v. Baron /1918/ A.C.1. In his judgment the learned judge quoted the following passage from the judgment of Willes, J., in the earlier case:-

> "Where parties enter into a contract which would have the effect of rescinding a previous one but which cannot operate according to their intention, the new contract shall not operate to affect the previously existing rights This is good sense and sound reasoning on which a jury might at least hold that there was no such intention."

Noble v. Ward was concerned with a contract for the sale of goods and it was held by the Court of the Exchequer Chamber that a parol agreement, being invalid under the Statute of Frauds (29 Car. 2, C.3) S.17, did not affect an implied rescission of an earlier contract in writing. The learned judge in the instant case decided that the Statute of Frauds and the Moneylending Law were not analogous. In paragraph 35 of his judgment he said:-

> " I cannot think that the Statute of Frauds and the Money-lending Law are, strictly speaking, analogous. The former rests squarely on the vagaries of the rules of evidence as they applied in the seventeenth century. The latter is a penal statute in protection of persons dealing with money-lenders. What the Statute of Frauds does, as part of the Law of Jamaica, is to prevent a party proving certain contracts unless there is a note or memorandum in writing. Naturally, if the agreement put forward as varying another is incapable of proof, then that other remains unaltered. It is a matter of evidence. As Denman C.J. said in Goss v. Lord Nugent 5 B & Ad. 58 at page 66 - 'But we think the object of the Statute of Frauds was to exclude all oral evidence as to contracts for the sale of lands, and that any contract which is sought

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to be enforced must be proved by writing only.' Under the Moneylending Law, however, the Court will construe the contract, and having done so, will say whether it is enforceable: Eldridge and Morris v. Taylor (1931) All E.R. Rep.542."

It was submitted by Mr. Littman that what the learned judge had done was to look at the original contract as varied and to ask whether the new hybrid was enforceable and that this was the wrong way to approach the problem. The correct approach, he submitted, was to take the two agreements separately and ask whether the first was enforceable and then to take the second and ask whether that was intended to abrogate the original and to substitute therefor a new agreement. If the answer was no, then the original contract stood and there was nothing to prevent it being enforced. He further submitted that such distinctions as may exist between the Moneylending Law and the Statute of Frauds were not material to the issue in the instant case and that the learned judge had been wrong when he decided that the Statute of Frauds and the Moneylending Law were not analogous and as a result he failed to give the proper weight and regard to cases such as Noble v. Ward and Morris v.Baron which were concerned with the enforceability of contracts under the Sale of Goods Act and the Statute of Frauds, statutes containing prohibitions against the enforceability of contracts, similar to the Moneylending Law.

Learned counsel for the respondent submitted that there was no direct authority on the Moneylending Law to support Mr. Littman's method of approach, and that there was a real distinction between the Moneylending Law on the one hand and the Statute of Frauds and the Sale of Goods Act on the other hand and that such similarilities as there appeared to be were merely superficial. Mr. Coore summed up his arguments by saying that all the cases show that in respect of contracts within the Statute of Frauds the rule that a parol variation leaves the original written contract unaffected and enforceable is simply a by-product of the more fundamental principle that the Statute of Frauds makes it impossible as a matter of evidence to prove a contract which offends its provisions and

in short, that these cases rested upon the special effect of the Statute of Frauds as interpreted by the courts and did not rest on any general jurisprudential principle and that the courts should be extremely reluctant to extend the exercise to any other statute, e.g. the Moneylending Law.

There can be no doubt that Mr. Coore presented his arguments with his usual eloquence and skill and I am unable to say that they were not without considerable merit but after careful consideration of the submissions of both counsel and examination of the various cases referred to, I am persuaded that the prohibition against the enforceability of contracts under the Moneylending Law is analogous with the prohibition contained in the Statute of Frauds and the Sale of Goods Act, and that the cases on these latter laws set out principles of law which are equally applicable to moneylending contracts.

The crucial words for consideration under the various laws are as follows:-

(i)	Sec.4 of the Statute of Frauds, 1677 - now contained in Sec. 40 (1) of the Law of Property Act 1925	"No action shall be brought"
(ii)	Sec.17 of the Statute of Frauds	"shall not be held to be good"
	Sec.17 repealed and now embodied in Sec. 4 of the Sale of Goods Act, 1893	"shall not be enforceable by action"
(iii)	Sec.8(1) of the Moneylending Law (Jam.) Cap.254 which is exactly the same as Sec.6(1) of the English Money-Lenders Act, 1927	"No contract .....shall be enforceable"

It will be noticed that there was a marked difference between the wording in this respect of the 4th section of the Statute of Frauds and the 17th section, as was pointed out in Leroux v.Brown 12 C.B.801. Lord Finlay L.C. remarked on this

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difference in Morris v. Baron [1918] A.C.1 at p.11 where he said: "notwithstanding the obiter dicta (for they are no more) of some eminent judges, I do not think that the language of the two sections had the same effect ---. The change made in the wording of the 4th section of the Sale of Goods Act as compared with s.17 of the Statute of Frauds in my opinion altered the law."

Viscount Haldane, in the same case, was of a different opinion. At p.15 he said: "It is true that the language of the 17th section of the Statute of Frauds which, like the 4th section of the Sale of Goods Act, relates to the sale of goods of the value of £10 or upwards, differs from that of the 4th. Instead of saying, as the latter and also the 4th section of the Sale of Goods Act do, that no action shall be brought to charge any one on a contract which does not comply with it, it says that no contract which does not fulfil its requirements 'shall be allowed to be good'. But these words have been construed as meaning good for the purpose of being enforced by proceedings. This being so, they do not destroy the contract for every purpose."

Lord Dunedin took the same view as Viscount Haldane and at p.24 he said, "For Lord Blackburn --- distinctly said in the case of Maddison v. Alderson (8 App. Cas. 467, 488) in this House: 'I think it is now finally settled that the true construction of the Statute of Frauds, both the 4th and 17th sections, is not to render the contract within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract.' And Brett L.J. in Britain v. Rossiter (11 Q.B.D.123, 127) says, 'In my opinion no distinction exists between the 4th and the 17th sections of the statute.' In view of these opinions I am inclined to think that although, doubtless Noble v. Ward (supra) proceeded in the 17th section, yet the judgment would have been the same had there only been the 4th in question." Whatever doubts may have existed, however, as to their true legal meaning were removed when section 17 was repealed and its provisions substantially embodied in section 4 of the Sale of Goods Act, 1893, which uses the expression "shall not be enforceable by action." There is no doubt that the effect of

these words is to make unenforceable by legal proceedings any contract caught by the section, but not to render the contract void or illegal. The somewhat similar words of the Moneylending Law make contracts caught by them unenforceable in any way, that is, not only by legal proceedings but, for example, by sale under a mortgage. The contract, however, is not rendered void or illegal.

It is quite correct, as submitted by Mr.Coore, that the absence of writing makes it impossible as a matter of evidence to enforce a contract which offends against the provisions of section 4 of the Statute of Frauds or section 4 of the Sale of Goods Act, but similarly, it is the absence of writing (among other things) which makes it impossible for a lender to enforce a moneylending contract which does not comply with the Moneylending Law. The note or memorandum in writing in each case must contain the terms of the contract, stated with particularity as required by the respective statutes, and signed by the party to be charged or his agent in cases under the Statute of Frauds or the Sale of Goods Act, and personally by the borrower in cases under the Moneylending Law.

It is true that in the case of contract under the Moneylending Law, there are certain additional requirements which are not called for in the other statutes but the nature of these requirements is not such as to make the provisions of the respective laws so different that one can say that they are not analogous. In my view the objects and provisions of the respective sections of these laws are so very similar that the principles settled by the English Courts over the years as being applicable to sections 4 and 17 of the Statute of Frauds and section 4 of the Sale of Goods Act are equally applicable to section 6 of the English Moneylenders Act which is the same as section 8 of the Jamaican Law.

Before turning to the consideration of the decisions in Noble v. Ward (supra) and Morris v. Baron (supra) I will refer to Eldridge and Morris v. Taylor [1931] 2 K.B. 416, (supra) which was relied on by the learned judge and which was cited to us by Mr. Coore. The learned judge

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referred to this case as authority for the proposition that "under the Moneylending Law (in contradistinction to the Statute of Frauds, sic) the Court will construe the contract and having done so, will say whether it is enforceable". He then proceeded to find that the original loan agreement was varied by the agreement to pay interest at 11% and that the new hybrid agreement was unenforceable. He regarded Eldridge's case as being one of variation of a moneylending contract. Careful persual of the case shows that the contract which the court was concerned with there was a new or substituted contract which had been sued on and not the original contract. The new contract was for repayment of a sum of money by a husband and wife which was greater than a sum of money lent to the husband only under the first contract which the wife was not a party to. There had been a previous action on the first contract which had not been proceeded with nor had it been disposed of and it is noteworthy that Greer L.J. in his judgment, at p.420, said: "The original transaction not having been carried out by the husband an action was brought against him ---. Apparently nothing was done with regard to disposing of the action at that time, but I assume that it was an implied term that the action should not be further pursued and should be stayed. A question might arise whether if the new agreement was not performed that action could not be proceeded with but we have not to deal with that question." The decision in Eldridge's case turned entirely on the enforceability of the second contract as the claim was not made on the first contract and the court there did not have to consider the situation which arises in the instant case. It is therefore not really relevant to the consideration of the instant case.

I come now to the decision in Noble v. Ward. I have already, at p.15, referred to the passage from the judgment of Willes, J., quoted by the learned judge. With every respect to the learned judge, I am of the opinion that he fell into error when he held that the principle enunciated in this case was not applicable to moneylending contracts, thinking as he did that the Statute of Frauds and the Moneylending Law were not analogous.

Noble v. Ward was considered and explained by

the House of Lords in Morris v. Baron [1918] A.C. 1 (supra). Morris v. Baron, was concerned with two contracts for the sale of goods. It was held by the House of Lords that a contract for the sale of goods of more than £10 in value, evidenced in writing as required by sec. 4 of the Sale of Goods Act, 1893, may be impliedly rescinded by a parol contract for the sale of goods, though this parol contract was itself unenforceable by reason of its non-compliance with the statute, where there was a clear intention to rescind as distinguished from an intention to vary. The Court of Appeal had treated the case of Noble v. Ward as having decided as a matter of law that in a case to which the 4th section of the Sale of Goods Act applies the original contract cannot be rescinded by a contract not complying with the section. In his speech Lord Finlay, L.C. at p.13, said, "All that Noble v. Ward decided was that it was a mistake to say that as a matter of law the original contract was rescinded, the variation being by parol and there being no change of circumstances. It did not decide that as a matter of law the first contract still existed. As was said in the judgment of the Exchequer Chamber, that would be a matter for the jury." (supra p.15).

In his speech, Viscount Haldane sets out the principles, pointing out with great clarity the distinction between rescission of the original contract which the unenforceable contract may be able to effect and variation of the original which is not possible. At p.16 he says:-

> "But I think that, in addition to this, a further construction is now firmly settled which bases both the 4th and 17th sections of the Statute of Frauds upon a special rule of evidence. That rule is that where an agreement is validly entered into which has had to comply with the Statute of Frauds, and variations are afterwards sought to be introduced by parol or by a document which does not comply with the statute, these variations cannot be set up even by a defendant as an answer in proceedings to enforce the original agreement. This rule was so laid down by Sir William Grant in Price v. Dyer (17 Ves. 356, 363), and again by a later Master

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of the Rolls Lord Lyndhurst (at that time Sir John Copley) in Robinson v. Page (1826) 3 Russ. 114, 121. These authorities were followed not long since in Vezey v. Rashleigh([1904] 1 Ch. 634) by Byrne J. It shows how definite the principle thus based on the statute was considered to be that in these cases, which related to the specific performance of contracts for the sale of land, the rule was applied, notwithstanding the tenderness towards defendants which the element of discretion in decreeing specific performance sometimes admits of. But both Sir William Grant and Lord Lyndhurst intimated the opinion that complete rescission by parol, as distinguished from mere variation, stands on a different footing, and is outside the principle so established."

The learned Lord then referred to the erroneous interpretation placed by the Court of Appeal on the decision in Noble v. Ward, which he says was "one of high authority", and then proceeds at p.17 - 18 -

"Now the important point here is to see, not merely what Noble v. Ward decided, but what it did not decide. .... What was therefore decided was merely that where parties enter into an invalid contract, which purports to vary, and only to that extent to supersede or rescind, an earlier written contract, the later one does not operate validly. It was not decided by Noble v. Ward that the Statute of Frauds prevents a parol agreement, if it plainly purports to do so, from rescinding in its entirety a previous written contract. Even although itself incapable of being sued on, a parol contract may have that effect. The question is whether there is an intention in any event to rescind, independent of any further intention which may exist to substitute a second contract. I think that Noble v. Ward affirms what seems to result from principle, that in such a case the agreement to rescind must receive effect.

Even if Noble v . Ward can be taken as

a decision confined to the 17th section, which I think it ought not to be, the authorities in equity to which I have referred established the principle clearly as regards the 4th section of the Statute of Frauds and of the Sale of Goods Act. No doubt it is not to be found in the expressed words of the sections. But if the construction placed by the Courts on such words is not accepted injustice will result. For it would then be in the power of a defendant to insist that the contract to be sued on by the plaintiff must be the entire new contract comprising the old one with the parol variations, and then to defeat the plaintiff by setting up the statute. The Courts, in order to avoid this result, have read the language as implying that the original formal contract is not, in any question of evidence in proceedings, to be treated as varied by a subsequent contract which is informal, and therefore of imperfect obligation. But this reason obviously does not apply to a complete rescission by parol, which does not seek to set up a new contract to be sued on, but merely terminates existing relations.

Accordingly while a parol variation of a contract required to be in writing cannot be given in evidence, the very authorities which lay down this principle also lay down not less clearly that parol evidence is admissible to prove a total abandonment or rescission. Now there is no reason why this should not be done through the instrumentality of a new agreement which does not comply with the statutory formalities, just as readily as by any other mode of mutual assent by parol. What is, of course, essential is that there should have been made manifest the intention in any event of a complete extinction of the first and formal contract, and not merely the desire of an alteration, however sweeping, in terms which still leave it subsisting."

And this is what Lord Dunedin said, at p.23 -

"My Lords, let me first say that I unhesitatingly accept Noble v. Ward as well

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decided and laying down correct law. The judgment in the Exchequer was the judgment of Pollock C.B. and Bramwell, Channell, and Pigott BB. In the Exchqeuer Chamber the judgment was given by Willes J., and was concurred in by Blackburn, Mellor, Montague Smith, and Lush, JJ. He would be a bolder iconoclast than I am who should say that a judgment resting on the authority of such names did not correctly set forth the law of England. But now comes the question of what exactly it was that Noble v. Ward decided, and that is not so easy to determine as might be expected. For in truth there are three possible views of the true effect of Noble v. Ward. I shall examine each of them."

The learned judge then proceeded to examine his first two views which I will not refer to and then at p.26 he said:

"This brings me to the third view of Noble v. Ward, which I humbly think is the correct one. The criterion does not lie in the question of whether the later contract is itself a contract which needs to be in writing. The criterion is in the question whether what is intended to be effected by the second contract is rescission or variation. Noble v. Ward decided that if the second contract fell within the statute then it could not be appealed to to vary the former; but it did not decide that it could not be appealed to to rescind."

The authorities on implied rescission of contract were considered very fully by the House of Lords in British and Beningtons Ltd. v. North Western Cachar Tea Company Ltd. /1923/ A.C.48 and the principles set out in Morris v. Baron, which I have just referred to at some length, were applied. It was held that a parol contract which was unenforceable did not operate as an implied rescission of the original enforceable contracts, there being no evidence of any intention to rescind. The original contracts contained a large number of terms and the unenforceable parol agreement was intended to vary only one of the terms. At p.62 Lord Atkinson said, "The object and purpose of this parol contract was merely to vary

the written contract with respect to one of its provisions. That, however, is precisely the thing which cannot be done so as to make the barred contract enforceable at law." And at p.68 Lord Sumner said:-

"Under these circumstances it is plain that the three original contracts were not made an end of on May 12, 1920, but were meant at most to be subjected to a variation or alteration as to the manner and measure of performance of the original terms. The change does not go to the very root of the original contracts nor is it inconsistent with them: it merely varied the written contract by parol, the situation of the parties being otherwise unchanged. I, therefore, think that the agreement de facto of May 12, 1920, has no effect on the original contracts, not having been reduced into writing and signed by the buyers, and not having superseded the original contracts.

It was, however, argued before your Lordships that, even so, the old contracts were discharged because a varied contract is not the old contract, and as you cannot have a new and varied contract and an old and unvaried contract regulating the same thing at the same time, the old contract, like other old things, must be disregarded. As a matter of formal logic, this may possibly be so, but such was not the view taken by this House in Morris v. Baron, since, if their Lordships had thought that any variation whatever would make a new contract and discharge the old one, they would have said so expressly and would not have dealt with the extent and completeness of the changes, as they did. The variation may be a new contract, so as to make writing, duly signed, indispensable to its admissibility, for this is a matter of form and of the words of the statute, but the discharge of the old contract must depend on intention, tested in the manner settled in Morris v. Baron & Co."

In the instant case it is abundantly clear that there was never any intention to rescind the

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No.9

Judgment of Duffus, P. (Dissenting)

18th April, 1966

(Contd.)

old contract and to substitute a new contract. The new agreement was intended to vary the old contract in respect to one of its provisions only, to wit, a temporary increase of the interest rate. Applying the principles as set forth in the aforementioned cases, I am of the view that the learned judge erred when he held that the new agreement to pay interest at 11%, which was not enforceable, was nevertheless effective to vary the original enforceable agreement and had the effect of making that also, as varied, unenforceable. I think that the agreement to pay interest at the rate of 11% had no effect on the original contract and that the same is still enforceable as written, that is, with the interest at 9%.

The appellant therefore succeeds on both grounds and I would allow the appeal and order that the judgment in the court below be set aside in its entirety and that judgment be entered for the appellant company with costs in the court below and that the appellant company also have the costs of this appeal.

No. 10

Judgment of Lewis, J.

18th April, 1966

NO. 10

JUDGMENT OF LEWIS, J.

This appeal raises two interesting questions. The appellant corporation (hereinafter referred to as U.D.C.) lent the plaintiff-respondent substantial sums of money on mortgage security at a fixed rate of interest of nine per cent per annum, repayable on demand. This loan was outside the operation of the Moneylending Law, Cap.254, by virtue of section 13. Subsequently U.D.C. demanded interest at the rate of eleven per cent per annum and the plaintiff agreed to pay it. The first question raised is whether there was consideration to support the new agreement. Has the respondent proved that he agreed to the new rate of interest in return for forbearance on the part of U.D.C.? Secondly, the agreement for the new rate being admittedly unenforceable by virtue of section 8 of the Moneylending Law, and the payment of interest being only one of several terms of the mortgage agreement, was the new agreement effective to vary

the mortgage so as to make the loan one at 11% and so unenforceable; or were the parties left to their original rights under the mortgage?

First, as to consideration. The learned judge found that the only reasonable inference to be drawn from the conduct of the parties was that it was agreed that U.D.C. would not demand payment while the plaintiff paid interest at 11% and, in addition, while he paid £150 per week on his account. Upon this finding he held that the plaintiff had established that there was consideration for the agreement to pay the increased rate of interest.

Learned counsel for U.D.C. submitted that the learned judge erred in so holding because the evidence did not establish that any forbearance on the part of U.D.C. was due unequivocally to the plaintiff's promise to pay increased interest, or, alternatively, that notwithstanding the arrangement for weekly payments, U.D.C. would probably have called in the loan if the plaintiff had not agreed to the demand for increased interest.

In my opinion, the learned judge's decision on this point was right. As he said, "the thing must be looked at in a business way, taking into account, so far as they are known, the normal usages of commercial life."

The plaintiff was a business man who had mortgaged all he had for repayment of a large loan. He found himself in difficulties in making payments satisfactory to his creditor. From March 1961, he had paid nothing. He had been told that further advances which he had expected and for which he had immediate need would not be made to him. His efforts to get the parent company to intervene had been unsuccessful and had only resulted in a stern letter from the general manager, Mr. Neale, ending with the statement that his failure to pay certain instalments "hardly tends to inspire confidence." All this at a time when credit restrictions imposed by Government and by U.D.C. had had the effect of reducing sales in the motor trade in which the Plaintiff was engaged. It is no doubt possible to criticse as extravant the learned judge's

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No. 10

Judgment of Lewis, J.

18th April, 1966 (Contd.)

reference to the plaintiff as a "debtor in extremis", but that his financial situation was critical and that he was under pressure, polite but firm, to meet his commitments in a manner more satisfactory to U.D.C. there can be little doubt.

It was in these circumstances that the plaintiff received on August 22nd, the demand for payment of increased interest. What was he to do? Had his financial situation been secure he might have protested on the ground that his mortgage agreement contained no provision for change in the interest rate. But with his loan payable on demand, his interest payments months in arrear and his creditor patently dissatisfied, he could be under no illusion as to the probable consequences if he refused. Nor does it appear from the phraseology of the letter, as learned counsel for the plaintiff pointed out, that U.D.C. contemplated a refusal. It stated -

> "As a result, interest on your loan will be computed at 4% above the Bank of England rate which is at present 7%. This change will take effect as from 26th July 1961."

The request to "confirm by signing and returning the attached copy" was almost a formality dictated by legal necessity.

Within a week of the receipt of this letter the plaintiff was called in by Mr. Neale for an interview about his account. Mr. Neale had returned from holiday to find a new commitment - an advance of £1,800 in fulfilment of a previous undertaking to Barclays Bank D.C.O. The plaintiff had earlier been informed that this advance would bear interest at 11% and would "be added to the existing mortgage loan." Mr.Neale was disturbed by this new commitment and "thought it was time for a heart to heart talk with plaintiff to see if we could get the thing put on a proper basis." Whether the plaintiff actually signed the confirmatory copy of the letter before or after this talk is not clear, for it was not delivered to U.D.C. (he says, by hand) until September 7th, one day after payment of the first weekly instalment of £150 agreed upon at the interview. But the discussion clearly took

place against the background of U.D.C.'s demand for the increased interest rate. Having made this demand U.D.C. was now calling for a fixed weekly payment. Could the plaintiff refuse either?

There can be little doubt that the promise to make weekly payments was made under pressure and, as subsequent events showed, with little real prospect of its being honoured.

The plaintiff gives his reason for agreeing to pay the increased rate. He says -

> "I signed it" (the letter) "because I had no choice. If I hadn't signed it they would have pressed for payment. I was not then able to repay the £55,000 and outstanding interest."

The learned judge accepted this, in my view rightly. I am clearly of opinion that the demand for increased interest, in the circumstances in which it was made, constituted pressure upon the plaintiff in connection with the payment of his loan. The plaintiff's acceptance of the demand can only be explained on the basis that he hoped thereby to avoid the loan being called in - an implied request to U.D.C. to forbear from calling for payment.

Learned counsel for U.D.C. submitted that the plaintiff must show that notwithstanding the agreement as to payment of fixed weekly instalments U.D.C. would probably have called in the loan had the plaintiff refused to pay the new rate. Looking at the facts in a business way I think it is a reasonable inference that had Mr. Neale received on September 7th a letter of refusal instead of an acceptance he would probably have moved promptly to call in the loan. It is unlikely that U.D.C. would have been content to allow the money to remain at the lower and unremunerative rate with a debtor in whom they had lost confidence and whose account they considered unsatisfactory. But in my opinion, once the connection between pressure, promise to pay the increased rate of interest and forbearance is established, it is not necessary for the plaintiff

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Judgment of Lewis, J.

18th April, 1966 (Contd.)

to exclude any possible effect that the promise of weekly payments may have had concurrently. That connection is sufficient to establish consideration for the agreement and I can see no reason in principle why the presence of some other factor should deprive it of its legal effect.

I think that this part of the case is really concluded by the reasoning in The Alliance Bank v. Broom (1864) 34 L.J.Ch.257, where Kindersley V.-C. says :

> " Now, what is the effect of the letter written by the defendants? It appears to me that when a creditor demands payment of a debt, and the debtor, in consequence of that application, agrees to give a certain security, although there is no promise by the creditor to abstain from suing for any given time, yet the effect is that the creditor does in fact give, or must be assumed to give, and the debtor receives, or must be assumed to receive, the benefit of some degree of forbearance, although for no definite or fixed period. If the debtor had refused to give any security at all, the creditor might, of course have taken immediate steps to enforce payment, but in consequence of the promise to hypothecate, the debtor does receive some degree of forbearance."

And in Glegg v. Bromley (1912) 3 K.B. 474, Fletcher Moulton, L.J. said, at p.486:

> " If there has been pressure and in response to that pressure the further assignment is made, that suffices."

I turn now to the other ground of appeal, namely, that as the new agreement was intended to vary only one term of the mortgage agreement, and as it was unenforceable, it was ineffective in law to vary the original agreement, which remained enforceable.

In support of this proposition reliance was placed upon cases decided under ss. 4 and 17 of the Statute of Frauds and s.4 of the Sale of Goods Act, 1893, especially Noble v. Ward (1867) L.R.

Exch. 135, Morris v. Baron (1918) A.C. 1 and British and Beningtons Ltd. v. N.W.Cachar Tea Co. (1923) A.C.48. These cases are authority for an important distinction with respect to the effect of parol contracts unenforceable under the above mentioned sections. A contract required by law to be in writing may be rescinded by parol either expressly or by the parties entering into a parol contract entirely inconsistent with it or to an extent which goes to the very root of it: the court will give effect to the intention of the parties to rescind but will not enforce the new parol contract which they have attempted to substitute. But where the parol contract is intended merely to vary, and not to rescind, the written contract, the variation is ineffective to alter the rights of the parties and the original contract remains enforceable.

Learned counsel for U.D.C. submitted that the distinction established by these cases ought by analogy to be applied to contracts unenforceable under s. 8 of the Moneylending Law. This section provides:-

> " (1) No contract for the repayment by a borrower of money lent to him or to an agent on his behalf after the commencement of this Law or for the payment by him of interest on money so lent and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract containing the particulars required by this section be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given as the case may be.
>
> (2) The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and the interest charged on the

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18th April, 1966

(Contd.)

loan expressed in terms of a rate per centum per annum."

It was argued that the words used in this section, viz: "No contract ... shall be enforceable" are the same as those used in s. 4 of the Sale of Goods Act, 1893, and are equivalent to those of the 4th and 17th sections of the Statute of Frauds as construed by the courts, and it was submitted that the distinction established under those sections is based upon a general rule of the common law and ought properly to be applied in the interpretation of a section which uses similar language. Thus in the instant case the section would operate to avoid the new agreement but would leave unaffected the original agreement.

In order to decide upon the merits of this submission it is necessary to examine the reason why a parol contract which is intended merely to vary a written contract has been held to be ineffective. In Morris v. Baron (supra), Lord Atkinson, after referring to "the well established rule that a contract which the law requires to be in writing cannot be varied by parol" goes on to say, at (1918) A.C. p. 31 -

> " The foundation, I think on which that rule rests is that after the agreed variation the contract of the parties is not the original contract which had been reduced into writing, but that contract as varied, that of this letter in its entirety there is no written evidence, and it therefore cannot in its entirety be enforced."

Lord Atkinson made a similar statement in giving his opinion in British and Beningtons Ltd. v. Cachar, saying at (1923) A.C., p.62:

> "The fourth and seventeenth sections of the Statute of Frauds, like the fourth section of the Sale of Goods Act, require that the whole not part of the contract, shall be evidenced by writing. Where a written contract is varied by parol, there is no writing covering both the original and the variation, hence the contract as varied is unenforceable."

He had earlier (at p. 61) cited with approval the remarks of Lord Denman in Stead v. Dawber 10 Ad. & E. 57, 64 as follows:-

> "The Contract is a contract within the Statute of Frauds, and cannot be proved, as to any essential parcel of it, by merely oral testimony: for to allow such a contract to be proved partly by writing and partly by oral testimony would let in all the mischiefs which it was the object of the statute to exclude."

That the matter has been treated as one of evidence binding upon both parties to the contract is shown by the following citations from the judgments in Morris v. Baron.

Viscount Haldane at p.16:

> "But I think that in addition to this, a further construction is now firmly settled which bases both the 4th and 17th sections of the Statute of Frauds upon a special rule of evidence. That rule is that where an agreement is validly entered into which has had to comply with the Statute of Frauds, and variations are afterwards sought to be introduced by parol or by a document which does not comply with the statute, these variations cannot be set up even by a defendant as an answer in proceedings to enforce the original agreement."

And later at p. 18:

> "Even if Noble v. Ward can be taken as a decision confined to the 17th section, which I think it ought not to be, the authorities in equity to which I have referred established the principle clearly as regards the 4th section of the Statute of Frauds and the Sale of Goods Act. No doubt it is not to be found in the expressed words of the sections. But if the construction placed by the Courts on such words is not accepted injustice will result. For it would then be in the power of a defendant to insist that the contract to be sued on by the plaintiff must be the entire

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18th April, 1966

(Contd.)

new contract comprising the old one with the parol variations, and then to defeat the plaintiff by setting up the statute. The Courts, in order to avoid this result, have read the language as implying that the original formal contract is not, in any question of evidence in proceedings, to be treated as varied by a subsequent contract which is informal, and therefore of imperfect obligation. But this reason obviously does not apply to a complete rescission by parol, which does not seek to set up a new contract to be sued on, but merely terminates existing relations."

And Lord Atkinson, at p. 30:

"There can be no doubt that it is quite competent to the parties to a written agreement to say by parol, 'Let us put an end to this agreement,' and if that be so, it is, I think, equally competent for them to say by parol, 'Let us put an end to this agreement, start afresh, and make an agreement to a particular effect in substitution for the first.' In my view this would be so though it might happen that, owing to some statutory provision such as that contained in the 4th section of the Statute of Frauds, the parol agreement could not, by reason of its not being evidenced in a particular way, be enforced at law, provided the intention of the parties to rescind the first be clear."

The foregoing citations are, I think sufficient to show that the true position under the Statute of Frauds and the Sale of Goods Act is as follows:

Where there is in existence a contract which complies with the statutory provisions, the parties may by parol expressly or impliedly rescind it. The Court will give effect to their intention so to do because the new contract is relied on only for the extinguishment of the old and the statutory provisions do not require writing for this purpose. But if the parol agreement goes on to make a new contract in place of the old this cannot be enforced for want of the type of evidence

of it which the statute requires. And if the parol agreement discloses as intention not to rescind but merely to vary the old contract, since the result of this is to make a new contract consisting of the old contract as varied and the whole of it cannot be proved in the manner required by the statute, the Court will not enforce the variation at the instance of either party but will treat it as ineffective and leave the parties to their rights under the original contract.

In my opinion, s. 8 of the Moneylending Law does not, like the Statute of Frauds and the Sale of Goods Act, prescribe procedural or evidentiary provisions which if not complied with, affect the ability of either party to prove the contract for the purpose of enforcing it. It prescribes certain formalities as part of the scheme for regulating the dealings of moneylenders, failure to observe which has the effect of depriving the moneylender of his right to enforce either the contract or the security. See Kasumu v. Baba-Egbe (1956) A.C. 539. These formalities are outside of the ambit of proof of the contract and are imposed upon the moneylender for the protection of the borrower. They are intended to ensure that the borrower should have in his possession a copy of a document signed by him which sets out all the terms of the loan agreement. And it is just as important that they should be observed when the contract is varied as when it is first made.

Where, then, a moneylending contract has been varied by an agreement which satisfied the terms of the Statute of Frauds the whole of the contract as varied can be proved, and no question of evidence arises in the proceedings to prevent the original contract from being treated as varied by the new agreement. It is this contract, consisting of the original contract as varied, which the Court will examine and if it finds that the formalities laid down for the protection of the borrower have not been complied with it will not permit the moneylender to enforce it. Where the effect of the variation is to bring within the compass of the Moneylending Law a contract which previously was exempted from it, the money-

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Judgment of Lewis, J.

18th April, 1966

(Contd.)

lender must so arrange the mechanics of the transaction as to enable him to comply with the provisions of section 8. If he fails to do so, there is nothing in principle to prevent the borrower, for whose protection the section was enacted, from drawing this fact to the attention of the Court and thus avoiding the contract as varied.

Lord Haldane, in the passage cited above, thought that a construction other than that placed by the courts upon the Statute of Frauds and the Sale of Goods Act would result in injustice by permitting a defendant to insist upon a plaintiff suing on the contract as varied and then setting up the Statute to defeat him. But the cases decided under s. 6 of the Money-lenders Act, 1927 (U.K.) - our section 8 - show that the courts have not shrunk from permitting borrowers to raise non-compliance with the section or from construing the section strictly against money-lenders even where the result of so doing may be to enable a dishonest borrower to triumph over a moneylender who perhaps has been merely negligent or has not been meticulously accurate. Indeed, once the fact of non-compliance comes to the attention of the court, it is in duty bound to give it such effect upon the rights of the parties as the law requires. The court is not at liberty to substitute its own ideas of justice in individual cases for the policy to which the legislature has given effect in section 8.

In my judgment, the distinction established by Noble v. Ward and that line of cases has no application to section 8 of the Moneylending Law. In the instant case, the effect of the agreement to pay interest at 11% was to vary the loan agreement so as to make it a loan at 11%, thereby taking it out of the exempting provisions of s.13(e) and bringing it within s.8. The contract as varied is unenforceable for want of compliance with the provisions of that section and the plaintiff is entitled to the relief sought.

I would dismiss this appeal with costs.

In the Court of Appeal

No. 11

Judgment of Henriques, J.

18th April, 1966

NO. 11
JUDGMENT OF HENRIQUES, J.

The first question which falls for consideration is whether the learned trial judge was correct in his conclusion that the proper and reasonable inference to be drawn from the evidence of the parties was that there was an agreement between them that so long as the plaintiff paid interest at the rate of 11%, and also at the same time paid the sum of £150 a week, that the United Dominions Corporation would forbear from demanding the loan. It was upon this finding that he had held that the plaintiff had established the fact of consideration for the agreement to pay the increased rate of interest. In spite of the very able and persuasive arguments which have been addressed to us by learned counsel for the appellants, I am satisfied that the learned judge was correct in his conclusion, and I see no reason for disturbing it.

The other question which was much canvassed on this appeal was whether the new agreement which was intended to vary only one term of the mortgage agreement, and as it was unenforceable, was ineffective in law to vary the original agreement, which remained enforceable. In support of this ground of appeal, reliance was placed on a number of cases commencing with Noble v. Ward, 1867 L.R. Exch. 135, decided under sections 4 and 17 of the Statute of Frauds and under section 4 of the Sale of Goods Act, 1893, and submissions were made that the principle of these cases ought by analogy to apply to contracts unenforceable under section 8 of the Moneylending Law. Despite the attractive form of the argument, I am of the view, however, that the principles in those cases do not apply to section 8 of the Moneylending Law. In the case before us the result of the agreement to pay interest at the rate of 11% was to vary the loan agreement so as to make it a loan at 11%, thereby removing it from the exemption provisions of section 13 (e) and bringing it within section 8. The contract as varied is unenforceable for want of compliance with the provisions of that section, and the plaintiff was entitled to succeed.

The appeal should, in my view, be dismissed with costs.

In the Court of Appeal

No. 12

Order on Judgment

18th April, 1966

NO. 12
ORDER ON JUDGMENT

The 18th day of April 1966

Before: The Hon. Mr. Justice Duffus, President
The Hon. Mr. Justice Lewis
The Hon. Mr. Justice Henriques

UPON Motion by way of appeal on the 25th, 26th 27th and 28th days of January and on the 1st, 2nd, and 3rd days of February 1965 made unto the Court by Mr. Vivian Blake and Mr. Mark Littman both of Queen's Counsel for the Defendant Appellant from the Judgment of Mr. Justice Douglas dated the 13th day of May 1963 and upon hearing Counsel for the Appellant and Mr. David Coore of Queen's Counsel and Mr. Richard Mahfood of Counsel for the Respondent and upon reading the said Judgment this Court did Order that the said Appeal should stand for Judgment and the said Appeal standing this day in the Paper for Judgment the written Judgment of the Court was read whereby the Court doth Order that the Appeal be dismissed with costs and that the Judgment in the Court below be affirmed the Hon. Mr. Justice Duffus, the President of the Court dissenting.

By the Court

(Sgd.) R. S. Sinclair

Dep. Registrar of the Court of Appeal

ENTERED by A.E.Brandon & Co., of 45 Duke Street, Kingston, Solicitors for the Plaintiff Respondent.

In the Court of Appeal

No. 13

Order granting conditional leave to Appeal to Her Majesty in Council.

30th May, 1966

NO. 13

ORDER GRANTING CONDITIONAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL.

The 30th day of May 1966.

UPON this Motion by the Applicant for Conditional Leave to Appeal from the Judgment of the Court of Appeal dated the 18th day of April 1966 to Her Majesty in Council coming on for hearing this day before their Lordships Mr.Justice Lewis Mr. Justice Waddington and Mr.Justice Shelley and after hearing Mr.Emil George of Counsel on behalf of the Applicant and Mr.David Coore and Mr.Richard Mahfood, Queen's Counsel, on behalf of the Respondent and upon referring to the Affidavit of Mr.William Humbert Swaby in support of this Application and the records herein.

BY CONSENT IT IS HEREBY ORDERED as follows:-

Leave to appeal to Her Majesty in Council granted on the following conditions:-

1. That Applicant within ninety days from the 30th day of May 1966 enter into good and sufficient security which may consist in whole of a deposit into Court of money in the sum of FIVE HUNDRED POUNDS sterling (£500) for the due prosecution of the appeal and the payment of all such costs as may become payable by the Applicant in the event of its not obtaining an order granting it final leave to appeal, or of the appeal being dismissed for non-prosecution, or of the Judicial Committee of the Privy Council ordering the Applicant to pay the costs of the appeal.

2. Stay of execution of the Judgment ordered save and except the order for Injunction and provided that the Defendant/Appellant do pay to the Plaintiff/Respondent the costs of the Court below and of the Court of Appeal, upon the Plaintiff/Respondent giving security with two sureties satisfactory to the Registrar for the re-payment of the said costs if such appeal is successful and it is so ordered.

3. Costs of this application to be costs in the cause.

BY THE COURT (Sgd.) R. S. Sinclair Dep.Registrar

ENTERED by MILHOLLAND, ASHENHEIM & STONE of No. 5 Port Royal Street, Kingston, Solicitors on behalf of the above named Applicant.

In the Court of Appeal

No. 14

Order granting Final Leave to Appeal to Her Majesty in Council.

23rd September, 1966

NO. 14

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

The 23rd of September, 1966.

Upon this Application by the Applicant for Final Leave to appeal from the Judgment of the Court of Appeal dated the 18th day of April 1966 to Her Majesty in Council coming on for hearing this day before the Honourable Mr. Justice Lewis, President (Acting), the Honourable Mr. Justice Moody and the Honourable Mr. Justice Shelley (Acting) and after hearing Mr. Emil George of Counsel on behalf of the Applicant and Mr. David Coore, Queen's Counsel, on behalf of the Respondent and upon referring to the Affidavit of Mr. William Humbert Swaby, Solicitor in support of this Application

IT IS HEREBY ordered as follows:-

Final Leave granted to appeal to Her Majesty in Council.

By the Court.

(Sgd.) R. S. Sinclair

Deputy Registrar.

FILED by MILHOLLAND, ASHENHEIM & STONE of No. 5, Port Royal Street, Kingston, Solicitors for the above named Applicant.

E X H I B I T S

Plaintiff's Exhibit

10a

Mortgage from Michael M. Shoucair to United Dominions Corporation (Jamaica) Ltd.

22nd April, 1961.

10a. - MORTGAGE UNDER THE REGISTRATION OF TITLES LAW

THIS INSTRUMENT OF MORTGAGE under the Registration of Titles Law made the Twenty-Second day of April One Thousand Nine Hundred and Sixty-One BETWEEN MICHAEL MITRI SHOUCAIR of 172C-D Orange Street in the parish of Kingston (hereinafter called "the Mortgagor" which expression shall where not repugnant to the context include the successors and transferees of the said Michael Mitri Shoucair) of the ONE PART and UNITED DOMINIONS CORPORATION (JAMAICA) LTD., Company duly incorporated under the Laws of Jamaica and having its registered office at Barclays Bank Building, King Street, Kingston (hereinafter called "the Mortgagee" which expression shall where not repugnant to the context include its successors and transferees) of the OTHER PART: WHEREAS the Mortgagor has requested the Mortgagee to lend to them the sum of FIFTY-FIVE THOUSAND POUNDS (£55,000) which the Mortgagee has agreed to do upon receiving the security hereinafter appearing NOW THIS INSTRUMENT W I T N E S S E T H as follows:-

1. IN CONSIDERATION of the premises and of the said sum of £55,000 lent by the Mortgagee to the Mortgagor this day (the receipt whereof is hereby acknowledged) the Mortgagor DOTH HEREBY C O V E N A N T with the Mortgagee as follows:-

(a) To pay to the Mortgagee the said sum of £55,000 (hereinafter referred to as "the loan moneys") on demand together with interest thereon at the rate of NINE POUNDS (£9.0.0) per centum per annum computed from the date hereof.

(b) To pay to the Mortgagee so long as the loan moneys or any part thereof shall remain unpaid interest thereon or on so much thereof as shall for the time being remain unpaid at the rate aforesaid as and when demanded by the Mortgagee or failing such demand by equal quarterly payments on the Second day of each of the months July, October, January and April

Plaintiff's Exhibit

10a

Mortgage from Michael M. Shoucair to United Dominions Corporation (Jamaica) Limited.

22nd April, 1961.

(Contd.)

in each and every year during the continuance of this security the first of such payments or the proportion thereof to be made on the Second day of July 1961.

(c) To insure and at all times keep insured in the name of the Mortgagee against fire however caused, lightning, earthquake, volcanic eruption, hurricane, cyclone, tornado and windstorm, riot and civil commotion and fire and/or damage arising therefrom respectively to their full insurable value at least all buildings now or that may hereafter be erected on the mortgaged lands in such Insurance office as the Mortgagee may from time to time direct and on demand to deliver to the Mortgagee all such Policies of Insurance and all receipts and vouchers for the payment of premiums.

(d) At all times during the continuance of this security to keep up preserve and maintain in good order and condition upon the mortgaged lands all and singular the buildings now or that hereafter may be erected on the mortgaged lands and all electric light fittings, water pipes, toilet and lavatory fittings, drains, gates, walls, fences and things that are not(sic) or may hereafter be thereon and to keep up and maintain the same according to the best and most approved methods to at least the same extent order and condition as the same now are and to do all things necessary and proper for keeping up the value of the said hereditaments in order that the security hereby given may not be depreciated or lessened in value.

(e) Not to lease, let or demise the mortgaged lands or any part or parts thereof during the continuance of this security without the express consent in writing of the mortgagee first had and obtained.

(f) To pay regularly and punctually all taxes rates and assessments outgoings and impositions whatever now or during the continuance of this security to become payable in respect

Plaintiff's Exhibit

10a

Mortgage from Michael M. Shoucair to United Dominions Corporation (Jamaica) Limited

22nd April, 1961.

(Contd.)

of the mortgaged lands and forthwith to produce to the Mortgagee all receipts and vouchers in proof of such payments.

(g) To pay to the Mortgagee on demand all costs charges and expenses incurred or to be incurred by the Mortgagee in relation to these presents or any default hereunder or the enforcement or protection of any rights of the Mortgagee under these presents.

(h) In addition to the Mortgagor's covenants implied and powers on Mortgagees conferred under the Registration of Titles Law the Mortgagee shall be entitled by itself or its agents at all times during the continuance of this security with or without workmen agents or servants to enter upon the mortgaged lands or any part thereof and to view the state and condition thereof and the condition and order of the buildings, electric light fittings, water pipes, toilet and lavatory fittings fences, walls, gates, ponds, drains and things and the several appurtenances thereof respectively with full and free power of ingress, egress and regress for such purposes and of all decays defects and want of reparation and amendment found upon such inspection to give or leave notice in writing to or with the Mortgagor and the Mortgagor will faithfully make good repair and supply according to any notice given hereunder so as at all times to keep up maintain and preserve the said buildings, fixtures, fittings, walls, gates, wells, ponds drains lands and hereditaments in good order and condition.

2. (i) It shall be lawful for but not obligatory on the Mortgagee to advance and pay all sums of money for the purpose of remedying any breach or breaches of covenant or obligation statutory or otherwise imposed on the Mortgagor or implied by Law or expressed under the provisions of this Mortgage and all moneys so paid and also all costs and expenses incurred by the Mortgagee in relation to any inspection and notice or the repairs or amendments mentioned in paragraph 1 (h) hereof shall

Plaintiff's Exhibit

10a

Mortgage from Michael M. Shoucair to United Dominions Corporation (Jamaica) Limited

22nd April, 1961

(Contd.)

be repayable on demand and in the meantime shall be a charge on the lands hereby mortgaged in addition to the other moneys hereby secured and bear interest at the rate aforesaid computed from the time or respective times of paying or advancing the same.

(ii) The Mortgagor shall not be at liberty to pay off the loan moneys or any part thereof before the expiration of One Year from the date hereof unless the Mortgagee shall be willing to receive the same nor to pay off on or after the said date without at least three calendar months notice in writing of their intention so to do PROVIDED that such notice shall expire on one of the quarterly days hereinbefore appointed for the payment of interest.

(iii) The statutory powers of sale and of appointing a Receiver and all ancillary powers conferred on mortgagees by the Registration of Titles Law may be exercised by the Mortgagee at any time upon any default in payment of the loan moneys or any other moneys hereby secured or of any payment of interest of instalment of interest hereinbefore required or of any part thereof respectively for fourteen days after the same shall have become respectively payable or upon any breach of or non-compliance with any other covenant condition or obligation on the part of the Mortgagor herein contained or hereunder implied without its being necessary in any one or more of such cases to serve any notice or demand on them anything in the Registration of Titles Law or any other Law to the contrary notwithstanding.

(iv) Any demand or notice hereunder may be properly and effectually made given and served on and to the Mortgagor at any time by letter addressed to him by registered post to 172C-D Orange Street, Kingston Post Office, and signed by the

Plaintiff's Exhibit

10a

Mortgage from Michael M. Shoucair to United Dominions Corporation (Jamaica) Limited.

22nd April, 1961

(Contd.)

Mortgagee or its Manager, Secretary, Agent or Solicitor on its behalf and every such demand and notice shall be deemed to have been made given and served the day following the posting thereof.

AND FOR BETTER SECURING the payment in manner aforesaid of the said loan moneys interest and other moneys hereinbefore covenanted to be paid by the Mortgagor the said MICHAEL MITRI SHOUCAIR being registered as the proprietor of an estate in fee simple in the land hereinafter described DO HEREBY MORTGAGE to the Mortgagee all his estate and interest and all the estate and interest which he is entitled to transfer and dispose of in ALL THOSE parcels of land as follows:

(1) ALL THAT parcel of land known as 172C Upper Orange Street in the parish of Kingston and comprised in Certificate of Title registered at Volume 440 Folio 76.

(2) ALL THAT parcel of land known as 172D Upper Orange Street in the parish of Kingston and comprised in Certificate of Title registered at Volume 87 Folio 74.

(3) ALL THAT Parcel of land part of Beechwood Avenue in the parish of Saint Andrew and comprised in Certificate of Title registered at Volume 183 Folio 79.

This Mortgage is subject to Caveat No. 34126 lodged by United Dominions Corporation (Jamaica) Limited and registered at Volume 440 Folio 76 and also Volume 87 Folio 74.

(Signed) M. M. Shoucair

Witness: (Signed) Edward Zacca
R. M. St. Catharine.

Defendant's Exhibit

13

Charge by Michael M. Shoucair to United Dominions Corporation (Jamaica) Limited

16th May, 1961

13. - CHARGE BY MICHAEL M. SHOUCAIR TO UNITED DOMINIONS CORPORATION (JAMAICA) LIMITED.

United Dominions Corporation (Jamaica) Ltd.,
2nd Floor,
Barclays Bank Building,
King Street,
Kingston.

Sirs,

I hereby charge my land known as 34 Beechwood Avenue, in the parish of Saint Andrew, and comprised in Certificate(s) of Title Registered at Volume 183 Folio 7-9, to secure the payment by me to you on demand of the amount of any balance which at the date of such demand shall be owing to you by me, either alone or jointly with or as surety for any other person or persons, Corporation or Corporations whether upon current accounts for cheques, bills or notes drawn, accepted, made or endorsed by me or for advances made to me or for my use or at my request or for any other monies whatsoever which I may be liable to pay you including interest at the rate of £9 per centum per annum, with monthly/quarterly vests, commission and other customary banking charges.

I undertake whenever called upon to do so to have prepared at my expense a legal mortgage to the satisfaction of your Solicitors.

This property is not encumbered in any way, other than the encumbrance noted below and I undertake not to execute any encumbrance so long as this charge to UNITED DOMINIONS CORPORATION LTD. remains in force.

This charge shall be impressed in the first instance with stamp duty to cover an indebtedness of £15,000, but you shall be at liberty and you are hereby empowered at any time or times hereafter (without any further licence or consent on my part and whether before or after the sale of the

Defendant's Exhibit

13

Charge by Michael M. Shoucair to United Dominions Corporation (Jamaica) Limited

16th May, 1961

(Contd.)

said security or any part thereof) to impress additional stamp duty thereon to cover any sum or sums by which my indebtedness to you may exceed £15,000 it being the intent thereof that this charge shall cover all sums to any aggregate in which I may be indebted to you at any time as detailed above.

Encumbrance referred to above.

Yours truly,

(Signed) M. M. Shoucair

Michael M. Shoucair
Hi-Drive (Drive Yourself)
173 Harbour Street,
Kingston.

Witness: Neal

United Dominions Corporation
(Ja.) Ltd.,
Barclays Bank Building,
King Street,
Kingston. 16th May 1961

Plaintiff's Exhibit

2.

Letter from Michael M. Shoucair Ltd. to United Dominions Trust Limited

3rd June, 1961

2. LETTER FROM MICHAEL M. SHOUCAIR LIMITED TO UNITED DOMINIONS TRUST LIMITED.

3rd June, 1961

Messrs. United Dominions Trust Ltd.,
United Dominion House,
Eastcheap, London, E.C.3

Attention: Mr. Alexander Ross

Dear Sir,

We refer to the arrangements made between Messrs. United Dominions Corporation Jamaica Ltd., and our Company during Mr. Harvey's term of office. The writer has recently been introduced to Mr. Neal and appreciates the frank manner in which he has discussed our business association.

It was agreed with Mr. Harvey that a mortgage of £55,000 would be granted to us in respect of our new premises and in addition a further £30,000 would be made available to our Company to purchase cars and furniture. Of this latter amount a sum of £15,000 has already been advanced. On the understanding that the remaining £15,000 would be available, the writer visited Western Germany and secured the BMW Agency for Jamaica and in addition the Morgan Agency from the United Kingdom.

Mr. Neal has now indicated that it is not his intention to advance any further monies either to Michael M. Shoucair, Michael M. Shoucair Limited or Hi-Drive Ltd. It is agreed that Mr.Neal has every right to decline any business he does not consider sound and whil'st we were naturally disappointed with his comments we can understand his wish to proceed cautiously until he is satisfied with the business people he is dealing with.

Under normal circumstances, we would be quite happy to let time and events demonstrate to Mr. Neal that we qualify for the generous terms

granted us. Unfortunately on the strength of Mr. Harvey's assurance we have gone ahead with our plans, ordered our stocks of cars, and in addition have proceeded with our plans to enter the furniture market. We have therefore an immediate need for the further sum of £15,000 which was arranged and we write to request that the remarks in this letter are confirmed with Mr. Harvey and that his arrangements with us are duly honoured.

In conclusion we should confirm that this letter is addressed direct to London since we appreciate it would not be reasonable to embarrass Mr. Neale with a further request for his predecessors undertakings to be met without ratification from his principals in the United Kingdom.

We look forward to your early and favourable reply.

Yours very truly,

MICHAEL M. SHOUCAIR LTD.

Michael M. Shoucair
Chairman.

MMS/gk
c.c. Mr. R. Neale

Plaintiff's Exhibit

2.

Letter from Michael M. Shoucair Ltd. to United Dominions Trust Limited.

3rd June, 1961

(Contd.)

Plaintiff's Exhibit

3.

Letter from United Dominions Trust Limited to Michael M. Shoucair Limited

9th June, 1961

3. LETTER FROM UNITED DOMINIONS TRUST LIMITED TO MICHAEL M. SHOUCAIR LIMITED

BANKERS,
United Dominion House
Eastcheap,
London E.C.3

9th June 1961

Michael M. Shoucair, Esq.,
Chairman,
Messrs. Michael M. Shoucair Ltd.,
172C-172D Orange Street,
Cnr. King Street and Booth Avenue,
Kingston,
Jamaica.

Dear Mr. Shoucair,

Thank you for your letter of the 3rd June, received here this morning.

I am sorry that a difficulty seems to have arisen in your arrangements with United Dominions Corporation (Jamaica) Ltd. but I am sure you will appreciate that all questions to do with the business arrangements of that Company lie within the autonomy of the Jamaican Board.

Mr. Harvey has already departed for South Africa and I am quite sure that the Directors of the Company and Mr. Neale will be fully aware of the arrangements made between you and Mr. Harvey.

I note that you have sent a copy of your letter to Mr.Neale and I too am sending him a copy of this letter.

I am sure you will appreciate that it would be quite impracticable for us here to interfere with the detailed arrangements of the Jamaican Company which, as I have said, are the prerogative of the local Board.

I do hope that the difficulties you are encountering can be reconciled to the satisfaction of all parties.

Yours sincerely,
(Signed) A. Ross

AR/EDM

4. - LETTER FROM UNITED DOMINIONS CORPORATION (JAMAICA) LIMITED TO MICHAEL M. SHOUCAIR,

Plaintiff's Exhibit

4.

Letter from United Dominions Corporation (Jamaica) Limited to Michael M. Shoucair.

16th June 1961

Barclays Bank Building,
King Street, KINGSTON,
Jamaica.

16th June 1961

Michael M. Shoucair, Esq.,
173, Harbour St.,
Kingston.

Dear Mr. Shoucair,

I have received a copy of your letter of the 3rd instant addressed to United Dominions Trust Ltd. for the attention of Mr. Alexander Ross and, although I have received no word from London on this matter, I have to advise you that I am unable at this time to reconsider my decision.

The fact that you had requested additional stocking facilities up to £30,000 was reported by Mr. Harvey both verbally and in the file. No decision whatever was made in this matter, however, before all the circumstances had been discussed with me and I am surprised that it should be necessary to remind you that at your last visit to this office before Mr. Harvey's departure, you were clearly told that we could not see our way to giving you such large stocking facilities.

It is not necessary for me further to dwell on the subject of your current and very heavy liability since I expressed my views on this matter quite clearly at your last meeting. Nevertheless, I think I should reiterate the fact that I was astonished at some of the proposals submitted to me by your Company during your recent absence. In addition to this, the fact that your instalment of £543.15.- on transaction 1861/16 which was due on the 15th April, and instalments amounting to a total of £164 in respect of your air-conditioned Chrysler motor car which were due on the 29th April, and the 29th May have not been received, hardly tends to inspire confidence.

Yours sincerely,

(Signed) R. A. Neal
General Manager

Plaintiff's Exhibit

5.

Letter from United Dominions Corporation (Jamaica) Limited to Michael M. Shoucair

31st July 1961

5. - LETTER FROM UNITED DOMINIONS CORPORATION (JAMAICA) LIMITED TO MICHAEL M. SHOUCAIR.

Barclays Bank Building,
King Street,
Kingston, Jamaica.

31st July 1961

Mr. Michael M. Shoucair,
172C & 172D Orange Street,
Kingston.

Dear Sir/Madam,

Owing to the increase in The Bank of England rate by 2% we have to advise you that we also will have to increase our rate of interest by a corresponding amount. As a result, interest on your loan will be computed at 4% above The Bank of England rate which is at present 7%. This change will take effect as from 26th July, 1961.

We trust that this will only be a temporary measure.

Please acknowledge receipt and confirm by signing and returning the attached copy.

Yours faithfully,

UNITED DOMINIONS CORPORATION (Ja) LTD.

(Signed) Lennon

for I. H. Sinclair
Secretary.

12 (Marked for identity "A") - LETTER FROM UNITED DOMINIONS CORPORATION (JAMAICA) LIMITED TO MICHAEL M. SHOUCAIR.

Defendant's Exhibit

12.

Letter from United Dominions Corporation (Jamaica) Limited to Michael M. Shoucair.

31st July 1961

Barclays Bank Building
King Street,
Kingston,
Jamaica.

31st July 1961.

Mr. Michael M. Shoucair,
172C & 172D Orange Street,
Kingston.

Dear Sir/Madam,

Owing to the increase in the Bank of England rate by 2% we have to advise that we also will have to increase our rate of interest by a corresponding amount. As a result, interest on your loan will be computed at 4% above the Bank of England rate which is at present 7%. This change will take effect as from 26th July, 1961.

We trust that this will only be a temporary measure.

Please acknowledge receipt and confirm by signing and returning the attached copy.

Yours faithfully,

UNITED DOMINIONS CORPORATION (JAMAICA) LTD.

(Signed) ?

for I. H. Sinclair

Secretary

Plaintiff's Exhibit

6.

Letter from United Dominions Corporation (Jamaica) Limited to Michael M. Shoucair Limited

17th August, 1961

6. - LETTER FROM UNITED DOMINIONS CORPORATION (JAMAICA) LIMITED TO MICHAEL M. SHOUCAIR LIMITED.

Barclays Bank Building,
King Street,
Kingston, Jamaica.

17th August 1961

Messrs. M. M. Shoucair Ltd.,
172C-D, Orange Street,
Kingston.

Dear Mr. Shoucair,

Further to our telephone conversation of last week, I am sending a cheque for £1,800 to Barclays Bank D.C.O. West Queen Street, in connection with the shipment of lifts supplied by Messrs. L.W.Lambourne & Co. Ltd.

As arranged will you kindly send them a further cheque in the sum of £542.9.4 to complete their claim for settlement of the lifts.

A Demand Promissory Note is attached for your signature - reference 58/33 - in the sum of £1,800 payable with interest and charges of 11% per annum.

This amount will be added to the existing mortgage loan.

Yours faithfully,

UNITED DOMINIONS CORPORATION (JA.) LTD.

(Signed) I. H. Sinclair
Secretary.

IHS/JJ
Encl:

15. - DEMAND PROMISSORY NOTE

Defendant's Exhibit

15.

Demand Promissory Note Michael M. Shoucair to United Dominions Corporation (Jamaica) Limited.

(undated)

£1,800. 0. 0

ON DEMAND FOR VALUE received I promise to pay to the Order of UNITED DOMINIONS CORPORATION (JAMAICA) LIMITED, Barclays Bank Building, 2nd Floor, King Street, KINGSTON, the sum of ONE THOUSAND EIGHT HUNDRED POUNDS, together with interest at 4% above Bank of England rate.

(Signed) M. M. Shoucair

172C & 172D Orange Street,

Kingston

Plaintiff's Exhibit

7.

Notice United Dominions Corporation (Jamaica) Limited to Michael M. Shoucair

5th October, 1961

7. - NOTICE

TO:-

Mr. Michael Shoucair
172C-172D Orange Street,
Kingston.

Default having been made by you in payment of quarterly instalments of £644.1.9 each totalling £3,005.18.5 in respect of interest which became due and payable on the last days of each quarter to 30th September, 1961 and which were covenanted to be paid by you under mortgage under the Registration of Titles Law dated the 22nd day of April, 1961, made between you of the ONE part and us the undersigned of the OTHER PART we DO HEREBY GIVE YOU NOTICE that you are required to pay to us the said sum of £58,005.18.5 by the 14th day of October, 1961, AND that if on the 14th day of October, 1961, you shall not have paid to us the said sum of £58,005.18.5 as required above we shall in exercise of the powers conferred on us by the said Mortgage sell the lands mortgaged by you to us being the lands known as

1. ALL THAT parcel known as 172C Upper Orange Street in the Parish of Kingston

2. ALL THAT parcel of land known as 172D Upper Orange Street in the parish of Kingston

3. ALL THAT parcel of land part of Beechwood in the parish of Saint Andrew

comprised in Certificates of Titles registered at volume 440 folio 76, volume 87 folio 74 and volume 183 folio 79 of the Register Book of Titles.

Dated the 5th day of October, 1961.

UNITED DOMINIONS CORPORATION (JAMAICA) LTD.

(SIGNED) R. A. Neal

General Manager

8. - LETTER FROM A. E. BRANDON & CO., SOLICITORS TO UNITED DOMINIONS CORPORATION (JAMAICA) LIMITED

Plaintiff's Exhibit

8.

Letter from A.E.Brandon & Co., to United Dominions Corporation (Jamaica) Limited

6th November, 1961

P.O. Box 131,
45, Duke Street,
Kingston,
Jamaica.

8th November 1961

United Dominions Corporation (Ja.) Ltd.,
Barclays Bank Building,
King Street,
Kingston.

Dear Sirs:

Re: Michael M. Shoucair and Michael M.Shoucair Ltd.

We are acting on behalf of Mr. Michael M. Shoucair and of Michael M. Shoucair Ltd., of 172C Orange Street, Kingston, and have been handed your Notice dated 5th October, 1961, addressed to Mr. Michael Shoucair for our attention and reply.

We are instructed that the Mortgage Loan referred to in the said Notice was originally made at an interest rate of 9%, but by agreement between Mr. Shoucair and yourselves this rate was varied to 11%. We would refer to your letter of the 31st July, 1961, addressed to our client Michael M. Shoucair, a copy of which letter was signed by Mr. Shoucair and returned to you evidencing his agreement. We would also refer to your letter of the 17th August, 1961, addressed to Michael M. Shoucair Ltd.

On the instructions of our clients we have taken the opinion of Counsel and have been advised that the loans to our clients at an interest charge of 11% do not comply with the provisions of Section 8, Chapter 254 of the Revised Edition (1953) of the Laws of Jamaica, the Moneylending Law, as inter alia, there is no note or memorandum in existence to comply with that Law.

Plaintiff's Exhibit

8.

Letter from A.E.Brandon & Co., to United Dominions Corporation (Jamaica) Limited

6th November, 1961.

(Contd.)

In view of the foregoing, we have been instructed to inform you that any attempt by you to enforce the loan or to realise the security for part of same will be resisted. We are further instructed to call upon you to join with us in an application to the Registrar of Titles to have the Mortgage mentioned in your Notice of the 5th ult. discharged from the Titles on which the same is endorsed, failing which our clients will be forced to bring legal proceedings to effect this result.

In view of the fact that in the issue of the Daily Gleaner of the 3rd inst. our Clients' holdings at 172C and 172D Orange Street and at 34 Beechwood Avenue were advertised for sale by Public Auction, such Auction to be held on Wednesday 22nd inst., we should be grateful if you would immediately inform us of the withdrawal of this sale so advertised, as unless we hear from you to this effect by Friday, 10th inst. we shall have no alternative but to file suit and to serve upon the Registrar of Titles a Notice of the issue of the Suit together with a Caveat forbidding dealings with our client's premises by you as Mortgagees.

Yours faithfully,

A. E. BRANDON & CO.,

per C.B.M.Lopez.

16. - LETTER FROM UNITED DOMINIONS CORPORATION (JAMAICA) LIMITED TO MICHAEL M. SHOUCAIR LIMITED

Defendant's Exhibit

16.

Letter from United Dominions Corporation (Jamaica) Limited to Michael M. Shoucair Limited

15th November, 1961

Barclays Bank Building,
King Street,
Kingston,
Jamaica.

15th November 1961.

REGISTERED MAIL

Messrs. M. M. Shoucair Ltd.,
106 Harbour Street,
Kingston.

Dear Sirs,

On the 31st July, 1961, a circular was sent to certain borrowers of this Corporation informing them that owing to the increase of the Bank of England rate by 2% our lending rate would be increased by a like amount.

This, of course, does not apply to those cases covered by an Instrument or Indenture wherein the interest is shown to be a fixed rate.

An inspection has revealed that such a circular was addressed to you in error. May we, therefore, apologise most sincerely for this oversight and confirm that the correct and agreed rate of interest has been applied to your account.

Yours truly,

UNITED DOMINIONS CORPORATION (JA.) LTD.

(Signed) Neal

R. A. Neal

General Manager.

Plaintiff's Exhibit

9.

Account Sheets of Michael M. Shoucair Limited (4) and Michael M. Shoucair (4) with United Dominions Corporation (Jamaica) Limited

9. - ACCOUNT SHEETS

A/C No. ML 6501/25

Hirer Michael M. Shoucair
172C & D Orange Street
Kingston

Price £4,000

Init. Rent -

Amount Financed £4,000

9%

Instalments of £

Charges

First Instalment due

10 Balance £4,000

Interest payable quarterly - additional to 3816/8 £14,000

Set Up £

1960

Interest

Date	Receipt No.	Debit	Credit	Balance	Dr.	Cr.	Int. of Balance
Sept.29	To cheques	£4,000		£4,000			
Oct.	Interest				£9. 9. 6		£9. 9. 6
Nov.	"				£7.10. 0		£16.19. 6
20 Dec. 9	Cash 19263					£16.19. 6	-
Dec.	Interest				30. 0. 0		75. 0. 0
	" short chg	Oct.	22.10. 0	Nov. 22.10. 0	45. 0. 0		75. 0. 0
Jan.26pt	22824					£75. 0. 0	-
" 31	Interest				30. 0. 0		30. 0. 0
Feb.28	"				30. 0. 0		60. 0. 0
March 17	Cash 27098					£60. 0.	-
" 31	Interest				30. 0. 0		30. 0. 0
April 30	"					£30. 0.	60. 0. 0
May	"				30. 0. 0		90. 0. 0

Plaintiff's Exhibit

9.

Acount Sheets of Michael M. Shoucair Limited (4) and Michael M. Shoucair (4) with United Domions Corporation (Jamaica) Limited

(Contd.)

Price £14,000
Init Rent
Amount Financed £14,000
Charges
Balance £14,000
Set Up £
1960

A/C No. ML 3816/8
Hirer: M. M. Shoucair
172C & D Orange Street
Kingston.

9% Instalments of £
First Instalment due

Date	Receipt No.	Debit	Credit	Balance	Interest Dr.	Interest Cr.	Int. of Balance
May 13							
" 18	To cheqs. & cheques	£14,000		£14,000	39.17. 9		
					93. 6. 8		
					105. 0. 0		£238. 4. 5
Aug. 4	By// 10723					238. 4. 5	
	Caveat	£14.5.0		14,014.5.	105. 0. 0		£105. 0. 0
Sept.	Interest				105. 2. 1		210. 2. 1
Oct. 6	Cash 14880		£14. 5.	1,400. 0		210. 2. 1	-
Oct.	Interest				105. 0. 0		105. 0. 0
Nov.	"				105. 0. 0		210. 0. -
Dec. 9	Cash 19262					210. 0. 0	-
Dec.	Interest				105. 0. 0		105. 0. 0
Jan.26	Cash 22824					105. 0. 0	-
Jan.31	Interest				105. 0. 0		105. 0. 0
Feb.28	"				105. 0. 0		210. 0. 0
Mar.17	CL 27098					210. 0. 0	-
" 31	Interest				105. 0. 0		105. 0. 0
Apr.30	"				105. 0. 0		210. 0. 0
May	"				105. 0. 0		315. 0. 0

Plaintiff's Exhibit

9.

Account Sheets of Michael M. Shoucair Limited (4) and Michael M. Shoucair (4) with United Dominions Corporation (Jamaica) Limited

(Contd.)

Price £6,000
Init. Rent -
Amount Financed £6,000
Charges
Balance £6,000
Set Up £

A/C No. ML 7185/23
Hirer M. M. Shoucair Ltd.
172C & D Orange St.
Kingston
Instalments of £
First Instalment Due 9%

1960

Date	Receipt No.	Debit	Credit	Balance	Interest Dr.	Interest Cr.	Int. of Balance
Oct. 28	To cheqs & cheques	£6,000		£6,000			
Nov.	Interest				£50.18. 4		£50.18. 4
Dec. 9	Cash 19263					£50.18. 4	-
Dec.	Interest				£45. 0. 0		£45. 0. 0
Jan. 26	Pt.22824					£45. 0. 0	-
Jan. 31	Interest				£45. 0. 0		£45. 0. 0
Feb. 28	"				£45. 0. 0		£90. 0. 0
Mar. 7	Cash 27098					£90. 0. 0	
Mar. 31	Interest				45. 0. 0		£45. 0. 0
April 30	"				45. 0. 0		£90. 0. 0
May	"				45. 0. 0		£135. 0. 0

Plaintiff's Exhibit

9.

Account Sheets of Michael M. Shoucair Limited (4) and Michael M. Shoucair (4) with United Dominion Corporation (Jamaica) Limited

(Contd.)

Price	£6,000	A/C No. ML 7845/23	
Init Rent	-	Hirer M. M. Shoucair Ltd.	
Amount Financed	£6,000	172 C & D Orange Street, KINGSTON.	
Charges			
Balance	£6,000	Instalments of £	
Set up £		First Instalment Due	Interest at 9%
1960			Interest

Date	Receipt No.	Debit	Credit	Balance	Dr.	Cr.	Init. of Balance
Nov.29	To chqs) cheques	£6,000		£6,000			
Dec.	Interest				£47.19. 2		47.19. 2
Jan.26	Pt.22824					£47.19. 2	
Jan.31	Interest				£45. 0. 0		45. 0. 0
Feb.28	"				£45. 0. 0		90. 0. 0
Mar.17	Cash 27098					£90. 0. 0	
Mar.31	Interest				£45. 0. 0		45. 0. 0
Apr.30	"				£45. 0. 0		90. 0. 0
May	"				£45. 0. 0		135. 0. 0

Plaintiff's Exhibit

9.

Account Sheets of Michael M. Shoucair Limited (4) and Michael M. Shoucair (4) with United Dominions Corporation (Jamaica) Limited

(Contd.)

A/C No. ML 8522/1

Price £12,000

Init Rent -

Amount Financed £12,000

Charges

Balance £12,000

Set Up £

Hirer: M. M. Shoucair Ltd.
172C & D Orange Street
Kingston.

Instalments of £

First Instalments of £ Interest at 9%

1960

Date	Receipt No.	Debit	Credit	Balance	Interest. Dr.	Interest. Cr.	Int. of Balance
Dec.29	To chqs.& cheques	12,000		£12,000			
Jan.26	"					£8.17. 7	£8.17. 7
Jan.30	Interest				98.17. 7		90. 0. 0
Feb.28	"				90. 0. 0		180. 0. 0
March 17	Cash 27098					180. 0. 0	-
" 31	Interest				90. 0. 0		90. 0. 0
Apr. 30	"				90. 0. 0		180. 0. 0
May	"				90. 0. 0		270. 0. 0

Plaintiff's Exhibit

9.

Account Sheets of Michael M. Shoucair Limited (4) and Michael M. Shoucair (4) with United Dominions Corporation (Jamaica) Limited

(Contd.)

A/C No. ML 6501/25

Price	£13,000	Hirer:	M. M. Shoucair
Init. Rent	-		172C & D Orange Street
Amount Financed	£13,000		KINGSTON.
Charges			1 Instalment of £13,000
Balance	£13,000		First Instalment due 9%
Set Up £			

Date	Receipt No.	Debit	Credit	Balance	INTEREST Dr.	Cr.	Int. of Balance
Apr.12	To chqs &) cheques	13,000		13,000			
Apr.30	Interest				60.18. 1		£60.18. 1
May	Interest				97.10. 0		168. 8. 1

Plaintiff's Exhibit

9.

Account Sheets of Michael M. Shoucair Limited (4) and Michael M. Shoucair (4) with United Dominions Corporation (Jamaica) Limited

(Contd.)

A/C No.	6501/23	£ 4,000						
	3816/8	£14,000						
	7185/23	£ 6,000						
	7845/23	£ 6,000						
	8522/1	£12,000						
	0681/58	£13,000						
	0802/58	£15,000	Stock					
Mort & Caveat		£70,000						
	58/33	1,800	additional for lift					
Price								
Init. Rent								
Amount Financed								
Charges								
Balance								
Set Up £								

A/c No. ML

Hirer: Michael M. Shoucair

172C & D Orange Street

Kingston.

Instalments of £

First Instalment due 9%

1961

Interest

Date	Receipt No.	Debit	Credit	Balance	Dr.	Cr.	Init. of Balance
May 31				70,171.17.6			1270. 5.10
July 10		92.	CDA Appraisl	70,263.17.6	June	£526. 5.10	1796.11. 8
Aug.17		1800.		72,063.17.6	July	526. 5.10	2322.17. 6
Oct. 3	J.V.818		51.14. 6	72,012. 3.0	Sep. 6		2172.17. 6
Oct.23		460. 8. 4	Insurance	72,472.11.4	Aug.	658.19. 2	2831.16. 8
					Sep. 15		2681.16. 8
					Sep.	644. 1. 9	3325.18. 5
					Sep. 19	320. 0. 0	3,005.18. 5
					Oct.	585. 8.11	3591. 7. 4

Plaintiff's Exhibit

9.

Account Sheets of Michael M. Shoucair Limited (4) and Michael M. Shoucair (4) with United Dominions Corporation (Jamaica) Limited

(Contd.)

Caveat £15,000

Price £15,000

Init. Rent

Amount Financed £15,000

Charges

Balance £15,000

Set up £

1961

Legal Mortgage £55,000

A/C No. ML 0802/58

Hirer M. M. Shoucair Ltd.

172 C & D Orange Street,

KINGSTON.

8 Instalments of £

First Instalment due 19/7/61 9%

Date	Receipt No.	Debit	Credit	Balance	Dr.	Cr.	Int. of Balance
Apr.19	To chqs &) cheques	15,000		15,000		12 days	Apr.
May 12	days Ap. 44.7.9) May 112.10)				156.17. 9		156.17. 9
May 31	Stamp Comm.	171.17.6		15171.17. 6			

IN THE PRIVY COUNCIL No. 37 of 1966

ON APPEAL
FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :

UNITED DOMINIONS CORPORATION (JAMAICA) LIMITED (Defendant) Appellant

- and -

MICHAEL MITRI SHOUCAIR (Plaintiff) Respondent

R E C O R D O F P R O C E E D I N G S

SIMMONS & SIMMONS,
14, Dominion Street,
London, E.C.2

Solicitors for the Appellant

DRUCES & ATTLEE,
82, King William Street,
London, E.C.4

Solicitors for the Respondent