

1934.

Kenya.

No. 23054.

SUBJECT

CO 533/443

Protection for Agricultural Mortgages.

See Agricultural Mortgages Relief Bill.

Previous

See 3078/32. Land Bank.

Subsequent

38296/37.

1. Col. Secretary of the (Committee) _____ 8th Jan 311
Trans. 12 copies of Report of the Committee on Agriculture:
Financial Position.

Shankar Library

2. Governor Byrne of Calcutta _____ 12th Jan 311
Trans. copy of report of Committee appointed to decide
what protection, if any, was deemed desirable for agricult-
ural mortgages, containing also the Agricultural
Mortgages Relief Bill, & seeks advice on the principles
reflected on the Report & Bill.

Libraries Legal

This Agricultural Mortgages Relief Bill
provides that the mortgagee of agricultural
property shall not foreclose without
first giving notice to the mortgagor; & that
the mortgagor may then apply to the
Court for relief.

The Gov. believes that there have
been recent precedents in other colonies.

Could you please say whether
similar legislation has in fact
been passed elsewhere recently? I
believe there is something like it in the

F. T. S.

Thos. W. : 13/2

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Reviews: 13/2

DESTROYED UNDER STATUTE

3. Governor Byrnes Tel 31 _____ 15 Feb 34

States S. of S. does not want a decision taken on Nos pending motions.

4. Governor Byrnes Tel 33 _____ 15 Feb 34

Motion No 3.

5. Extract from 'The Times' Feb. 16th 1934

6. Governor Byrnes Tel _____ 16 Feb 34

From S. of S to Sir J. Jeffery. States has authorised Gov. to make a statement on the financial position, substance of which follows by tel. States also has had an interview with elected members regarding financial position & proposed loans to pay off farm mortgages & districts as to statements for press.

4 Governor Byrnes Tel _____ 16 Feb 34

From S. of S to Sir J. Jeffery. Gives substance of statement which Gov. has been authorised to make regarding financial position & loans to pay off farm mortgages.

8. Substance of statement made by S. of S. on financial position

9. To J. O. B. Ferguson (S.O) - (ref 679) - 16 Feb 34

DESTROYED UNDER STATUTE

10. Extract from 'The Times' 17 February 34

10^A Minutes regarding interview with press representatives.

The & draft Bill enclosed in 2000

not envisage any form of financial relief by Govt, and is not, on the face of it, inconsistent with S. of S.'s policy as declared in 6-7.

Pending S. of S.'s return, the search

for precedents shd. continue, and the legal advice shd. be asked for any comment - the details of the aft. Bill.

Director 19/2

As Mr. Treaster says we cannot do anything with this until the Secretary of State comes back, but in view of the importance of the matter it is advisable to get our ideas into shape. I understand from conversations with Mr. Tolson, the Editor of 'East Africa', that the fear at the head of the Kenya settlers is that some private speculators will take over their mortgages from the Banks and then foreclose as soon as things begin to look more prosperous, with a view to selling the land on a rising market. As long as there was no demand for land in Kenya the settlers were quite happy because the banks could not possibly foreclose as they would have no means of dealing with the land they had and could not sell, but lately there have been one or two sales of land and consequently alarm has been aroused.

The effect of the proposed Ordinance is that when any mortgagee wants to foreclose or take any other proceedings in regard to the land mortgaged the mortgagor may apply to a Judge for relief and the Judge may order the mortgagee to refrain from the exercise of his powers for a period not exceeding 12 months.

I do not know of any similar provisions in any part of the British Empire, and I should think myself

? outwards

myself that to introduce a moratorium of this kind in Kenya would have the most disastrous effects on the stability of the very people whom it is intended to benefit, viz: the settlers. They will certainly find it extremely hard to get any credit whatever from any source and in that event their eventual recovery might be seriously delayed for lack of capital. At the same time we should be faced with a lot of protests from Banks and other interested bodies who would, with some excuse, regard it as a measure of confiscation of their properties.

The idea probably is that the passing of such an Ordinance would encourage the settlers to call on the Land Bank to takeover the mortgages as far as they had the capital to do so, and would thus put that Bank in the position of holding the land. In that event it could not foreclose and would probably sooner or later be faced with an organised refusal to pay interest, in which case nothing could be done. The extraordinary provision in the Bill that it should bind the Crown would as the Governor says bring about the situation where the Agricultural Advances Board could not take any steps to recover the sums advanced to settlers. This I regard as really serious because the debts to that Board which amount to over £107,000 are all extremely badly secured as it is. The view taken here has always been that the grant of those advances was very largely a mistake, and to take any step which would render the security more uncertain would probably result in our having to write down Kenya's assets by the

But see
cl 3(2) (t)

B

Shall think we need
have referred to the
Board

How many are
making the
interest?

All the pre-1920
debtors would like
to know what
can be done
now.

irrecoverable advances.

The curious thing about the Bill is that Section 8 does not say what considerations are to guide the Court in granting a moratorium. Under Section 8(1) the mortgagor is bound to satisfy the Court that he has maintained the property in good condition and has observed all the provisions of the mortgage except that of payment of the principal. The Court, under Section 8(2), having satisfied itself as to the foregoing has then got to pay regard to "all other relevant considerations" and is then to be satisfied that relief ~~shall~~^{ought to} be granted. That grounds are to be submitted to the Court, which may consist of a Judge in chambers, is nowhere stated. As far as I can see the only thing for the mortgagor to do is to appear before the Judge and say "I cannot pay," in which case the Judge may at his full discretion say "Very well, you need not for a year." I think myself that some sort of legal provision ought to be made in the Ordinance to guide the Judge as to what factors are proper to be taken into account.

It will be observed that the Committee started off by wanting to discuss "the whole question of currency," and to talk about devaluation and a general moratorium. Two of the Unofficial Members have recorded their opinion that a new Committee ought to be set up to consider agricultural finance generally and to have power to take "an unfettered review of the currency question". From this obtrusion of currency I am inclined to suspect that Major Grogan is one of the moving spirits in the performance.

Looking at the thing as a whole I can see the gravest objections to it, and from the Governor's

despatch

despatch it will be seen that he also feels excessively doubtful as to the wisdom of the suggested policy.

The passage in the Board of Agriculture Cttee's report mentioned in paragraph 1 is in No. 49 on 3078/39. It was there stated that there was in many cases a demand for repayment of the principal of loans as they fall due and a fear of foreclosure. It was for that reason that they were suggesting an enormous increase in the Land Bank's capital and they urged that steps should be taken to safeguard the farmers in the event of threatened foreclosure, and mentioned moratoria and statutory reductions in interest. All these notions were turned down by the Land Bank Board, and the Governor said that it was not desirable to try to increase the capital up to more than £500,000 which has been done, saying "this was and remains the Government view in the present financial position of the Colony".

What we can do at present is, I think, to hunt for precedents, though I doubt if there will be any, and to let the Legal Advisers examine the draft Bill and say what they think. It is so unusual that there may not be many legal remarks to make.

(J.E.W Flood ?)

I cannot recall any precedents.

2. The first point that strikes one is that very little indeed is said as to the necessity for this very unusual legislation. The Comm: are " satisfied that a fear exists in the Colony that on a rising land market rapacious mortgagees may be tempted to institute proceedings for foreclosure or sale". This is rather nebulous, it seems to me. Are the Banks the " rapacious mortgagees" ? Is the actual mortgage position such that the fear is justified ? Is there any reason to think that recovery is going to be so rapid that this fear is likely to be justified? And, if the thing looks as if there was justification for it, is a period of one year going to meet the difficulty? (One notes that there is provision for a further--indefinite--extension by proclamation:--a power which on the wording could apparently be exercised once only.)

3. The drafting of the Bill seems to me so involved that it is difficult to get a clear idea of what is really going to be the effect, if it be enacted. It would, for instance, apparently cover an ordinary sale of agricultural property--entirely irrespective of any question of a mortgage? It is difficult to believe that that can be necessary--or that it would be advantageous for the settlers.

4. I agree generally with Mr: Flood's minute. ~~It~~ ^{a bill} sets up an authority--from which there is no appeal--~~who~~ ^{that} has to act in this important matter without legal directives of any kind. There is direct interference with contracts already executed; and that interference is indefinite in time. It is indefinite also

as to the principles on which it is to be based. The effect in practical working I cannot make out clearly: the drafting is so involved. Is clause 3 (g) (f), for instance, a gigantic loophole? --through which one could drive almost anything. Are ordinary straightforward sales and purchases--entirely irrespective of mortgage considerations--within the scope of the Bill?

6. The measure, if passed, would I think have very serious repercussions, detrimental to the interests of the settlers. Who would lead in future? This measure would perhaps soon pass away; but what had been done once could be done again--the fear of this would dry up credit. All this would throw the burden of financing the settlers more and more on the Govt:--which is in no state to bear additional burdens. It would I think undoubtedly intensify the political difficulties of the Govt:; vis-a-vis the organised settlers. It would tend to tie them, more and more, to a system which time may show is not a suitable system for the best development of the country; and it would link their finances--directly, and through through the railway--to an increasing degree with that system.

I like the thing as little as Mr. Flood. I think it is unsound, for the settlers and for the Govt: alike; and I attach importance to the long-term implications briefly alluded to above.

The 22-2-34.

Handwritten signature
22/2/34

A. and B. in the Flood's scheme are exactly the approval of the solution put to me by a Kenya mortgagee last week.

It is unless it proved good to the previous account on the merits.

Library (Legal)

Will you please say if there has been similar legislation anywhere?

Mr. Roberts' way.

Perhaps you will be good enough to give the draft Bill a first examination. As far as possible is uncertain if we can go deeply into the details.

W.C.S.

22.2.34

I have been unable to trace any similar legislation in the Colonies

Gannace
Liby legal
27/2/34

Mr. Gannace

Mr. Thompson mentioned to me the question of similar legislation in the Dominion. I was aware of such legislation

The S. D. is due in England on March 15th

as to the principles on which it is to be based. The effect in practical working I cannot make out clearly: the drafting is so involved. Is clause 3 (2) (f), for instance, a gigantic loophole? --through which one could drive almost anything. Are ordinary straightforward sales and purchases--entirely irrespective of mortgage considerations--within the scope of the Bill?

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[Signature]
22/2/34

A. and B. in Mr. Flood's minute are exactly the approval & the solution put forward by a Kenya mortgagee last week.

It is unclear at present as to the previous meeting, or the result.

Library (Legal)

Will you please say if there has been similar legislation anywhere?

Mr. Roberts' way.

Perhaps you will be good enough to give the Draft Bill its first examination. As the principle is uncertain if adoption we cannot ask you to go deeply into the details.

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Clarence
by legal
27/2/34

Mr. Greston

Mr. Thompson mentioned to me the question of similar legislation in the Dominion. I was aware of such legislation

when I mentioned above, has it is not our
practice to put up as precedents for Colonial
legislation, Dominion legislation.

I annex copies of cases which
have been enacted in S. Africa, Victoria,
N.S. Wales, Queensland & N. Zealand

C. Linnam
Solicitor (Legal)
8/3/34

Paper loaned from me and returned
today on 8/3/34

X

I see no great legal objection to the
main principle of this draft Ordinance, and would
invite attention to Section 7 of the ^{Rent} ~~Law~~ and
Mortgage Interest Restriction Act, 1920, which,
it will be seen, entirely prohibits the calling
in of mortgages to which the Act applies (see
Section 12(4)) except in specified circumstances.
From a legal point of view the most important
comments are those contained in paragraph 3 of Sir
J. Campbell's minute. The drafting is very
involved, but it seems that the Ordinance would
prevent the enforcement of ordinary contracts of
sale, whether by means of forfeiture of
deposit or by proceedings for the recovery of
the purchase price or specific performance, and
I cannot see the reason for this. In addition,
I have the following observations:

Clause 5(1). It is, I believe, usual to say
"the Crown" rather than "His Majesty".

Clause 6(4). No provision is made for a case
where proceedings are discontinued. The words
"has been withdrawn or" might be inserted after

"application".

Clause 8. I agree with Mr. Flood that this does
not give very much helpful guidance to the Court.

Clause 16. I suggest that a saving is required for
an innocent purchaser.

Clause 18. I agree with Sir J. Campbell that the
Ordinance could apparently be extended by proclamation
only once.

John Maffey
9.3.34.

Sir John Maffey.

This cannot, I think, be carried any further
before the Secretary of State returns.

In No. 2, (which the Secretary of State
directed to be held over for his return) the
Governor asked for advice on two points:-

(1) whether the proposed moratorium on
mortgages would have an adverse effect on the
credit of the Colony and on the confidence of
investors. I do not see that it should affect
the credit of the Government of the Colony, but I
agree with Mr. Flood and Sir John Campbell in
thinking that the private individual would find
it difficult to raise money in future. Even
without any extension of the Ordinance I do not
see how a man could raise money on a second
mortgage after the Ordinance was passed, because
it would in practice surely be impossible for the
second mortgagee to foreclose in the face of the
dormant rights of the first mortgagee:

(2) whether the Crown should be bound by the
provisions of the Bill. If the Ordinance is to go
through at all, I think that we must accept this,

although I do not like it. If a bank desires, in the fact of the Ordinance, to restrict its future mortgage business it is perfectly at liberty to do so. The Government, on the other hand, would be opened to continual pressure to give loans of one kind or another, the more so if the Ordinance led to an important restriction of credit from ordinary sources.

J. R. S. H. M. M. M.

to. ed. 12.3.34

JRM
13/3

I must discuss this with you. The principle does not shock me. As Mr. R. B. H. says, we have done it at home for a wide range of property.

Is it clear that relief will only be given on condition interest is paid?

I think we must consider Dominion precedents. We need not follow them; but they are the chief arguments used in support. Please summarise & shortly.

③ If this is rejected, we shall get legislation proposed to reduce the rate of interest, much more difficult.

④ Obviously ordinary sales must not be interfered with.

⑤ Why not let the man seeking relief pay costs at the discretion of the Court?

PVA
2/4

I have got the Library to look out Dominion precedents and have found some in Nova Scotia, Ontario, and British Columbia in Canada, and Queensland, South Australia, Western Australia, and New Zealand. I attach a note on the subject which I think will be sufficient for present purposes.

Since there is precedent for interfering with mortgages, I think it is necessary to revise our views. I may start by saying that I still don't

like it, and that any legislation directed, as the suggested legislation is, to the interests of one small section of the community is not of itself desirable. It may lead to demands for legislation to relieve other sections which are not nearly so deserving. At the same time, it is quite possible to overdo this objection. Farming is undoubtedly the main interest of Kenya, and it seems to be accepted that it is necessary to assist the European farmer to keep going. He has got agricultural advances, wheat and maize subsidies, and a Land Bank, but all this apparently is not enough. If they are in Kenya seriously alarmed at the prospect of foreclosure or recovery of mortgages, then I think we shall have to face the situation. As the Dominion legislation shows, there is precedent for interfering with the legal rights of mortgagees, and in point of fact the Kenya mortgagee might welcome provisions of law which, while enabling him to retain his claim, ^{will} ~~would~~ prevent the disturbance which would occur if he were to enforce his legal rights.

What the Governor asks for is advice as to the general effect of interference with mortgages on the credit of the Colony. I don't think that it would have any bad effect on the general credit of Kenya, as such, though it certainly would have a serious effect upon the private credit of any Kenya settler. If once the idea goes abroad, that the Kenya settler is powerful enough to have Ordinances passed to relieve him of legal liabilities which he has contracted with his eyes open, it will be very difficult for them to get credit. There might be a repugnance on Government credit, because the City might argue

that if the settlers can force Government, or persuade Government, to legislate in their favour, they can equally persuade Government to legislate to interfere with the payment of interest on loans, and so forth. Of course, the two things are not really on the same footing, but it would be hard to convince the City that they were not, if the idea once gained currency. But I don't think that that is a real risk.

As regards binding the Crown, it will be seen from the attached note that there are precedents both ways, but that the only one which binds the Crown is New Zealand.

I think then we might inform Kenya that the S. of S. does not think that Kenya's credit as a Colony would be damaged by such legislation, though he feels bound to point out that it might have awkward results on the position of the farming community should they endeavour in the future to arrange mortgages, and enclose copies of the legislation in force in New Zealand, Queensland, South Australia, and Western Australia, for their information, and say that there is also similar legislation in force in some of the Canadian Provinces, but that there it takes the form followed in Western Australia, ^{where} ~~that~~ the mortgagee has to apply to the Court for leave to take proceedings. We might also enquire what the position is intended to be as regards the payment of costs, and ask whether it is the intention that the mortgagor seeking relief shall pay costs or not, saying that in any case it is presumed that the costs of procedure would be low.

J. G. H. 12.4

(I don't see in the Canada & U.S. laws which are in last volume)

1. I do not think that the credit of the Govt: of Kenya is likely to be seriously affected by the proposed legislation. There might be some repercussion, as Mr: Flood points out; but it seems unlikely that that would be important. The C.Ags: are I think our usual advisers in such matters. The real point here is that the City assumes--probably with sound justification--that H.M.G. must stand behind Kenya. Everything else is of very minor importance.

2. I agree that this measure is likely to have a very serious effect on the sources of private credit available to settlers. My view--already explained--is that this will have serious effects also on the Govt: . Briefly, it will mean that the burden of "carrying" the settlers will be thrown, more and more directly, on the Govt: . This must one would think make for increasing political tension between the organised settlers and the Govt: . The Govt: has little or no money: the demands of the settlers--deprived largely of private credit--on the Govt: will become more and more *excessive and* insistent. The possibilities of quite important difficulties seem obvious.

3. In any reply, I think we must make the point that the proposed legislation is involved, and on many points obscure. The "ordinary sale" question should be alluded to.

4. Further, it seems to me wrong to introduce a measure of this kind, in terms operative for (say) one year only, but with a provision that it can be indefinitely extended by a pro-

clamation by the Govt: with the approval of the Leg: Council. That power can be exercised once only;--which further complicates matters, because the tendency, in these circumstances, will presumably be to fix a very safe distant date. Put concretely, this rather unusual type of legislation would ostensibly be for one year, and might by proclamation be extended to twenty years. If we are going on with the thing, I'd much rather fix a longer initial period, and leave it to the ordinary process of legislation to re-enact later, if need be.

b. I'd attach much more importance to the precedents now cited if one knew how they had worked in practice.

The 13th: April 1934.

Handwritten signature
13/4/34

The Secretary of State discussed this question with Sir John Maffey, Mr. Roberts-Wray and myself on 17th April. He agreed with the opinions expressed that the revenues of the Government of Kenya would not be seriously affected by any legislation on the lines proposed.

With regard to the principle of the legislation he came to the conclusion that in view of the much more drastic provisions of the Rent Restrictions Acts in this country and of the provisions of the various Dominion Enactments to which attention had been drawn, there was no need to cavil at the principle involved, more particularly as the draft Ordinance provides that relief could only be given in cases where the mortgagor had maintained the security in good condition, ^x carried out all the covenants and

Handwritten note:
This is a good point, quite essential. The S.G. has a clause in mind but it only requires these matters to be taken into account. In practice, no doubt, if the mortgagor had maintained the security in good condition, he would be allowed to be relieved.

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Handwritten note:
This is a good point, quite accurate. The S.G.S. had done it in mind but it only requires these matters to be taken into account. In practice, no doubt, if the

and provisions of the instrument except the covenant for the payment of the principal money. That meant that the mortgagor was a good and useful person and it was quite right that the Court should be able to give him some relief against ^{unlawful} ~~arbitrary~~ actions on the part of the mortgagee.

He agreed that the Ordinance would have to apply to the Crown and that it would be necessary to exempt from its operations ordinary sales and contracts of sale.

It was pointed out by Mr. Roberts-Wray that the Ordinance was somewhat involved in its wording and intention, and it was generally thought that when it came to be introduced into Council it would have to be considerably modified. Draft despatch herewith for conson.

~~W.S. 200~~
174

In the course of the discussion on the 17th of April, the Secretary of State intimated that he would like the precise details of the provisions of the Rent and Mortgage Interest Restriction Act to be ascertained. Section 7 of the Act of 1920 is almost identical with Section 1(4) of the Act of 1915 which it replaced. Both provided that it should not be lawful for any mortgagee under a mortgage to which the Act applies (i.e. a mortgage created before the passing of the Act in respect of a house where the standard rent or rateable value does not exceed the specified

specified amounts) to call in his mortgage or take any steps for exercising any right of foreclosure or sale or for otherwise enforcing his security, or for recovering the principal money so long as interest at the permitted rate is not more than 21 days in arrear, the covenants by the mortgagor (other than the covenants for the repayment of the principal money) are performed, and the mortgagor keeps the property in a proper state of repair and pays all interest and instalments of principal recoverable under any prior encumbrance.

W.S. 200
18.4.34.

W.S. 200

W.S. 200
18/4/34

~~11~~ ~~Tier 15 Gov. No 169 Conf~~ ~~23rd April~~

~~12~~ ~~Zohary, Conf~~ ~~9 MAY 1934~~
(Conf New Zealand - Greenland Act)
(Admiral)

Mr. Dreyfus,

In returning to the office 4/27/24
Mr. T. J. told me that he would like a
telegram to be sent to the Prof. Dreyfus
to the effect that "Mr. T. J. is going to
afford his mortgage bill in full, but
that there will be some ^{small} details on which
Mr. T. J. will be addressing him."

Let, you please arrange accordingly

E. J. Boyd

23/4/24

Tel. herewith. When it has gone, p.p. shd.
return to Mr. Boyd with the aff. corp.
below

J. Dreyfus

23/4

11. Tel. to gov. N. 109. conf. 23 April/24

16th of 12. To Kenya, brief - 9 May, p.p.
(w/ 12-3 & antecedent acts. 2220)

Mr. Grant might note

15. Extract from Record of Interview between the S. of S. &
European Elected members of Leg. Council on 10th Feb. 24.

? On viewing No. 12, this may be
Partly - Affirmative.
7/6/24.

J. Dreyfus

signed

26 April

108

Extract from The Times of 11 July 34

(The Bill has been sent by C. Ross with 29/7/34 above.)

DESTROYED UNDER STATUTE

RR

Parliamentary Question by Mr. Lunn -
NO 12 a P.P. file

15. Ed. Secretary 3hr _____ 6 Aug 34
Trans. 12 copies of report of Select Committee on a Bill to give further powers to the Supreme Court with respect to the recovery of money secured by mortgages or charges & similar matters.

Shaw's Library

Put by

RR
7/9

C.S. Agricultural Ordinance

16. Governor Byrne 130 (Conf) _____ 6 Sept 34

Trans. in dup. authenticated copy of Agricultural Mortgage Relief Ordinance 1934 No 26, together with a copy of the Bill showing amendments & furnishes explanation thereof.

Shaw's Library

17. A/Ed. Secy 3hr _____ 8 Sept 34

Trans. 12 printed copies of the Agricultural Mortgage Relief Ordinance 1934, No 26.

Shaw's Library

16. The Ordinance has been agreed to in principle & it is now a matter of considering the amendments made since the Bill was prepared.

The amendments appear to cover all the suggestions raised

(No 12) in the P.C.'s Dispatch of 9 May. Subject to legal views the Ordinance may be sanctioned.

No 17. Put by

C. Ross with 15/7/34

RR
15

I still do not see why the words "an agreement of sale or purchase" are wanted in the definition of the word "mortgage". As, however, S. 5 is applied only to "mortgages" the definition of which seems to be satisfactory, I do not think we need object.

The word "or" has been omitted in S. 6(4). I see now that the mere addition of the words suggested in para 6 of 12, but the was not entirely satisfactory but the omission of "or" does not quite do what is required. Amended as we proposed, the subsection would mean that even when an application was withdrawn, the mortgagee could still not recover his money except in accordance with an order of the Court. But the subsection as it stands appears to have this effect; that when the application has been disposed of the mortgagee can not otherwise than in accordance with the order.

One way of putting this right is shown in para 6 of the red inked copy of the Order, enclosed with 17. I suggest amending S. 6(4) & leaving them to amend or not as they think fit.
C. Ross with 19/10/34

I have discussed this with Mr. Roberts-Wray, and I think Section 6(4) is all right. The effect of it is this. The mortgagor makes an application to the Court, then the mortgagees may not do anything - except as the Court may direct - until

(1) the application is withdrawn, in which case, of course, they revert to the position that they were in before any application was made, or

(2) the Court disposes of the application either by rejecting it altogether, in which case again they revert to the status quo ante, or by making some order, in which case both parties are bound by the terms of that order and can only proceed in accordance therewith. Mr. Roberts-Wray agrees that this is a possible interpretation and that the Court would probably adopt it if any argument took place as to the precise intention of Section 6(4).

Wherefore signify non-disallowance if.

J. E. W. Flood

29.10.34.

at mee

initial
copy
29/10/34

18

To Kemper 878 — C/3

19

- Col Sec. Kemper (16 answered) 8/20

25 OCT 1934

librarian to
note, etc.

HR

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To Kempa 878 — c/3

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= Col Sec. Kempa (16 annual) 2/20

25 OCT 1934

Library to
note, etc.

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23000/34 Kenya

Confidential

Att. 1/14

The H.S. of. for the Colo.

C. O.

Mr. ~~Neesh~~ 8/10
Mr. ~~Vanning~~ 2/10

Mr.
Mr. Parkinson
Sir G. Tompkinson
Sir C. Bottomley
Sir J. Shuckburgh
Permt. U.S. of S.
Parly. U.S. of S.
Secretary of State.

presents his compliments to the
Colonial Secretary, Kenya, and

is directed to inform him

G. O.
R 2200
D 24

that the reference in the
Secretary of States despatch

No 875 of the 25 of October,

is to the Governor's

Confidential despatch

No 130 of the 6th of

September.

DRAFT. 3/10

(Don't
insert
reply)

(16)

FURTHER ACTION.

2/10

25

25
October, 1924

23064/24 Kenya
Confidential *Hot* *14*
See U.S. of. for the Col.

C. O.

Mr. *Ward* 510
Mr. *Verning* 22/10
Mr.

Mr. Parkinson.
Sir G. Tomlinson.
Sir C. Bottomley.
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Permt. U.S. of S.
Parly. U.S. of S.
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CONFIDENTIAL
22007
D 24

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No 130 of the 6th of
September.

DRAFT. *3/10*

(Keep
Secret to
insert
reply)

(16)

FURTHER ACTION.

4/10

25
D.S.
October, 1924

174



THE SECRETARIAT,
NAIROBI,
KENYA.

RECEIVED
23 SEP 1934
C. O. REG. 94

WHEN REPLYING
PLEASE QUOTE
NO. S. 9/1934.44/1/1.
AND DATE

SEPTEMBER, 1934.

CONFIDENTIAL.

No 16

The Acting Colonial Secretary of the Colony and Protectorate of Kenya presents his compliments to the Under Secretary of State for the Colonies and with reference to Kenya Confidential despatch No. 130 of the 6th September has the honour to transmit twelve printed copies of Ordinance No. XXXV of 1934 entitled "An Ordinance to give Further Powers to the Supreme Court with Respect to the Recovery of Money Secured by Mortgages or Charges and Similar Matters".

17¹⁰



THE SECRETARIAT,
NAIROBI,
KENYA.

WHEN REPLYING
PLEASE QUOTE
NO. S. O. / AGR. 44/1/1.
AND DATE

RECEIVED
29 SEP 1934
C. O. REGY

9⁴ SEPTEMBER, 1934.

CONFIDENTIAL.

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Colony and Protectorate of Kenya.

IN THE TWENTY-FIFTH YEAR OF THE REIGN OF

HIS MAJESTY KING GEORGE V.

JOSEPH ALOYSIUS BYRNE, G.C.M.G., K.B.E., C.B.,
Governor.

Assented to in His Majesty's
name this 27th day of August,
1934

BYRNE

Governor.

AN ORDINANCE TO GIVE FURTHER POWERS
TO THE SUPREME COURT WITH RESPECT TO
THE RECOVERY OF MONEY SECURED BY
MORTGAGES OR CHARGES AND SIMILAR
MATTERS

ORDINANCE No. XXXV of 1934

An Ordinance to Give Further Powers to the Supreme Court with respect to the Recovery of Money secured by Mortgages or Charges and Similar Matters.

ENACTED by the Governor of the Colony of Kenya, with the advice and consent of the Legislative Council thereof as follows:—

1. This Ordinance may be cited as the Agricultural Mortgagors' Relief Ordinance, 1934. Short title.

2. In this Ordinance, unless the context otherwise requires— Interpreta-
tion.

"instrument" means any document evidencing any mortgage, or agreement of sale or purchase in respect of or affecting immovable property;

"mortgage" means any deed, memorandum of mortgage, instrument, or agreement whereby security for payment of money is granted over immovable property or any interest therein, and includes an agreement for sale and purchase of immovable property where payment of the unpaid purchase money and interest thereon is secured on such property and also includes an equitable mortgage by deposit of title deeds and any document by which the duration of the mortgage is extended or by which any provision of the mortgage is varied;

"mortgagor" means a person liable under the provisions of an instrument, and includes any person who has guaranteed the performance by the mortgagor of any covenant, condition or agreement expressed or implied in the instrument, whether such guarantee is expressed in the instrument or in any other document, and also includes any person against whom a mortgagor has a legal or equitable right of indemnity in respect of any liabilities under the instrument;

"mortgagee" means the person entitled to the benefit of the security of the instrument, and includes every person whose powers are restricted by the provisions of this Ordinance;

"principal money" includes principal money which by the terms of any instrument is payable in one sum or by instalments with or without interest payments added thereto or combined therewith, but does not include money payable as rent.

Application
of Ordinance.

3. (1) The Crown shall be bound by the provisions of this Ordinance, and the word "person" where used in this Ordinance shall include the Crown.

(2) This Ordinance shall not apply to—

- (a) any instrument affecting immovable property which is not occupied or used mainly for the purposes of agriculture, which term shall for the purposes of this Ordinance be deemed to include grazing and stock raising;
- (b) money payable in respect of premiums of insurance or taxes or arrears of taxes, including arrears which may under any instrument be capitalized or added to or form part of the principal money payable thereunder, and whether the same is payable before or after the commencement of this Ordinance;
- (c) simple interest or money payable in respect of interest or arrears of interest which may under the terms of any instrument be payable under a plan by which interest and principal payments are combined, or if in arrears be capitalized or added to or form part of the principal money payable thereunder, and whether the same is payable before or after the commencement of this Ordinance;
- (d) any instrument affecting immovable property situate outside the Colony;
- (e) any instrument affecting immovable property made or created after the commencement of this Ordinance.

4. The provisions of this Ordinance shall apply to an instrument under the Chattels Transfer Ordinance, 1930, given on the security of crops, stock and other chattels normally used in the course of farming operations as if such instrument were an instrument affecting immovable property.

Ordinance to
apply to
Chattels
Transfer
Ordinance.
No. 24 of
1930.

5. (1) Notwithstanding the provisions of the Indian Prohibition Transfer of Property Act, 1882, as applied to the Colony, it shall not be lawful for a mortgagee under a mortgage to which this Ordinance applies or any other person—

- (a) to exercise (except in respect of property which the mortgagor has abandoned) any power of sale, rescission, or entry into possession conferred by any such mortgage or by statute; or
- (b) to issue or to be concerned in the issue of any process of execution in pursuance of any judgment, decree, or order of any court in its civil jurisdiction obtained against the mortgagor after the commencement of this Ordinance in respect of any covenant, condition or agreement expressed or implied in the mortgage, or to continue or to be concerned in the continuance of any such process of execution;
- (c) to file a bankruptcy petition against the mortgagor in respect of any debt arising out of any covenant, condition or agreement expressed or implied in the mortgage,

otherwise than subject to and in accordance with the provisions of this Ordinance.

(2) For the purposes of this Ordinance, the exercise of a power of sale shall be deemed to be completed when the vendor becomes bound by an agreement or contract of sale, and the onus of proving that any immovable property has been abandoned by a mortgagor shall rest upon the mortgagee.

6. (1) A mortgagee before proceeding to do any such act or exercise any such power as is defined in the last preceding section shall give to the mortgagor notice in writing of his intention to do such act or exercise such power.

Notice by
mortgagee of
intention to
exercise
powers.

(2) Such notice shall contain an address for service, and shall be signed by the mortgagee, or by some duly authorized attorney or agent of the mortgagee, and shall be deemed to be duly given if delivered to the mortgagor personally, or if posted by registered letter addressed to the mortgagor at his last known place of abode in the Colony. A notice so posted shall be deemed to have been given seven days after the time when the registered letter would be delivered in the ordinary course of post.

"mortgagee" means the person entitled to the benefit of the security of the instrument, and includes every person whose powers are restricted by the provisions of this Ordinance;

"principal money" includes principal money which by the terms of any instrument is payable in one sum or by instalments with or without interest payments added thereto or combined therewith, but does not include money payable as rent.

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- (b) money payable in respect of premiums of insurance or taxes or arrears of taxes, including arrears which may under any instrument be capitalized or added to or form part of the principal money payable thereunder, and whether the same is payable before or after the commencement of this Ordinance;
- (c) simple interest or money payable in respect of interest or arrears of interest which may under the terms of any instrument be payable under a plan by which interest and principal payments are combined, or if in arrears be capitalized or added to or form part of the principal money payable thereunder, and whether the same is payable before or after the commencement of this Ordinance;
- (d) any instrument affecting immovable property situate outside the Colony;
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Ordinance to
apply to
Chattels
Transfer
Ordinance,
No. 34 of
1930.

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5. (1) Notwithstanding the provisions of the Indian Prohibition Transfer of Property Act, 1882, as applied to the Colony, it shall not be lawful for a mortgagee under a mortgage to which this Ordinance applies or any other person—

- (a) to exercise (except in respect of property which the mortgagor has abandoned) any power of sale, rescission, or entry into possession conferred by any such mortgage or by statute; or
- (b) to issue or to be concerned in the issue of any process of execution in pursuance of any judgment, decree, or order of any court in its civil jurisdiction obtained against the mortgagor after the commencement of this Ordinance in respect of any covenant, condition or agreement expressed or implied in the mortgage, or to continue or to be concerned in the continuance of any such process of execution;
- (c) to file a bankruptcy petition against the mortgagor in respect of any debt arising out of any covenant, condition or agreement expressed or implied in the mortgage,

otherwise than subject to and in accordance with the provisions of this Ordinance.

(2) For the purposes of this Ordinance, the exercise of a power of sale shall be deemed to be completed when the vendor becomes bound by an agreement or contract of sale, and the onus of proving that any immovable property has been abandoned by a mortgagor shall rest upon the mortgagee.

6. (1) A mortgagee before proceeding to do any such act or exercise any such power as is defined in the last preceding section shall give to the mortgagor notice in writing of his intention to do such act or exercise such power.

Notice by
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powers

(2) Such notice shall contain an address for service, and shall be signed by the mortgagee, or by some duly authorized attorney or agent of the mortgagee, and shall be deemed to be duly given if delivered to the mortgagor personally, or if posted by registered letter addressed to the mortgagor at his last known place of abode in the Colony. A notice so posted shall be deemed to have been given seven days after the time when the registered letter would be delivered in the ordinary course of post.

(3) If the mortgagor does not within one month after the giving of such notice apply to the Supreme Court for relief as hereinafter provided, and serve a copy of such application on the mortgagee, and on the Registrar of Titles, the mortgagee may on the expiration of the said month proceed to do such act or exercise such powers as aforesaid.

(4) If the mortgagor makes such application and serves a copy thereof in accordance with the last preceding sub-section the mortgagee shall not do such act or exercise such power until such application has been withdrawn or has been disposed of by the Supreme Court, otherwise than subject to and in accordance with any order made by the Supreme Court as hereinafter provided.

Procedure

7. (1) An application by a mortgagor under this Ordinance shall be by motion on notice supported by affidavit, and shall state the date on which such notice as aforesaid was given by the mortgagor, the specific grounds on which relief is sought and whether copies of the application have been served on the mortgagee and on the Registrar of Titles.

(2) An application under this Ordinance may be made to and disposed of by a Judge in Chambers.

(3) The Judge may give directions as to the service of notice of the hearing of the application upon any person whom he deems a proper party to the proceedings, and may adjourn the hearing for that purpose, or he may, if he considers that service of the notice would occasion useless or unnecessary expense or delay, dispense with service of notice of the application upon any party who appears to have abandoned his interest in the immovable property.

(4) No appeal shall lie from any order made under this Ordinance.

8. (1) In determining whether relief against the doing of any act or the exercise of any powers as aforesaid by the mortgagee shall be granted to the mortgagor, the Supreme Court shall take into consideration—

(a) the effect of the continuance of the mortgage upon the security thereby afforded to the mortgagee;

(b) the inability of the mortgagor to redeem the property either from his own moneys or by borrowing at a reasonable rate of interest;

Matters to be considered by Supreme Court on application by mortgagor.

- (c) the conduct of the mortgagor in respect of any breaches by him of the covenants of the mortgage;
- (d) any hardship that would be inflicted on the mortgagee by the continuance of the mortgage or upon the mortgagor by the enforcement thereof;
- (e) the extent to which any default by the mortgagor has been caused by any economic or financial conditions affecting trade or industry in the Colony;
- (f) whether any relief granted by the court pursuant to this Ordinance would be reasonably likely to enable the mortgagor, having regard to his circumstances and the conditions mentioned in the last preceding paragraph, to meet his liabilities under the mortgage within such time as the court deems reasonable;
- (g) any other relevant consideration.

(2) If the court, being satisfied regarding the matters mentioned in the first sub-section of this section and, having regard to all other relevant considerations is of opinion that relief should be granted to the mortgagor, it may, in its absolute discretion, order that the mortgagee shall not, before a date specified in such order (being not later than twelve months after the date of the mortgagor's application for relief), do any act or exercise any power mentioned in section 5 of this Ordinance:

Provided that no such order shall operate to postpone the exercise of any right or remedy to a date subsequent to the expiry of this Ordinance.

9. Subject to the provisions of this Ordinance, the order may be upon such terms, conditions and limitations, including the giving of any undertaking, the depositing in court or otherwise of any security, the appointment of a receiver, the granting of an injunction, and the reservation of leave to apply to vary the same as the Judge may deem proper.

10. (1) Every order of the court made under this Ordinance shall be registered by the mortgagor with the Registrar of Titles within seven days of the making of the order and no fee shall be chargeable in respect of such registration.

(2) The Registrar of Titles shall cause a register to be kept containing the particulars of all orders so registered and such register shall, at all reasonable times, be open to inspection by any person without fee.

Nature of relief that may be granted by court.

Scope of order.

Registration of court orders.

Order granting relief to be null and void if mortgagor fails to register or pay interest

11. When an order postponing the exercise of any right or remedy has been made under any of the foregoing provisions of this Ordinance and the mortgagor—

- (a) fails to register such order as required by section 10 (1) of this Ordinance; or
- (b) during the time of such postponement fails or neglects to pay interest on or within forty-two days after the date on which such interest becomes due.

such order shall thereupon become null and void and the mortgagor may take action for the recovery of the principal sum and interest due in such manner as he may think fit and may do such acts and exercise such powers as he might have done or exercised if this Ordinance had never been passed.

Power to add interest due to mortgage debt.

12. Notwithstanding the provisions of section 3 (3) (c) and section 8 of this Ordinance it shall be lawful for the court, in any case in which it is satisfied that, although the interest reserved by any instrument has not been paid in full, interest has been paid at a rate which in all the circumstances of the case the court deems to be reasonable, not in any case being less than half the rate reserved by the instrument, and that the covenants and provisions of the mortgage have been otherwise observed, to order that the amount due and unpaid in respect of interest be added to the mortgage or other debt, and the amount so added be deemed to be part of the principal money and shall carry interest as from the date of its being so added at the rate reserved under the instrument.

Costs.

13. In any proceedings under this Ordinance no order shall be made for the payment of costs by a mortgagor unless the court certifies that in its opinion the conduct of the mortgagor has been for the purpose of causing delay or has in any other respect been vexatious.

Order at trial.

14. Where a suit, action or other proceeding has been taken in court on any instrument, then upon the trial of any issue arising in the suit, action or proceedings, the trial Judge, whether an application has or has not been made under this Ordinance, may make an order as provided for under this Ordinance.

Powers to be additional.

15. The powers conferred by this Ordinance shall be in addition to and not in substitution for or derogation of any other powers of the court or Judge.

16. Proceedings under this Ordinance shall, so far as not expressly provided for by this Ordinance, be conducted in accordance with the ordinary practice of the Supreme Court in dealing with such matters.

Procedure.

17. Every decree, judgment, or order, foreclosure or forfeiture, made, declared or taken advantage of, distress levied, possession taken or sale by a mortgagee made in contravention of this Ordinance or of any order made thereunder shall be absolutely null and void.

Effect of contravention of Ordinance.

18. This Ordinance shall continue in force until the thirty-first day of December One thousand nine hundred and thirty-six and shall then expire.

Duration of Ordinance.

Passed in the Legislative Council the first day of August, in the year of Our Lord one thousand nine hundred and thirty-four.

This printed impression has been carefully compared by me with the Bill which passed the Legislative Council and is presented for authentication and assent as a true and correct copy of the said Bill.

J. F. C. TROUGHTON

Acting Clerk of the Legislative Council

Order granting relief to be null and void if mortgagor fails to register or pay interest

11. When an order postponing the exercise of any right or remedy has been made under any of the foregoing provisions of this Ordinance and the mortgagor—

- (a) fails to register such order as required by section 10 (1) of this Ordinance; or
 (b) during the time of such postponement fails or neglects to pay interest on or within forty-two days after the date on which such interest becomes due,

such order shall thereupon become null and void and the mortgagee may take action for the recovery of the principal sum and interest due in such manner as he may think fit and may do such acts and exercise such powers as he might have done or exercised if this Ordinance had never been passed.

Power to add interest due to mortgage debt.

12. Notwithstanding the provisions of section 3 (2) (c) and section 8 of this Ordinance it shall be lawful for the court, in any case in which it is satisfied that, although the interest reserved by any instrument has not been paid in full, interest has been paid at a rate which in all the circumstances of the case the court deems to be reasonable, not in any case being less than half the rate reserved by the instrument, and that the covenants and provisions of the mortgage have been otherwise observed, to order that the amount due and unpaid in respect of interest be added to the mortgage or other debt, and the amount so added be deemed to be part of the principal money and shall carry interest as from the date of its being so added at the rate reserved under the instrument.

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Order at trial.

14. Where a suit, action or other proceeding has been taken in court on any instrument, then upon the trial of any issue arising in the suit, action or proceedings, the trial Judge, whether an application has or has not been made under this Ordinance, may make an order as provided for under this Ordinance.

Powers to be additional.

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Procedure.

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Effect of contravention of Ordinance.

17. Every decree, judgment, or order, foreclosure or forfeiture, made, declared or taken advantage of, distress levied, possession taken or sale by a mortgagee made in contravention of this Ordinance or of any order made thereunder shall be absolutely null and void.

Duration of Ordinance.

18. This Ordinance shall continue in force until the thirty-first day of December One thousand nine hundred and thirty-six and shall then expire.

Passed in the Legislative Council the first day of August, in the year of Our Lord one thousand nine hundred and thirty-four.

This printed impression has been carefully compared by me with the Bill which passed the Legislative Council and is presented for authentication and assent as a true and correct copy of the said Bill.

J. F. C. TROUGHTON

Acting Clerk of the Legislative Council

KENYA.

No. 130

CONFIDENTIAL.

No. 130



RECEIVED
29 SEP 1934
G. O. REGY

16 12
GOVERNMENT HOUSE,
NAIROBI,
KENYA.

6.4
SEPTEMBER, 1934.

Sir,

Answer (9)

No. 12

With reference to your Confidential despatch of the 9th May I have the honour to submit two authenticated copies of Ordinance No. XXXV of 1934 entitled An Ordinance to give Further Powers to the Supreme Court with respect to the recovery of money secured by mortgages or charges and similar matters, which passed its third reading in the Legislative Council on the 1st August, 1934 and was assented to in His Majesty's name on the 27th August, together with the Legal Report in duplicate, a Comparative Table in duplicate and a copy of the Bill showing in red ink where the Ordinance deviates from the Bill sent to you with Kenya Confidential despatch No. 7 of the 12th January, 1934.

—
—

No. 2

Twelve printed copies of the Ordinance are being despatched under separate cover.

No. 2

2. The minor amendments suggested in paragraphs 5 and 6 of your despatch under reference have been included in the Ordinance and section 18 follows paragraph 9 of your despatch by making the Ordinance expire on the 31st of December 1936. In order to afford to innocent purchasers the protection suggested in paragraph 8 of your despatch, section 6(3) provides for notice of application for relief to be given to the Registrar of Titles and for subsequent Court orders to be registered with him.

See 55.10.11

3. The ...

THE RIGHT HONOURABLE

MAJOR SIR PHILIP GUNLIFYE-LISTER, F.C., G.B.E., M.C., M.P.,
SECRETARY OF STATE FOR THE COLONIES,
LONDON, ENGLAND.

No 17

3. The points raised in paragraph 7 of your despatch have been met by substituting for the former Clause 8 of the Bill, a clause modelled on section 7 of the Queensland Mortgagors' Relief Act, 1931.

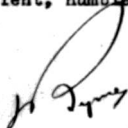
4. In order to comply with the suggestions contained in paragraph 4 of your despatch, Clause 5 of the Bill has been omitted and part of Section 4 of the Queensland enactment of 1931 has been substituted instead. The very wide definition of "immovable property" which appeared in the original Bill has also been deleted as there is already a definition in the Interpretation and General Clauses Ordinance.

5. Section 3(2)(a) has been altered to include grazing and stock-raising in the term "agriculture" and Clause 3(2)(d) referring specifically to property in Municipalities or Townships has been deleted.

I have the honour to be,

Sir,

Your most obedient, humble servant,



BRIGADIER-GENERAL
GOVERNOR.

COPY
OF
THE AGRICULTURAL MORTGAGORS' RELIEF BILL, 1934,
SHOWING IN RED INK WHERE THE PRESENT BILL
DEVIATES FROM THE ONE SENT TO THE
SECRETARY OF STATE IN KENYA
DESPATCH NO. 7 OF THE 12TH
JANUARY, 1934.

no 2.



A BILL TO GIVE FURTHER POWERS TO THE
SUPREME COURT WITH RESPECT TO THE
RECOVERY OF MONEY SECURED BY
MORTGAGES OR CHARGES AND SIMILAR
MATTERS

A Bill to Give Further Powers to the Supreme Court with respect to the Recovery of Money secured by Mortgages or Charges and Similar Matters.

BE IT ENACTED by the Governor of the Colony of Kenya, with the advice and consent of the Legislative Council thereof, as follows :—

1. This Ordinance may be cited as the Agricultural Mortgagors' Relief Ordinance, 1934. Short title.

2. In this Ordinance, unless the context otherwise requires— Interpretation.

"instrument" means any document evidencing any mortgage, or agreement of sale or purchase in respect of or affecting immovable property;

"mortgage" means any deed, memorandum of mortgage, instrument, or agreement whereby security for payment of money is granted over immovable property or any interest therein, and includes an agreement for sale and purchase of immovable property where payment of the unpaid purchase money and interest thereon is secured on such property and also includes an equitable mortgage by deposit of title deeds and any document by which the duration of the mortgage is extended or by which any provision of the mortgage is varied;

"mortgagor" means a person liable under the provisions of an instrument, and includes any person who has guaranteed the performance by the mortgagor of any covenant, condition or agreement expressed or implied in the instrument, whether such guarantee is expressed in the instrument or in any other document, and also includes any person against whom a mortgagor has a legal or equitable right of indemnity in respect of any liabilities under the instrument;

"mortgagee" means the person, entitled to the benefit of the security of the instrument, and includes every person whose powers are restricted by the provisions of this Ordinance;

"principal money" includes principal money which by the terms of any instrument is payable in-one sum or by instalments with or without interest payments added thereto or combined therewith, but does not include money payable as rent.

Application
of Ordinance.

3. (1) The Crown shall be bound by the provisions of this Ordinance, and the word "person" where used in this Ordinance shall include the Crown.

(2) This Ordinance shall not apply to—

- (a) any instrument affecting immovable property which is not occupied or used mainly for the purposes of agriculture, which term shall for the purposes of this Ordinance be deemed to include grazing and stock raising;
- (b) money payable in respect of premiums of insurance or taxes or arrears of taxes, including arrears which may under any instrument be capitalized or added to or form part of the principal money payable thereunder, and whether the same is payable before or after the commencement of this Ordinance;
- (c) simple interest or money payable in respect of interest or arrears of interest which may under the terms of any instrument be payable under a plan by which interest and principal payments are combined, or if in arrears be capitalized or added to or form part of the principal money payable thereunder, and whether the same is payable before or after the commencement of this Ordinance;
- (4) ~~And~~ any instrument affecting immovable property situate outside the Colony;
- (e) any instrument affecting immovable property made or created after the commencement of this Ordinance.

Ordinance to
apply to
Chattels
Transfer
Ordinance.
No. 24 of
1930.

4. The provisions of this Ordinance shall apply to an instrument under the Chattels Transfer Ordinance, 1930, given on the security of crops, stock and other chattels normally used in the course of farming operations as if such instrument were an instrument affecting immovable property.

5. (1) Notwithstanding the provisions of the Indian Transfer of Property Act, 1882, as applied to the Colony, it shall not be lawful for a mortgagee under a mortgage to which this Ordinance applies or any other person—

- (a) to exercise (except in respect of property which the mortgagor has abandoned) any power of sale, rescission, or entry into possession conferred by any such mortgage or by statute; or
- (b) to issue or to be concerned in the issue of any process of execution in pursuance of any judgment, decree, or order of any court in its civil jurisdiction obtained against the mortgagor after the commencement of this Ordinance in respect of any covenant, condition or agreement expressed or implied in the mortgage, or to continue or to be concerned in the continuance of any such process of execution;
- (c) to file a bankruptcy petition against the mortgagor in respect of any debt arising out of any covenant, condition or agreement expressed or implied in the mortgage.

otherwise than subject to and in accordance with the provisions of this Ordinance.

(2) For the purposes of this Ordinance, the exercise of a power of sale shall be deemed to be completed when the vendor becomes bound by an agreement or contract of sale, and the onus of proving that any immovable property has been abandoned by a mortgagor shall rest upon the mortgagee.

6. (1) A mortgagee before proceeding to do any such act or exercise any such power as is defined in the last preceding section shall give to the mortgagor notice in writing of his intention to do such act or exercise such power.

Notice by
mortgagee of
intention to
exercise
powers.

(2) Such notice shall contain an address for service, and shall be signed by the mortgagee, or by some duly authorized attorney or agent of the mortgagee, and shall be deemed to be duly given if delivered to the mortgagor personally, or if posted by registered letter addressed to the mortgagor at his last known place of abode in the Colony. A notice so posted shall be deemed to have been given seven days after the time when the registered letter would be delivered in the ordinary course of post.

"mortgagee" means the person entitled to the benefit of the security of the instrument, and includes every person whose powers are restricted by the provisions of this Ordinance;

"principal money" includes principal money which by the terms of any instrument is payable in one sum or by instalments with or without interest payments added thereto or combined therewith, but does not include money payable as rent.

Application
of Ordinance.

3. (1) The Crown shall be bound by the provisions of this Ordinance, and the word "person" where used in this Ordinance shall include the Crown.

(2) This Ordinance shall not apply to—

- (a) any instrument affecting immovable property which is not occupied or used mainly for the purposes of agriculture, which term shall for the purposes of this Ordinance be deemed to include grazing and stock raising;
- (b) money payable in respect of premiums of insurance or taxes or arrears of taxes, including arrears which may under any instrument be capitalized or added to or form part of the principal money payable thereunder, and whether the same is payable before or after the commencement of this Ordinance;
- (c) simple interest or money payable in respect of interest or arrears of interest which may under the terms of any instrument be payable under a plan by which interest and principal payments are combined, or if in arrears be capitalized or added to or form part of the principal money payable thereunder, and whether the same is payable before or after the commencement of this Ordinance;
- (d) any instrument affecting immovable property situate outside the Colony;
- (e) any instrument affecting immovable property made or created after the commencement of this Ordinance.

Ordinance to
apply to
Chattels
Transfer
Ordinance,
No. 24 of
1930.

4. The provisions of this Ordinance shall apply to an instrument under the Chattels Transfer Ordinance, 1930, given on the security of crops, stock and other chattels normally used in the course of farming operations as if such instrument were an instrument affecting immovable property.

5. (1) Notwithstanding the provisions of the Indian Prohibition of Property Act, 1882, as applied to the Colony, it shall not be lawful for a mortgagee under a mortgage to which this Ordinance applies or any other person—

- (a) to exercise (except in respect of property which the mortgagor has abandoned) any power of sale, rescission, or entry into possession conferred by any such mortgage or by statute; or
- (b) to issue or to be concerned in the issue of any process of execution in pursuance of any judgment, decree, or order of any court in its civil jurisdiction obtained against the mortgagor after the commencement of this Ordinance in respect of any covenant, condition or agreement expressed or implied in the mortgage, or to continue or to be concerned in the continuance of any such process of execution;
- (c) to file a bankruptcy petition against the mortgagor in respect of any debt arising out of any covenant, condition or agreement expressed or implied in the mortgage;

otherwise than subject to and in accordance with the provisions of this Ordinance.

(2) For the purposes of this Ordinance, the exercise of a power of sale shall be deemed to be completed when the vendor becomes bound by an agreement or contract of sale, and the onus of proving that any immovable property has been abandoned by a mortgagor shall rest upon the mortgagee.

6. (1) A mortgagee before proceeding to do any such act or exercise any such power as is defined in the last preceding section shall give to the mortgagor notice in writing of his intention to do such act or exercise such power.

Notice by
mortgagee of
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(2) Such notice shall contain an address for service, and shall be signed by the mortgagee, or by some duly authorized attorney or agent of the mortgagee, and shall be deemed to be duly given if delivered to the mortgagor personally, or if posted by registered letter addressed to the mortgagor at his last known place of abode in the Colony. A notice so posted shall be deemed to have been given seven days after the time when the registered letter would be delivered in the ordinary course of post.

(3) If the mortgagor does not within one month after the giving of such notice apply to the Supreme Court for relief as hereinafter provided, and serve a copy of such application on the mortgagee, and on the Registrar of Titles, the mortgagee may on the expiration of the said month proceed to do such act or exercise such powers as aforesaid.

(4) If the mortgagor makes such application and serves a copy thereof in accordance with the last preceding sub-section the mortgagee shall not do such act or exercise such power until such application has been withdrawn or *until the application* has been disposed of by the Supreme Court, otherwise than subject to and in accordance with any order made by the Supreme Court as hereinafter provided.

Procedure.

7. (1) An application by a mortgagor under this Ordinance shall be by motion on notice supported by affidavit, and shall state the date on which such notice as aforesaid was given by the mortgagor, the specific grounds on which relief is sought and whether copies of the application have been served on the mortgagee and on the Registrar of Titles.

(2) An application under this Ordinance may be made to and disposed of by a Judge in Chambers.

(3) The Judge may give directions as to the service of notice of the hearing of the application upon any person whom he deems a proper party to the proceedings, and may adjourn the hearing for that purpose, or he may, if he considers that service of the notice would occasion useless or unnecessary expense or delay, dispense with service of notice of the application upon any party who appears to have abandoned his interest in the immovable property.

(4) No appeal shall lie from any order made under this Ordinance.

Matters to be considered by Supreme Court on application by mortgagor.

8. (1) In determining whether relief against the doing of any act or the exercise of any powers as aforesaid by the mortgagee shall be granted to the mortgagor, the Supreme Court shall take into consideration—

- (a) the effect of the continuance of the mortgage upon the security thereby afforded to the mortgagee;
- (b) the inability of the mortgagor to redeem the property either from his own moneys or by borrowing at a reasonable rate of interest;

- (c) the conduct of the mortgagor in respect of any breaches by him of the covenants of the mortgage;
- (d) any hardship that would be inflicted on the mortgagee by the continuance of the mortgage or upon the mortgagor by the enforcement thereof;
- (e) the extent to which any default by the mortgagor has been caused by any economic or financial conditions affecting trade or industry in the Colony;
- (f) whether any relief granted by the court pursuant to this Ordinance would be reasonably likely to enable the mortgagor, having regard to his circumstances and the conditions mentioned in the last preceding paragraph, to meet his liabilities under the mortgage within such time as the court deems reasonable;
- (g) any other relevant consideration.

(2) If the court, being satisfied regarding the matters mentioned in the first sub-section of this section and, having regard to all other relevant considerations is of opinion that relief should be granted to the mortgagor, it may, in its absolute discretion, order that the mortgagee shall not, before a date specified in such order (being not later than twelve months after the date of the mortgagor's application for relief), do any act or exercise any power mentioned in section 5 of this Ordinance.

Nature of relief that may be granted by court.

Provided that no such order shall operate to postpone the exercise of any right or remedy to a date subsequent to the expiry of this Ordinance.

9. Subject to the provisions of this Ordinance, the order may be upon such terms, conditions and limitations, including the giving of any undertaking, the depositing in court or otherwise of any security, the appointment of a receiver, the granting of an injunction, and the reservation of leave to apply to vary the same as the Judge may deem proper.

Scope of order.

10. (1) Every order of the court made under this Ordinance shall be registered by the mortgagor with the Registrar of Titles within seven days of the making of the order and no fee shall be chargeable in respect of such registration.

Registration of court orders.

(2) The Registrar of Titles shall cause a register to be kept containing the particulars of all orders so registered and such register shall, at all reasonable times, be open to inspection by any person without fee.

(3) If the mortgagor does not within one month after the giving of such notice apply to the Supreme Court for relief as hereinafter provided, and serve a copy of such application on the mortgagee, and on the Registrar of Titles, the mortgagee may on the expiration of the said month proceed to do such act or exercise such powers as aforesaid.

(4) If the mortgagor makes such application and serves a copy thereof in accordance with the last preceding sub-section the mortgagor shall not do such act or exercise such power ^{until the application} ~~unless such application has been withdrawn or~~ has been disposed of by the Supreme Court, otherwise than subject to and in accordance with any order made by the Supreme Court as hereinafter provided.

Procedure.

7. (1) An application by a mortgagor under this Ordinance shall be by motion on notice supported by affidavit, and shall state the date on which such notice as aforesaid was given by the mortgagor, the specific grounds on which relief is sought, and whether copies of the application have been served on the mortgagee and on the Registrar of Titles.

(2) An application under this Ordinance may be made to and disposed of by a Judge in Chambers.

(3) The Judge may give directions as to the service of notice of the hearing of the application upon any person whom he deems a proper party to the proceedings, and may adjourn the hearing for that purpose, or he may, if he considers that service of the notice would occasion useless or unnecessary expense or delay, dispense with service of notice of the application upon any party who appears to have abandoned his interest in the immovable property.

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- (a) the effect of the continuance of the mortgage upon the security thereby afforded to the mortgagee;
- (b) the inability of the mortgagor to redeem the property either from his own moneys or by borrowing at a reasonable rate of interest;

(c) the conduct of the mortgagor in respect of any breaches by him of the covenants of the mortgage;

(d) any hardship that would be inflicted on the mortgagee by the continuance of the mortgage or upon the mortgagor by the enforcement thereof;

(e) the extent to which any default by the mortgagor has been caused by any economic or financial conditions affecting trade or industry in the Colony;

(f) whether any relief granted by the court pursuant to this Ordinance would be reasonably likely to enable the mortgagor, having regard to his circumstances and the conditions mentioned in the last preceding paragraph, to meet his liabilities under the mortgage within such time as the court deems reasonable;

(g) any other relevant consideration.

(2) If the court, being satisfied regarding the matters mentioned in the first sub-section of this section and, having regard to all other relevant considerations is of opinion that relief should be granted to the mortgagor, it may, in its absolute discretion, order that the mortgagee shall not, before a date specified in such order (being not later than twelve months after the date of the mortgagor's application for relief), do any act or exercise any power mentioned in section 5 of this Ordinance.

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Provided that no such order shall operate to postpone the exercise of any right or remedy to a date subsequent to the expiry of this Ordinance.

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Registration of court orders.

(2) The Registrar of Titles shall cause a register to be kept containing the particulars of all orders so registered and such register shall, at all reasonable times, be open to inspection by any person without fee.

Order granting relief to be null and void if mortgagor fails to register or pay interest.

11. When an order postponing the exercise of any right or remedy has been made under any of the foregoing provisions of this Ordinance and the mortgagor—

- (a) fails to register such order as required by section 10 (1) of this Ordinance; or
 (b) during the time of such postponement fails or neglects to pay interest on or within forty-two days after the date on which such interest becomes due,

such order shall thereupon become null and void and the mortgagor may take action for the recovery of the principal sum and interest due in such manner as he may think fit and may do such acts and exercise such powers as he might have done or exercised if this Ordinance had never been passed.

Power to add interest due to mortgage debt.

12. Notwithstanding the provisions of section 3 (2) (c) and section 8 of this Ordinance it shall be lawful for the court, in any case in which it is satisfied that, although the interest reserved by any instrument has not been paid in full, interest has been paid at a rate which in all the circumstances of the case the court deems to be reasonable, not in any case being less than half the rate reserved by the instrument, and that the covenants and provisions of the mortgage have been otherwise observed, to order that the amount due and unpaid in respect of interest be added to the mortgage or other debt, and the amount so added be deemed to be part of the principal money and shall carry interest as from the date of its being so added at the rate reserved under the instrument.

Costs.

13. In any proceedings under this Ordinance no order shall be made for the payment of costs by a mortgagor unless the court certifies that in its opinion the conduct of the mortgagor has been for the purpose of causing delay or has in any other respect been vexatious.

Order at trial.

14. Where a suit, action or other proceeding has been taken in court on any instrument, then upon the trial of any issue arising in the suit, action or proceedings, the trial Judge, whether an application has or has not been made under this Ordinance, may make an order as provided for under this Ordinance.

Powers to be additional.

15. The powers conferred by this Ordinance shall be in addition to and not in substitution for or derogation of any other powers of the court or Judge.

16. Proceedings under this Ordinance shall, so far as not expressly provided for by this Ordinance, be conducted in accordance with the ordinary practice of the Supreme Court in dealing with such matters. Procedure.

17. Every decree, judgment, or order, foreclosure or forfeiture, made, declared or taken advantage of, distress levied, possession taken or sale by a mortgagor made in contravention of this Ordinance or of any order made thereunder shall be absolutely null and void. Effect of contravention of Ordinance.

18. This Ordinance shall continue in force until the thirty-first day of December, One thousand nine hundred and thirty-six and shall then expire. Duration of Ordinance.

OBJECTS AND REASONS.

This Bill is designed, in view of the present financial circumstances of the Colony, to protect the interests of and to afford reasonable security of tenure to the agricultural community in Kenya.

A Committee was appointed in 1933 to consider what legislative measures, if any, were necessary for this purpose. The Bill, which follows similar legislation in other parts of the Empire, is founded on the Committee's report and on the recommendations of the Secretary of State.

The main provisions of the Bill ensure that the holder of a mortgage on agricultural property shall not foreclose or take action for recovery without first giving notice to the mortgagor. The mortgagor upon receipt of such notice is enabled to apply to the court for relief.

No expenditure of public moneys will be involved if the provisions of this Bill become law.

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11. When an order postponing the exercise of any right or remedy has been made under any of the foregoing provisions of this Ordinance and the mortgagor—

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 (b) during the time of such postponement fails or neglects to pay interest on or within forty-two days after the date on which such interest becomes due.

such order shall thereupon become null and void and the mortgagor may take action for the recovery of the principal sum and interest due in such manner as he may think fit and may do such acts and exercise such powers as he might have done or exercised if this Ordinance had never been passed.

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17. Every decree, judgment, or order, foreclosure or forfeiture, made, declared or taken advantage of, distress levied, possession taken or sale by a mortgagor made in contravention of this Ordinance or of any order made thereunder shall be absolutely null and void. Effect of contravention of Ordinance

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OBJECTS AND REASONS.

This Bill is designed, in view of the present financial circumstances of the Colony, to protect the interests of and to afford reasonable security of tenure to the agricultural community in Kenya.

A Committee was appointed in 1933 to consider what legislative measures, if any, were necessary for this purpose. The Bill, which follows similar legislation in other parts of the Empire, is founded on the Committee's report and on the recommendations of the Secretary of State.

The main provisions of the Bill ensure that the holder of a mortgage on agricultural property shall not foreclose or take action for recovery without first giving notice to the mortgagor. The mortgagor upon receipt of such notice is enabled to apply to the court for relief.

No expenditure of public moneys will be involved if the provisions of this Bill become law.

LEGAL REPORT.

THE AGRICULTURAL MORTGAGORS' RELIEF BILL, 1954.

This Bill is designed, in view of the present financial circumstances of the Colony, to protect the interests of and to afford reasonable security of tenure to the agricultural community in Kenya.

A Committee was appointed in 1953 to consider what legislative measures, if any, were necessary for this purpose. The Bill, which follows similar legislation in other parts of the Empire, is founded on the Committee's report and on the recommendations of the Secretary of State.

The main provisions of the Bill ensure that the holder of a mortgage on agricultural property shall not foreclose or take action for recovery without first giving notice to the mortgagor. The mortgagor upon receipt of such notice is enabled to apply to the court for relief.

No 2

A copy of the Bill showing in red ink where the present Bill deviates from the one sent to the Secretary of State in Kenya Despatch No.7 of the 12th January, 1954, together with a Comparative Table is attached.

In my opinion, His Excellency the Governor may properly assent to this Bill in the name and on behalf of His Majesty.

Nairobi,

SOLICITOR GENERAL.

2nd August, 1954.

COMPARATIVE TABLE.

THE AGRICULTURAL MORTGAGORS' RELIEF BILL, 1954.

Clause of the Bill.	Remarks.
1	Short title.
2 "instrument"	Cf. Section 2 of the British Columbia Act No. 55 of 1952.
"mortgage"	Cf. Section 2 of the Queensland Act No. 6 of 1951 as amended by Act No. 10 of 1952.
"mortgagor"	Cf. Section 2 -do-
"mortgagee"	Cf. Section 2 -do-
"principal money"	Cf. Section 2 of the British Columbia Act No. 55 of 1952.
5 (1)	Section 5(1) -do-
(2) (a)	New.
(b)	Section 5 (2) (c) -do-
(c)	Section 5 (2) (d) -do-
(d) and (e)	Section 5 (2) (e) -do-
4	New.
5 (1) (a) and (b)	Section 4 of the Queensland Act No. 6 of 1951.
(c)	Section 4 (1) (c) of the New Zealand Act No. 5 of 1951.
(2)	Section 4 (2) of the Queensland Act No. 6 of 1951.
6	Section 5 -do-
7	Cf. Section 10 -do-
8 (1)	Cf. Section 7 -do-
(2)	Cf. Section 8 of the New Zealand Act No. 5 of 1951.
9	Section 7 of the British Columbia Act No. 55 of 1952.
10	New.
11	New.
12	New.
13	Cf. New Zealand Act No. 47 of 1951, Section 15 amended by Section 13 of Act No. 1 of 1952.

COMPARATIVE TABLE.

THE AGRICULTURAL MORTGAGORS' RELIEF BILL, 1954.

Clause of the Bill.	Remarks.
1	Short title.
2 "instrument"	Cf. Section 2 of the British Columbia Act No. 55 of 1952.
"mortgage"	Cf. Section 2 of the Queensland Act No. 6 of 1951 as amended by Act No. 10 of 1952.
"mortgagor"	Cf. Section 2 -do-
"mortgagee"	Cf. Section 2 -do-
"principal money"	Cf. Section 2 of the British Columbia Act No. 55 of 1952.
5 (1)	Section 5(1) -do-
(2) (a)	New.
(b)	Section 5 (2) (c) -do-
(c)	Section 5 (2) (d) -do-
(d) and (e)	Section 5 (2) (e) -do-
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5 (1) (a) and (b)	Section 4 of the Queensland Act No. 6 of 1951.
(c)	Section 4 (1) (c) of the New Zealand Act No. 5 of 1951.
(2)	Section 4 (2) of the Queensland Act No. 6 of 1951.
6	Section 5 -do-
7	Cf. Section 10 -do-
8 (1)	Cf. Section 7 -do-
(2)	Cf. Section 8 of the New Zealand Act No. 5 of 1951.
9	Section 7 of the British Columbia Act No. 55 of 1952.
10	New.
11	New.
12	New.
13	Cf. New Zealand Act No. 47 of 1951, Section 15 as amended by Section 18 of Act No. 1 of 1952.

Clause of the Bill.	Remarks.
14	Section 9 of the British Columbia Act No. 55 of 1952.
15	Section 10 -do-
16	Section 11 -do-
17	Section 12 -do-
18	New.

15 34



THE SECRETARIAT,
NAIROBI,
KENYA.

RECEIVED
- 3 SEP 1934
C. O. REGY

WHEN REPLYING
PLEASE QUOTE
No. S
AND DATE

D/Leg.Co.26/3/5/34

6th August, 1934.

The Colonial Secretary of the Colony and Protectorate of Kenya presents his compliments to the Under Secretary of State for the Colonies and has the honour to transmit for information twelve copies of each of the undermentioned publications: -

Report of the Select Committee upon the provisions of a Bill to give further powers to the Supreme Court with respect to the recovery of money secured by mortgages or charges and similar matters.

23026/34 Report of the Select Committee on a Bill to provide for the Removal and Settlement of Laibens.

23034/7/34 Report of the Select Committee on a Bill to Amend the Native Lands Trust Ordinance, 1930.

23274/34 Report of the Select Committee on a Bill to Amend the Police Ordinance, 1930.

23202/34 Report of the Select Committee on a Bill to Amend the Electric Power Ordinance.

23270/34 Report of the Select Committee on a Bill to Amend the Traffic Ordinance, 1928.

23040/34 Report of the Select Committee on a Bill to Provide for the Levy of a Native Hut and Poll Tax.

23109/1/34 Report of the Standing Finance Committee on the Schedule of Additional Provision No. 2 of 1934, and the Schedule of Additional Expenditure not included in Schedule of Additional Provision No. 2 of 1934.

R E P O R T
 O F
 THE SELECT COMMITTEE OF THE LEGISLATIVE
 COUNCIL APPOINTED TO CONSIDER AND REPORT
 UPON THE PROVISIONS OF A BILL TO GIVE
 FURTHER POWERS TO THE SUPREME COURT
 WITH RESPECT TO THE RECOVERY OF
 MONEY SECURED BY MORTGAGES OR CHARGES
 AND SIMILAR MATTERS.

Your Excellency,

We, the members of the Select Committee of the Legislative Council appointed to consider and report on the provisions of the above Bill, have the honour to recommend that the Bill be amended by the substitution of the word "shall" for the word "may" which occurs in the fourth line of sub-clause (1) of Clause 8.

We have the honour to be,
 Your Excellency's
 obedient servants,

- | | |
|---------------------|------------|
| SD. W. HARRAGIN | (CHAIRMAN) |
| SD. G. WALSH | (MEMBER) |
| SD. H. B. WATERS | (MEMBER) |
| SD. R. de V. SHAW | (MEMBER) |
| SD. A. C. TANNAHILL | (MEMBER) |
| SD. E. H. WRIGHT | (MEMBER) |
| SD. J. B. PANDYA | (MEMBER) |

Nairobi,
 27th July, 1934.

*Extract from Record of an Interview between the
S. of S. & E. Union Elected Members of Leg. Council on 11/10/1936*

LORD FRANCIS SCOTT. We want these to be put up, Sir, but we understood there is great difficulty in getting any money at home which would be required. The Land Bank has put up a scheme - no doubt the Government have shown it to you - in which they asked for half a million extra, and then there is this other question of evolving some scheme for relieving mortgagors from the danger of foreclosing.

SECRETARY OF STATE. I am going to deal with that.

LORD FRANCIS SCOTT. That deals with rather a larger question. The point really is that we have got to a stage now when farmers are in a very difficult position, when mortgagees are beginning to foreclose very rapidly on farmers, and we want to try and devise some scheme.

SECRETARY OF STATE. Is there a great deal of foreclosure going on?

LORD FRANCIS SCOTT. I cannot answer with the figures.

SECRETARY OF STATE. On what kind of land?

LORD FRANCIS SCOTT. On agricultural land.

CAPT. COTTER. This is my statement, Sir. There are two a week. I understand there are at least two seizures of the mortgage holder; for instance, if a man is taken to Court for a mortgage he has his expenses. Instead of foreclosing, the custom now is seizing.

CAPT. SCHWARTZ. There has been in the last six months a considerable advance in seizures.

SECRETARY OF STATE. We must talk business. Is your proposition that the general taxpayer - because it is no good talking about the State - should come in and pay off the mortgage where the mortgagee is threatening to foreclose? That is the most amazing proposition that has ever been made to any Government in my own experience. I know cases at home where shareholders have lost every farthing they possess. I have constituents who have lost every farthing; men - some of them were well-off, and were also occupying positions of trust and responsibility, expected to continue almost indefinitely - who are literally living on relief to-day. It has never been advanced

advanced as a proposition that because a man has lost the money which he has invested, the taxpayer should come forward and re-finance him.

LORD FRANCIS SCOTT. The idea is to find a method by which these short-term mortgages might be changed on to a long-term basis or something of that sort under an amortization scheme. I would not like to commit myself definitely to any one scheme, because, as you say, these are matters which have to be carefully explored.

SECRETARY OF STATE. It is a tremendous proposition, but it does come to this - what you are proposing is that the Government (that is, the taxpayer) should take over the mortgage. Is that your proposition?

CAPT. COTTER. If you are referring to me, Sir, that is not my proposition at all. I have taken some trouble to study what has happened in other Colonies - in New Zealand they have had a relief Bill which brings down the amount of their mortgage to exactly half.

SECRETARY OF STATE. There has been some legislation about reducing the rate of interest, but I am told - I have discussed this matter with the Banks - that in the case of mortgages ~~who are not paying the interest on their mortgages~~ there is no case where a Bank would not be only too anxious to come to a reasonable accommodation.

CAPT. COTTER. In New Zealand, which is our great competitor more than any other country.....

SECRETARY OF STATE. I must say absolutely that I cannot, and it is no good my pretending - it would not be tolerated for a moment in the Cabinet at home - that I should go and put forward proposals of a kind which we have entirely rejected in our own country. If I put that forward, with all my influence I have not a dog's chance of getting it accepted.

LORD FRANCIS SCOTT. I am not proposing as a definite thing that the Land Bank should deal with this sort of thing, but they have dealt with it in Northern Rhodesia. They have given notice that onerous mortgages which carried a rate of interest of 9%, then 8% and 7% should be reduced; it came down by degrees with the Land Bank in Northern Rhodesia. That was one method they adopted and of course Captain Cotter has mentioned New Zealand which is another.

SECRETARY OF STATE. I think the Land Banks would be perfectly ready to adjust things if there was any question of accommodation.

LORD FRANCIS SCOTT. It is not only the Banks - there are also companies.

CAPT. COTTER. It is the principle involved. Where a man by his own misjudgment, bad behaviour or bad farming has got into a position from which he cannot recover, I am the last man in the world to suggest that he should have any help at all, but at least sixty per cent of the farmers in this country will be sold out eventually through circumstances over which they have no control. For

instance, we pass a Bill here - the East African Currency Enabling Bill; the state of the trade of this Colony had become so bad and the run on the shilling was so great that the Currency Board, unless it had a loan, had become bankrupt. Under that Bill it had the right to borrow and that makes it solvent. Because it had the right to borrow, naturally people did not run away from the shilling any more.

CAPT. SCHWARTZ:

Most
~~Nearly every~~ mortgagee in

Key this Colony would be only too pleased to be relieved of that mortgage at a ~~very~~ ~~great~~ discount and if we could thus get the debts on farms reduced by a very large proportion of the capital amount, and at the same time have a rate of interest fixed for the debtor farmer at much less than at present, the whole picture would, in my view, be completely altered by the relief to agriculture; to ask the taxpayer temporarily to put up the money is asking him to make an investment.

SECRETARY OF STATE:

Would any outsider make the investment?

CAPT. SCHWARTZ:

If the money could be found

I am not at all certain they would not. Actually there was a suggestion at home as far back as 1931 and the possibility was discussed of getting some Mortgage Investment Company to do that; but of course the difficulty is the large amount which would be required. I am not putting any concrete scheme up, but if it could be worked by some system of the issue of bonds there would be no need to borrow the full amount or more than 30 per cent. You would change your short-term mortgages into long-term mortgages - frozen credit - the mortgagees get out at a small rate of interest on their bonds instead of having a paper big rate of interest and frozen capital. I do think it is worth considering.

LORD FRANCIS SCOTT:

We are not putting a definite

scheme up to you. We are not asking you to commit yourself to a definite scheme, but if we can evolve some scheme here which is a reasonably sound scheme we should have your sympathetic help; that is the broad principle of the

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CAPT. SCHWARTZ.

Mont

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12

C. O.

- Mr. Flood. 17.4
- Mr. Roberts way 19.4
- Mr.
- Mr. Parkinson.
- Mr. Tomlinson.
- X Sir C. Bottomley. 20.4
- Sir J. Shuckburgh.
- + Perm. U.S. of S. 20.4
- Parly. U.S. of S.
- X Secretary of State.

Please see minutes.

5 MAY 1934

Amended No 16

9 May 1934

Handwritten initials and number: *PM*
575

DRAFT. for conon.

KENYA

CONFIDENTIAL

GOV.

Large handwritten mark consisting of two diagonal lines forming an 'X' shape.

FURTHER ACTION.

I have, etc., to refer to your confidential dispatch of the 12th January in which you reported the draft of a Bill to give to the Supreme Court with respect to the recovery of money, interest, costs or charges and similar matters.

2. I have not had an opportunity of considering the draft Bill and I am advised that there is little reason to anticipate that its enactment would have any serious effect upon the credit of the Colony as a whole. The Colony's credit on the public market depends upon the general confidence of the investor, who is governed by such matters as the ability of the Colony to balance its budget year by year, and

to maintain reserve funds of a more or less substantial amount, and ^{4/}the fact that the Colony has not defaulted at any time in its interest payments on loans. At the same time it would be idle to deny that a measure to restrict the rights of mortgagees might have an adverse effect upon the credit of the individual settler, since an intending mortgagee might argue that if a simple measure of relief such as the one under consideration can be introduced now, much more drastic interference might take place at some future date should mortgagors find themselves in an increasingly difficult position. That risk, however, must be faced if any proposal of the kind under consideration is to be adopted. Precedents for such legislation do exist in certain of the self-reversing Dominions. Somewhat

C. O.

Mr.

Mr.

Mr.

Mr. Parkinson.

Mr. Tomlinson.

Sir C. Bottomley.

Sir J. Shuckburgh.

Parlt. U.S. of S.

Parly. U.S. of S.

Secretary of State.

DRAFT.

FURTHER ACTION.

40
similar enactments are to be found in New Zealand, Queensland, South Australia, and Western Australia and in certain of the provinces of Canada, ~~such as~~ ^{namely} Nova Scotia, British Columbia, and Ontario, and I enclose, for your information, copies of the relevant Acts in New Zealand and Queensland which may prove of assistance in framing local legislation.

4. With regard to the details of the draft Bill enclosed in your despatch I think that some comment is desirable. As drafted, the Bill would appear to prevent the enforcement of any contract of sale whether by means of forfeiture of deposit or by proceedings for the recovery of purchase price or for specific performance. I am sure that this ~~can hardly~~ ^{cannot} have been intended and ~~I presume that~~ ^{without} steps ~~will be~~ ^{will no doubt} taken to alter the Bill in this

is respect before it is introduced
to Council.

5. I see no objection
making the Bill binding on
the Crown, but I would suggest
that in ^{Clause} Section 3(1) the words

"the Crown" should be substituted
for the words "His Majesty" as being
the more usual phrase.

6. In Clause 8(4) there
appears to be no provision for the
case in which proceedings have been
instituted but have been discontinued
and I suggested that it would be improved
by the insertion of the words "has been
withdrawn or" after the word "application"
at the beginning of the ^{first} line of
the draft.

7. ~~With regard to~~ ^{Clause} para. 8,
which prescribes the matters to be
considered by the Court on the
application of the mortgagor, I note
~~that an essential condition for~~

C. O.

- Mr.
- Mr.
- Mr.
- Mr. Parkinson.
- Mr. Tomlinson.
- Sir C. Bottomley.
- Sir J. Shuckburgh.
- Permd. U.S. of S.
- Parly. U.S. of S.
- Secretary of State.

DRAFT.

FURTHER ACTION.

4
~~relief is that the mortgagor shall
have observed all the covenants
and provisions in the instrument except
the covenant for the payment of the
original money~~ ^{It should in practice serve to}
~~but the clause as~~ ^{restrict the grant of relief to deserving cases. The}
~~clause as~~ ^{however}
drafted does not appear to give
much guidance to the Court as to the
manner in which its discretion is to
be exercised.

8. Clause 16 provides that
any proceeding in contravention of
the Ordinance or of any Order made
thereunder shall be absolutely null
and void, but it is possible that
~~you would consider~~ ^{you would} that a saving
clause is required to protect an
innocent purchaser.

9. Clause 18 provides that
the Ordinance shall remain in force
until the end of this year, but it
may be extended by proclamation until
a date to be fixed. No provision
is laid down as to the limit of any

such extension and it would in theory be possible to extend it for some long period, or even indefinitely. I do not think that such a provision is altogether satisfactory and it might be preferable to fix a longer initial period for the Ordinance to remain in force and then leave it to be ~~renewed by the ordinary process of legislation~~ ^{extended by further Ordinances} should the necessity arise.

10. In short, I have no objection to offer to the enactment of an Ordinance on the lines suggested, but it is for consideration whether the draft submitted in your despatch should not be substantially amended before its introduction into Council. I do not consider that such an enactment would have any serious effect upon the credit of the

C. O.

- Mr.
- Mr.
- Mr.
- Mr. Parkinson.
- Mr. Tomlinson.
- Sir C. Bottomley.
- Sir J. Stuckburgh.
- Parlt. U.S. of S.
- Parly. U.S. of S.
- Secretary of State.

Colony as a whole and no doubt your advisers have fully considered its result upon the credit of the individual mortgagor.

I have, etc.,

(Sgd.) P. CUNLIFFE-LISTER

DRAFT.

FURTHER ACTION.

Mr. Houston 23/11
Mr. Wood 23 actual

Mr. Tomlinson
Sir C. Blomley
Sir J. Shackburgh
Sir G. Gindoff
Parad. U.S. of S.
Parly. U.S. of S.
Secretary of State

DRAFT Tali

Gov. Maundi

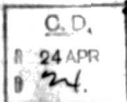
Pf. to the Board
- or -

Kanya

Coded + Sent

8m

~~See~~



23/4/34

Conf No 109

Your dep. 12th Jan. N:7

Conf. I am prepared to

approve Mortgage Bill

Bill in principle, but there
are some details on which

I shall address you shortly

Dominion precedents for legislation of this kind are to be found in South Africa, New Zealand, Queensland, South Australia, Western Australia, Nova Scotia, Ontario and British Columbia.

The South African legislation is in a different form from that adopted in the other cases, because its purpose is not to stop dealings in mortgages and foreclosures, but to bring down the interest. To this end it prescribes in Section 6 that any interest over 5 per cent on a farm mortgage is confiscated to the State, and it allows a subsidy not exceeding $1\frac{1}{2}$ per cent to be paid by the Government towards the interest on farm mortgages. The result of that is that the mortgagor gets his money for $3\frac{1}{2}$ per cent and the mortgagee gets 5 per cent, the difference being made up by the State.

Kenya has not suggested following this form of legislation. From the wording of Sections 8 and 9 of the draft Kenya Ordinance I suspect that New Zealand or Queensland have been taken as the model.

N.Z., Queensland, & S. Australia

In the Australian laws the system adopted is to prescribe that the mortgagee shall only exercise his powers after giving notice to the mortgagor, who may apply to the Court for a stay of execution. In the Canadian legislation, the procedure is reversed, and it is laid down that the mortgagee may not take proceedings without the leave of the court. In other words in the Australian/New Zealand laws the mortgagor has to apply for relief, while in the Canadian law the mortgagee has to go to court for permission to proceed.

With regard to proceedings against the Crown, there are curious differences. The South Australia Act definitely says that it does not apply

to mortgages entered into with the Crown (Section 3). The New Zealand Act (Section 13) says that the Act does apply to the Crown. The Queensland Act (Section 2 subsection 5) does not apply to the Crown nor does the Western Australian Act (Section 3).

It looks very much as if Kenya were following either the New Zealand or the Queensland Acts. The New Zealand Act is the earlier and from the preamble to the Queensland Act it looks as if they had followed New Zealand.

I think that it is quite clear from Section 10 of the draft Kenya enactment that relief (can only be) given on condition that the interest is paid. That Section provides that when an order has been made postponing foreclosure and the mortgagor fails on all debts to pay interest within 6 weeks of the date on which it becomes due the order is void and the mortgagee can take proceedings as if it had never been made. Section 11 gives the Court discretion where interest has been paid at a rate which is considered reasonable, not being less than half the rate provided by the mortgage, to order that unpaid interest shall be added to the principal and bear interest at the prescribed rate. This would have the effect of enabling the Court to give relief even where interest had not been paid in full.

I am not sure what the exact effect of Section 12 is meant to be. It may be the intention that no costs at all shall be payable by either party and from the fact that applications may be heard by a Judge in chambers it looks to me as if the intention was that both parties should have to

meet their own costs, if any, except that the Court might order a vexatious mortgagee to pay costs. The Dominion enactments where they mention costs at all vary. Queensland (Section 16) leaves the matter at the absolute discretion of the Court. South Australia says that procedure shall be under one of their local Acts, which Act probably provides for costs though I have not looked it up to see. Western Australia (Section 14) says definitely that no costs shall be ordered against any party to an application, but it gives the Court power to award costs against a party who has unsuccessfully and unreasonably made an application after the refusal of a previous application for substantially the same object. Nova Scotia (Section 12) provides that the costs of the application shall be in the discretion of the Judge, and Ontario and British Columbia have a similar measure. It must be remembered, however, that in the case of Canada the duty of making application is on the mortgagee who has to show cause for being allowed to proceed.

I think the section enables the Court to order the mortgagor to pay costs but not necessarily the mortgagee - probably the ground that the mortgagor is asking for a mortgagee to pay the costs of getting it. The latter cannot be a party to the proceedings or empowered to meet

R 257

10#

Mr. Flood

(attach)

Si. J. Jeffrey

Sir Cecil Bottomley.

Yesterday I saw a representative of the City Editor of the "Times", the Assistant Foreign Editor of the same paper, a representative of the ^{Financial Times} ~~Financial Times~~, and Mr Joelson, Editor of "East Africa", and I also spoke to one or two others.

I enclose cuttings from the "Times" city notes and from the "Financial Times". It may be that the Foreign Editor of the "Times" will deal with the matter on Monday, but, in view of to-day's telegram from Nairobi, I should think it not improbable that the Foreign Editor will consider the ground fully covered by the Secretary of State. I could have wished of course that the "Times" Foreign Editor had had an opportunity of dealing with the matter in his own way, but he was absent from the "Times" office yesterday, and his assistant felt that it would be better to await his return ^{chief} before publishing what he ^{had} had the opportunity of publishing.

In none of these interviews, except that with Mr Joelson, did I feel that I was encountering any difficulty, and I think that most of the papers appreciated the soundness of the principle that the credit of a Colony must of necessity be enhanced rather than prejudiced by avoiding additions to the dead-weight burden of debt.

I am not assuming that Mr Joelson did not also appreciate the validity of this principle; but of course he always represents the interests of the settlers, or so it seems to me. He made the point

point that the Government of Kenya erred in encouraging the elected members and settlers in believing that they might look for help in the matter of their mortgages. I pointed out that, as far as I knew, the Government had given no such encouragement, and Mr Joelson then shifted his ground and reiterated that at all events the Government, instead of adopting a merely negative and passive attitude, ought to have actively discouraged ^{the} germination of any such belief. Whether he will make anything of this point remains to be seen in his next week's issue.

I might to see that local opinion may be influenced to a considerable extent by the E. African Standard and that the fact that the S. J. is on the spot affords the best opportunity of getting out of debt and its national staff (the paper has a London office which is published in Nairobi) must allow of checking stuff called to London - for this paper is the Kenya Congress the I want some papers.]

Highly

Dr. J. Matthey.

Very satisfactory, I think. Mr Hood was present at the talk with Mr. Joelson and has a more helpful opinion than the Ripways of his tobacco attitude.

If it is true that the East of Kenya waited for the proposal for taking over mortgages also definitely formulated, they avoided a severe storm by doing so. My contention, which I have not scribbled, is that the S. J. off. life as dealt on the point when in various local Congress and

Captain Anderson (1932)
of the "E. A. Standard" in 1932

Party?

Feb 17 2 34

Mr. Matthey has seen and has sent a copy to the Secretary
which

Matthey
2/17/34

I must have this done. The S. J. has been able to do something, but leaves today. J.S.

9
16th February 1934

Dear Fergusson,

I am sending you at once copies of two telegrams which have just reached Sir John Maffey from the Secretary of State at Nairobi in regard to the financial position in Kenya, and I should be grateful if you would show them at the earliest possible moment to Mr. Chamberlain, as Sir Philip requests in the last sentence of the longer of the two telegrams.

We are arranging for our Press Officer to be instructed as to the manner in which he should deal with Press representatives.

Yours sincerely,

(Signed) E. B. BOYD.

J.D.B. Fergusson, Esq.

8

**SUMMARY OF STATEMENT MADE BY SECRETARY OF STATE ON
FINANCIAL POSITION IN KENYA.**

19th February, 1964.

In the opinion of the Treasury and of the City
Kenya has borrowed as much as is justifiable having regard
to her present financial position. That is a fact which
cannot be disregarded. The proposal that the Government
should borrow largely in order to take over existing
mortgages is not a development but a relief proposal.
Any proposal for sound economical development will be
sympathetically considered. The Secretary of State has
for example discussed fully with representatives of the
textile industry certain proposals for installation of
machinery to obtain greatly reduced costs of production.

ORIGINAL decode of a telegram from the Governor of Kenya

Dated 16th February Received in the Colonial Office at 10.42 am on 16th February 1924.

Decoded by M.A.W.
~~XXXXXXXX~~

Immediate.

Following for Maffey from the Secretary of State begins-

Following is telegram referred to in my immediately preceding telegram begins:-

[In the opinion of the Treasury and of the City Kenya has borrowed as much as is justifiable having regard to her present financial position. That is a fact which cannot be disregarded. The proposal that the Government should borrow large in order to take over existing mortgages is not a development but a relief proposal. Any proposal for sound economic development will be sympathetically considered. The Secretary of State has for example discussed fully with representatives of the sisal industry certain proposals for installation of machinery to obtain greatly reduced costs of production.] Ends.

SUBSTANCE OF STATEMENT MADE
 SECRETARY OF STATE ON
 FINANCIAL POSITION IN KENYA

(15 Feb 1924)

ORIGINAL decode

of a telegram from the Governor of Kenya

Dated 16th
February

1934

Received in the
Colonial
Dominions

Office at

10.52.a.m. on 16th
February.

Decoded

by W.N.

Deciphered

IMMEDIATE.

Following for Maffey from the Secretary of State begins. I found it absolutely necessary to authorize Governor to make a statement in my name yesterday on the financial position. Telegram following gives the substance of statement. I had long interview with the Elected Members day previous and put the position frankly to them. My speech to them cannot be published for some time; and I thought it essential ^{that} garbled reports should not get about. Also Elected Members have been advocating that Government borrow running into millions in order that Government should pay off ~~farm mortgages~~ ^{mortgages} on such terms as can be arranged with the mortgagees and charge the mortgagors lower rates of interest. I thought it essential to pronounce on this. Local press suggests my statement will depress Kenya credit. It is important that comment in the London press should be that a fair realization of the financial position and a determination that at the present time any Kenya borrowing should be confined to economic proposals of proved soundness (see my remarks on sisal) so far ^{from} depressing Kenya credit will greatly enhance it. I am absolutely confident of the future; but in the interests of the present and future alike

ORIGINAL

of a telegram from the

Dated

192

Received in the Colonial Office at

on

Dominions

Decoded

by

Decyphered

2.

it is essential that the course of prudent finance should

be pursued. Please instruct Beckett-Platt on these lines.

Please also give copy of this at once to the Chancellor of the

Exchequer who will I am sure lend his support. ends.

Governor.

KENYA.

No. 7

CONFIDENTIAL.



25
2
GOVERNMENT HOUSE,
NAIROBI,
KENYA.

- 5 FEB 1934

C. O. REG.

12th January, 1934.

Sir,

Unword (12)
Nov 9, 3078/33

I have the honour to refer to paragraph 39 of the report of the Sub-Committee appointed by the Board of Agriculture to enquire into the question of agricultural credits, a copy of which accompanied Kenya Confidential despatch No. 121 of the 28th August, 1933. In that paragraph of their report, which was adopted by the Board of Agriculture in January, 1933, the Committee referred to the precarious credit position of many farmers who were threatened with foreclosure by mortgagees at distress prices on a rising market.

2. The Committee stated that there was a fear that improvement in conditions and a rise in land values might induce foreclosures and expressed the belief that there were elements of real danger in the situation. The Committee appear to have envisaged a general stay of execution or moratorium in respect of all mortgages on agricultural land or property, and recommended that steps should be taken to remove the possibility of what might become a grave social injustice ...

THE RIGHT HONOURABLE
MAJOR SIR PHILIP CUNLIFFE-LISTER, P.C., G.B.E., M.C., M.P.,
SECRETARY OF STATE FOR THE COLONIES,
DOWNING STREET,
LONDON. S. W. 1.

injustice.

3. In May last, on the advice of Executive Council, I appointed a Committee consisting of the Treasurer, the Director of Agriculture, Mr. G.A.H. Hamilton, Mr. H.B. Hamilton and Captain J.L. Cotter, under the Chairmanship of the Attorney General, "to consider whether in the present financial circumstances of the agricultural community any special legislative measures are necessary to protect its interests and afford it reasonable security of tenure." The Committee reported in October and submitted a draft Bill which, in brief, provides that the holder of a mortgage on agricultural property shall not foreclose or take action for recovery without first giving notice due to the mortgagor, and that the mortgagor upon receipt of such notice may apply to the Courts for relief. Copies of the Report, with the appended Bill, are enclosed.

4. In accordance with the advice of Executive Council the Report was laid on the Table of the Legislative Council at the recent session, when it was announced that the Government proposed to take no action on the Report until you had had an opportunity of considering it.

5. The principal practical objection to any interference with the legal rights of mortgagees lies naturally in the general effect which such interference may have on the credit of the Colony and on the confidence of investors. This is an objection on which I should be particularly grateful for your advice, since it is clearly of fundamental importance that any special measures that may be

found necessary to meet the present situation should not result in further drying up private sources of credit for farmers or, indirectly, in increasing the rate of interest chargeable on loans from the Land Bank. On the other hand a genuine anxiety has been expressed in certain quarters that without some protection by way of legislation against foreclosure the position of many farmers may be seriously and unfairly endangered. It has been suggested that there have been recent precedents for such legislation in other parts of the Empire, where the need for special protection of the primary producer has been recognized.

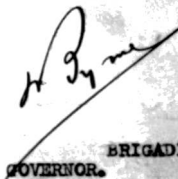
6. It will be observed from Clause 3(1) of the Bill that the Committee proposed that the Crown should be bound by the provisions of the Bill. You will no doubt consider the propriety of inserting such a provision, which would include the Central Agricultural Advances Board.

7. I should be glad to be furnished, in due course, with your advice on the principles reflected in the Committee's Report and the Bill.

I have the honour to be,

Sir,

Your most obedient, humble servant,



BRIGADIER GENERAL,
GOVERNOR.

found necessary to meet the present situation should not result in further drying up private sources of credit for farmers or, indirectly, in increasing the rate of interest chargeable on loans from the Land Bank. On the other hand a genuine anxiety has been expressed in certain quarters that without some protection by way of legislation against foreclosure the position of many farmers may be seriously and unfairly endangered. It has been suggested that there have been recent precedents for such legislation in other parts of the Empire, where the need for special protection of the primary producer has been recognized.


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7. I should be glad to be furnished, in due course, with your advice on the principles reflected in the Committee's Report and the Bill.

I have the honour to be,

Sir,

Your most obedient, humble servant,



H. B. Jones

BRIGADIER GENERAL.
GOVERNOR.

50

REPORT OF THE COMMITTEE ON
AGRICULTURE: FINANCIAL POSITION
(AGRICULTURAL MORTGAGES COMMITTEE)

7e, the undersigned, were appointed a Committee to consider the financial position of the agricultural community, the scope of the inquiry being indicated by the following terms of reference :-

"To consider whether in the present financial circumstances of the agricultural community, any special legislative measures are necessary to protect its interests and afford it reasonable security of tenure".

2. The Committee has met on four occasions, viz. June 12th., July 4th., August 11th and September 7th.

3. At the first meeting a precise interpretation of the terms of reference presented some difficulty to the Committee and it was decided to ask Government for a more definite instruction.

The principal point upon which there was difference of opinion amongst the members was whether it was competent for the Committee to discuss the whole question of currency and make recommendations of so far-reaching a character as is implied by such subjects as devaluation or a general moratorium.

4. The matter was accordingly referred to Government and in reply the Hon. the Colonial Secretary stated that in the opinion of His Excellency The Governor the terms of reference excluded consideration of any currency manipulation or of a moratorium, the prime object of the enquiry being to decide what protection, if any, was deemed desirable for agricultural mortgagors against possible action by mortgagees should a rise in land values become apparent.

5. This decision considerably restricted the field which the Committee had to cover and, being satisfied that a fear exists in the Colony that on a rising land market rapacious mortgagees may be tempted to institute proceedings for foreclosure or sale, we have been able unanimously to recommend legislation designed to give mortgagors and purchasers of agricultural land protection against harsh or embarrassing proceedings by mortgagees or vendors. This recommendation is submitted in the form of a draft Bill, Annexure A.

6. To this extent we have been able to achieve unanimity, but two of our members are of opinion that the proposed measure goes but a short distance along the road they would wish to travel and they have accordingly signed a minority report in addition, which is appended hereto.

A.D.A. MacGregor (Chairman)
H.H. Rushton.
H. Wolfe.
J.L. Cotter.
G.A.H. Hamilton.
H.B. Hamilton.

S. Thornton (Secretary).

MINORITY REPORT, being a rider to the foregoing.

We, the undersigned, whilst subscribing to the provisions of the draft Bill appended hereto desire to record our opinion that only the fringe of the subject has been dealt with and we recommend that a new Committee, with much wider terms of reference, including an unfettered review of the currency question, should be appointed to consider agricultural finance generally..

(Signed) J.L. COTTER.
H.B. HAMILTON.

S. THORNTON (Secretary).

NAIROBI: October 2nd 1933.

A BILL TO GIVE FURTHER POWERS TO THE SUPREME COURT WITH RESPECT TO THE RECOVERY OF MONEY SECURED BY MORTGAGES OR CHARGES AND SIMILAR MATTERS.

BE IT ENACTED by the Governor of the Colony of Kenya, with the advice and consent of the Legislative Council thereof, as follows :-

Short title.

1. This Ordinance may be cited as "the Agricultural Mortgageors' Relief Ordinance, 1933".

Interpretation.

2. In this Ordinance, unless the context otherwise requires :-

"Immovable property" includes every estate, right, title and interest in immovable property, both legal and equitable, and of whatsoever nature and kind;

"Instrument" means any document evidencing any mortgage, or agreement of sale or purchase in respect of or affecting immovable property;

"Mortgage" includes a charge, equitable mortgage by deposit of title deeds, debenture, debenture trust deed, or any transaction whereby a transfer of an interest in immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan is created and includes a mortgage of conditional sale, a usufructuary mortgage and an English mortgage;

2. under

"Mortgagor" means a person liable under the provisions of an instrument, and includes any person who has guaranteed the performance by the mortgagor of any covenant, condition or agreement expressed or implied in the instrument, whether such guarantee is expressed in the instrument or in any other document, and also includes any person against whom a mortgagor has a legal or equitable right of indemnity in respect of any liabilities under the instrument;

"Mortgagee" means the person entitled to the benefit of the security of the instrument, and includes every person whose powers are restricted by the provisions of this Ordinance;

"Principal money" includes principal money which by the terms of any instrument is payable in one sum or by instalments, with or without interest payments added thereto or combined therewith but does not include money payable as rent.

Application of Ordinance.

3.(1) His Majesty shall be bound by the provisions of this Ordinance, and the word "person" where used in this Ordinance shall include His Majesty.

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(2) This Ordinance shall not apply to :-

A BILL TO GIVE FURTHER POWERS TO THE SUPREME COURT WITH RESPECT TO THE RECOVERY OF MONEY SECURED BY MORTGAGES OR CHARGES AND SIMILAR MATTERS.

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"Mortgagor" means a person liable under the provisions of an instrument, and includes any person who has guaranteed the performance by the mortgagor of any covenant, condition or agreement expressed or implied in the instrument, whether such guarantee is expressed in the instrument or in any other document, and also includes any person against whom a mortgagor has a legal or equitable right of indemnity in respect of any liabilities under the instrument;

"Mortgagee" means the person entitled to the benefit of the security of the instrument, and includes every person whose powers are restricted by the provisions of this Ordinance;

"Principal money" includes principal money which by the terms of any instrument is payable in one sum or by instalments, with or without interest payments added thereto or combined therewith but does not include money payable as rent.

Application of Ordinance.

3.(1) His Majesty shall be bound by the provisions of this Ordinance, and the word "person" where used in this Ordinance shall include His Majesty.

(2) This Ordinance shall not apply to :-

- (a) Any instrument affecting immovable property which is not occupied or used mainly for the purposes of agriculture;
- (b) Money payable in respect of premiums of insurance or taxes or arrears of taxes, including arrears which may under any instrument be capitalized or added to or form part of the principal money payable thereunder, and whether the same is payable before or after the commencement of this Ordinance;
- (c) Simple interest or money payable in respect of interest or arrears of interest which may under the terms of any instrument be payable under a plan by which interest and principal payments are combined, or if in arrears be capitalized or added to or form part of the principal money payable thereunder, and whether the same is payable before or after the commencement of this Ordinance;
- (d) Any instrument affecting immovable property situate in any municipality or township;
- (e) Any instrument affecting immovable property situate outside the Colony;
- (f) Any instrument affecting immovable property made or created after the commencement of this Ordinance.

4. The provisions of this Ordinance shall apply to an instrument under the Chattels Transfer Ordinance, 1930, given on the security of crops, stock and other chattels normally used in the course of farming operations as if such instrument were an instrument affecting immovable property.

5. (1) Notwithstanding the provisions of the Indian Transfer of Property Act, 1882, as applied to the Colony no person shall (except in respect of immovable property which the mortgagor has abandoned)-

- (a) Take or continue proceedings in court by way of foreclosure or sale or otherwise, or proceed to execution on or otherwise to the enforcement of a decree judgment or order of court, entered or made after the commencement of this Ordinance, for the recovery of the principal money secured by any instrument;
- (b) Take proceedings out of court under a power of sale, or levy a distress, or take, resume or enter into possession of immovable property for the recovery of principal money under a power contained in any instrument or in any law;

Prohibition.

Proceedings
in Court.

Proceedings
out of Court.

Proceedings for forfeiture.

Proceedings on covenant.

- 3 -

- (c) Take or continue proceedings in or out of Court to declare or cause a forfeiture of immovable property or a sum of money paid or deposited for or on account of the purchase price of immovable property under any instrument by reason of the non-payment of principal money payable under such instrument;
- (d) Take or continue proceedings in or out of Court for the recovery of principal money payable under any instrument by a mortgagor upon any covenant or agreement as principal or guarantor or otherwise, whether expressed or implied.
- (e) File a bankruptcy petition against the Mortgagor in respect of any debt arising out of any covenant, condition or agreement expressed or implied in the instrument or in any guarantee in respect of such instrument,

except as hereinafter provided.

(2) For the purposes of this Ordinance the exercise of a power of sale shall be deemed to be completed when the vendor becomes bound by an agreement or contract of sale, and the onus of proving that any immovable property has been abandoned by a mortgagor shall rest upon the mortgagee.

Notice by mortgagee of intention to exercise powers.

6.(1) A mortgagee before proceeding to do any such act or exercise any such power as is defined in the last preceding section shall give to the mortgagor notice in writing of his intention to do such act or exercise such power.

(2) Such notice shall contain an address for service, and shall be signed by the mortgagee, or by some duly authorised attorney or agent of the mortgagee, and shall be deemed to be duly given if delivered to the mortgagor personally, or if posted by registered letter addressed to the mortgagor at his last known place of abode in the Colony. A notice so posted shall be deemed to have been given seven days after the time when the registered letter would be delivered in the ordinary course of post.

(3) If the mortgagor does not within one month after the giving of such notice apply to the Supreme Court for relief as hereinafter provided, and serve a copy of such application on the mortgagee, the mortgagee may on the expiration of the said month proceed to do such act or exercise such power as aforesaid.

(4) If the mortgagor makes such application and serves a copy thereof in accordance with the last preceding sub-section the mortgagee shall not so such act or exercise such power until such application has been disposed of by the Supreme Court or otherwise than subject to and in accordance with any order made by the Supreme Court as hereinafter provided.

Procedure.

7.(1) An application by a mortgagor under this Ordinance shall be by motion or notice supported by affidavit, and shall state the date on which such notice as aforesaid was given by the mortgagee, and shall also set forth the specific grounds on which relief is sought.

(2) An application under this Ordinance may be made to and disposed of by a Judge in Chambers.

(3) The Judge may give directions as to the service of notice of the hearing of the application upon any person whom he deems a proper party to the proceedings, and may adjourn the hearing for that purpose, or he may dispense with service of notice of the application upon any party who appears to have abandoned his interest in the immovable property, if the Judge considers that service of the notice would occasion useless or unnecessary expense or delay.

(4) No appeal shall lie from any order made under this Ordinance.

Matters to be considered by Court on application of mortgagor.

8. In determining whether relief shall be granted to a mortgagor the court shall have regard to the extent to which and the manner in which the mortgagor has maintained the security on which the mortgage is created in the same condition as it was at the date of the mortgage, and has effected and maintained all necessary improvements as may be specified in the instrument or as may be necessary to maintain the security and has kept any buildings and other erections on the property in a proper state of repair (fair wear and tear excepted) and has performed and observed all the covenants and provisions in the instrument (except the covenant for payment of the principal money).

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Nature of relief that may be granted by Court.

9. (1) If, having regard to the considerations mentioned in the last preceding section and to all other relevant considerations, the court is of opinion that relief should be granted to the mortgagor, it may, in its discretion, order that the mortgagee shall not, before a date specified in such order (being not later than twelve months after the date of the mortgagor's application for relief), do any act or exercise any power mentioned in section 5 of this Ordinance:

Provided that no such order shall operate to postpone the exercise of any right or remedy to a date subsequent to the expiry of this Ordinance.

Scope of order.

(2) Subject to the provisions of this Ordinance, the order may be upon such terms, conditions and limitations, including the giving of any undertaking the deposit in court or otherwise of any security, the appointment of a receiver, the granting of an injunction, and the reservation of leave to apply to vary the same as the Judge may deem proper.

Decided.

- 4 -

(4) If the mortgagor makes such application and serves a copy thereof in accordance with the last preceding sub-section the mortgagee shall not so such act or exercise such power until such application has been disposed of by the Supreme Court or otherwise than subject to and in accordance with any order made by the Supreme Court as hereinafter provided.

Procedure.

7.(1) An application by a mortgagor under this Ordinance shall be by motion or notice supported by affidavit, and shall state the date on which such notice as aforesaid was given by the mortgagee, and shall also set forth the specific grounds on which relief is sought.

(2) An application under this Ordinance may be made to and disposed of by a Judge in Chambers.

(3) The Judge may give directions as to the service of notice of the hearing of the application upon any person whom he deems a proper party to the proceedings, and may adjourn the hearing for that purpose, or he may dispense with service of notice of the application upon any party who appears to have abandoned his interest in the immovable property, if the Judge considers that service of the notice would occasion useless or unnecessary expense or delay.

(4) No appeal shall lie from any order made under this Ordinance.

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Provided that no such order shall operate to postpone the exercise of any right or remedy to a date subsequent to the expiry of this Ordinance.

Scope of order.

(2) Subject to the provisions of this Ordinance, the order may be upon such terms, conditions and limitations, including the giving of any undertaking, the deposit in court or otherwise of any security, the appointment of a receiver, the granting of an injunction, and the reservation of leave to apply to vary the same as the Judge may deem proper.

10. Then an order postponing the exercise of any right or remedy has been made under any of the foregoing provisions of this Ordinance and the mortgagor during the time of such postponement fails or neglects to pay interest on or within forty-two days after the date on which such interest becomes due such order shall thereupon become null and void and the person to whom such interest is due may take action for the recovery of the principal sum and interest due in such manner as he may think fit as if this Ordinance has never been passed.

11. Notwithstanding the provisions of section 3 (2) (c) and section 5 of this Ordinance it shall be lawful for the court, in any case in which it is satisfied that although the interest reserved by any instrument has not been paid in full, interest has been paid at a rate which in all the circumstances of the case the court deems to be reasonable, not in any case being less than half the rate reserved by the instrument, and the covenants and provisions of the mortgage have been otherwise observed, to order that the amount due and unpaid in respect of interest be added to the mortgage or other debt, and the amount so added shall be deemed to be part of the principal money and shall carry interest as from the date of its being so added at the rate reserved under the instrument.

Costs.



12. In any proceedings under this Ordinance no order shall be made for the payment of costs by a mortgagee unless the court certifies that in its opinion the conduct of the mortgagee has been for the purpose of causing delay or has in any other respect been vexatious.

Order at trial.

13. Where a suit, action or other proceeding has been taken in court on any instrument, then upon the trial of any issue arising in the suit, action or proceedings, the trial Judge, whether an application has or has not been made under this Ordinance, may make an order as provided for under this Ordinance.

Powers to be additional.

14. The powers conferred by this Ordinance shall be in addition to and not in substitution for or derogation of any other powers of the court or Judge.

Procedure.

15. Proceedings under this Ordinance shall, so far as not expressly provided for by this Ordinance be conducted in accordance with the ordinary practice of the Supreme Court in dealing with such matters.

Effect of contravention of Ordinance.

16. Every decree, judgment or order, foreclosure or forfeiture, made, declared or taken advantage of, distress levied, possession taken or sale made in contravention of this Ordinance or of any order made thereunder shall be absolutely null and void.

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10. When an order postponing the exercise of any right or remedy has been made under any of the foregoing provisions of this Ordinance and the mortgagor during the time of such postponement fails or neglects to pay interest on or within forty-two days after the date on which such interest becomes due such order shall thereupon become null and void and the person to whom such interest is due may take action for the recovery of the principal sum and interest due in such manner as he may think fit as if this Ordinance has never been passed.

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16. Every decree, judgment or order, foreclosure or forfeiture, made, declared or taken advantage of, distress levied, possession taken or sale made in contravention of this Ordinance or of any order made thereunder shall be absolutely null and void.

Jurisdiction of magistrates.

17.(1) Where the principal money remaining due and unpaid under the provisions of any instrument does not exceed one thousand pounds a subordinate court of the first class shall have in respect of such instrument and the granting of relief to the mortgagor and the doing of any act or the exercise of any power by the mortgagee, the same jurisdiction, powers and discretions as are by this Ordinance conferred upon the Supreme Court.

(2) In the case of any such instrument, unless inconsistent with the context, all the provisions of this Ordinance shall apply and be read and construed as if the words "First Class Magistrate" were substituted for the words "Supreme Court" or "Judge" and the words "the magistrate" for the words "the court".

(3) No appeal shall lie to the Supreme Court from an order of a magistrate under this Ordinance.

(4) Nothing in this section contained shall be construed to limit the jurisdiction of the Supreme Court where application for relief is made by a mortgagor in respect of any instrument to which this section applies.

18. This Ordinance shall continue in force until the thirty-first day of December, One thousand nine hundred and thirty-four, and shall then expire:

Provided that the Governor may by proclamation, with the approval of the Legislative Council, declare that this Ordinance shall remain in force until a date to be fixed in such proclamation.

Duration of Ordinance.

COLONY AND PROTECTORATE OF KENYA



**REPORT OF THE COMMITTEE
ON AGRICULTURE: FINANCIAL
POSITION**

(AGRICULTURAL MORTGAGES COMMITTEE)

NAIROBI:
PRINTED BY THE GOVERNMENT PRINTER
1932

COLONY AND PROTECTORATE OF KENYA



**REPORT OF THE COMMITTEE
ON AGRICULTURE: FINANCIAL
POSITION**

(AGRICULTURAL MORTGAGES COMMITTEE)

Report of the Committee on Agriculture: Financial Position

(AGRICULTURAL MORTGAGES COMMITTEE)

We, the undersigned, were appointed a Committee to consider the financial position of the agricultural community, the scope of the inquiry being indicated by the following terms of reference:—

“To consider whether in the present financial circumstances of the agricultural community; any special legislative measures are necessary to protect its interests and afford it reasonable security of tenure.”

2. The Committee has met on four occasions, viz. 12th June, 4th July, 11th August and 7th September.

3. At the first meeting a precise interpretation of the terms of reference presented some difficulty to the Committee and it was decided to ask Government for a more definite instruction.

The principal point upon which there was difference of opinion amongst the members was whether it was competent for the Committee to discuss the whole question of currency and make recommendations of so far-reaching a character as is implied by such subjects as devaluation or a general moratorium.

4. The matter was accordingly referred to Government and in reply the Hon. the Colonial Secretary stated that in the opinion of His Excellency the Governor the terms of reference excluded consideration of any currency manipulation or of a moratorium, the prime object of the inquiry being to decide what protection, if any, was deemed desirable for agricultural mortgagors against possible action by mortgagees should a rise in land values become apparent.

5. This decision considerably restricted the field which the Committee had to cover and, being satisfied that a fear exists in the Colony that on a rising land market rapacious mortgagees may be tempted to institute proceedings for foreclosure or sale, we have been able unanimously to recommend legislation designed to give mortgagors and purchasers of agricultural

65

Report of the Committee on Agriculture: Financial Position

(AGRICULTURAL MORTGAGES COMMITTEE)

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5. This decision considerably restricted the field which the Committee had to cover and, being satisfied that a fear exists in the Colony that on a rising land market rapacious mortgagees may be tempted to institute proceedings for foreclosure or sale, we have been able unanimously to recommend legislation designed to give mortgagors and purchasers of agricultural

land protection against harsh or embarrassing proceedings by mortgagees or vendors. This recommendation is submitted in the form of a draft Bill, Annexure A.

6. To this extent we have been able to achieve unanimity but two of our members are of opinion that the proposed measure goes but a short distance along the road they would wish to travel and they have accordingly signed a minority report in addition, which is appended hereto.

A. D. A. MACGREGOR.

Chairman.

H. H. RUSHTON.

H. WOLFE.

J. L. COTTER.

G. A. H. HAMILTON.

H. B. HAMILTON.

S. THORNTON,

Secretary.

Nairobi,

2nd October, 1933.

Minority Report

(being a rider to the foregoing)

We, the undersigned, whilst subscribing to the provisions of the draft Bill appended hereto desire to record our opinion that only the fringe of the subject has been dealt with and we recommend that a new Committee, with much wider terms of reference, including an unfettered review of the currency question, should be appointed to consider agricultural finance generally.

J. L. COTTER.

H. B. HAMILTON.

S. THORNTON,

Secretary.

Nairobi,

2nd October, 1933.

ANNEXURE A.

A Bill to Give Further Powers to the Supreme Court with respect to the Recovery of Money Secured by Mortgages or Charges and Similar matters.

BE IT ENACTED by the Governor of the Colony of Kenya, with the advice and consent of the Legislative Council thereof, as follows:—

1. This Ordinance may be cited as "the Agricultural Mortgages' Relief Ordinance, 1933." Short title.

2. In this Ordinance, unless the context otherwise requires— Interpretation.

"immovable property" includes every estate, right, title and interest in immovable property, both legal and equitable, and of whatsoever nature and kind;

"instrument" means any document evidencing any mortgage, or agreement of sale or purchase in respect of or affecting immovable property;

"mortgage" includes a charge, equitable mortgage by deposit of title deeds, debenture, debenture trust deed, or any transaction whereby a transfer of an interest in or charge on immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan is created and includes a mortgage of conditional sale, a usufructuary mortgage and an English mortgage;

"mortgagor" means a person liable under the provisions of an instrument, and includes any person who has guaranteed the performance by the mortgagor of any covenant, condition or agreement expressed or implied in the instrument, whether such guarantee is expressed in the instrument or in any other document, and also includes any person against whom a mortgagor has a legal or equitable right of indemnity in respect of any liabilities under the instrument;

land protection against harsh or embarrassing proceedings by mortgagees or vendors. This recommendation is submitted in the form of a draft Bill, Annexure A.

6. To this extent we have been able to achieve unanimity but two of our members are of opinion that the proposed measure goes but a short distance along the road they would wish to travel and they have accordingly signed a minority report in addition, which is appended hereto.

A. D. A. MACGREGOR.

Chairman.

H. H. RUSHTON.

H. WOLFE.

J. L. COTTER.

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2. In this Ordinance, unless the context otherwise Interpretation. requires—

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"mortgage" includes a charge, equitable mortgage by deposit of title deeds, debenture, debenture trust deed, or any transaction whereby a transfer of an interest in or charge on immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan is created and includes a mortgage of conditional sale, a usufructuary mortgage and an English mortgage;

"mortgagor" means a person liable under the provisions of an instrument, and includes any person who has guaranteed the performance by the mortgagor of any covenant, condition or agreement expressed or implied in the instrument, whether such guarantee is expressed in the instrument or in any other document, and also includes any person against whom a mortgagor has a legal or equitable right of indemnity in respect of any liabilities under the instrument;

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"mortgagee" means the person entitled to the benefit of the security of the instrument, and includes every person whose powers are restricted by the provisions of this Ordinance;

"principal money" includes principal money which by the terms of any instrument is payable in one sum or by instalments with or without interest payments added thereto or combined therewith, but does not include money payable as rent

Application of Ordinance

3. (1) His Majesty shall be bound by the provisions of this Ordinance, and the word "person" where used in this Ordinance shall include His Majesty

(2) This Ordinance shall not apply to—

- (a) any instrument affecting immovable property which is not occupied or used mainly for the purposes of agriculture;
- (b) money payable in respect of premiums of insurance or taxes or arrears of taxes, including arrears which may under any instrument be capitalized or added to or form part of the principal money payable thereunder, and whether the same is payable before or after the commencement of this Ordinance;
- (c) simple interest or money payable in respect of interest or arrears of interest which may under the terms of any instrument be payable under a plan by which interest and principal payments are combined, or if an arrears be capitalized or added to or form part of the principal money payable thereunder, and whether the same is payable before or after the commencement of this Ordinance;
- (d) any instrument affecting immovable property situate in any municipality or township;
- (e) any instrument affecting immovable property situate outside the Colony;
- (f) any instrument affecting immovable property made or created after the commencement of this Ordinance.

4. The provisions of this Ordinance shall apply to an instrument under the Chattels Transfer Ordinance, 1980, given on the security of crops, stock and other chattels normally used in the course of farming operations as if such instrument were an instrument affecting immovable property.

Ordinance to apply to Chattels Transfer Ordinance, No. 24 of 1980.

5. (1) Notwithstanding the provisions of the Indian Transfer of Property Act, 1882 as applied to the Colony no person shall (except in respect of immovable property which the mortgagor has abandoned)

- (a) take or continue proceedings in court by way of foreclosure or sale or otherwise, or proceed to execution or otherwise to the enforcement of a decree, judgment or order of court, entered or made after the commencement of this Ordinance, for the recovery of the principal money secured by any instrument. Proceedings in court
- (b) take proceedings out of court under a power of sale, or levy a distress, or take, resume or enter into possession of immovable property for the recovery of principal money under a power contained in any instrument or in any law. Proceedings out of court
- (c) take or continue proceedings in or out of court to declare or cause a forfeiture of immovable property or a sum of money paid or deposited for or on account of the purchase price of immovable property under any instrument by reason of the non-payment of principal money payable under such instrument. Proceedings for forfeiture
- (d) take or continue proceedings in or out of court for the recovery of principal money payable under any instrument by a mortgagor upon any covenant or agreement as principal or guarantor or otherwise, whether expressed or implied. Proceedings on covenant
- (e) file a bankruptcy petition against the mortgagor in respect of any debt of principal money arising out of any covenant, condition or agreement expressed or implied in the instrument or in any guarantee in respect of such instrument. Proceedings in bankruptcy

except as hereinafter provided.

(2) For the purposes of this Ordinance, the exercise of a power of sale shall be deemed to be completed when the vendor becomes bound by an agreement or contract of sale, and the onus of proving that any immovable property has been abandoned by a mortgagor shall rest upon the mortgagee.

"mortgagee" means the person entitled to the benefit of the security of the instrument, and includes every person whose powers are restricted by the provisions of this Ordinance.

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- (a) any instrument affecting immovable property which is not occupied or used mainly for the purposes of agriculture;
- (b) money payable in respect of premiums of insurance or taxes or arrears of taxes, including arrears which may under any instrument be capitalized or added to or form part of the principal money payable thereunder, and whether the same is payable before or after the commencement of this Ordinance;
- (c) simple interest or money payable in respect of interest or arrears of interest which may under the terms of any instrument be payable under a plan by which interest and principal payments are combined, or if in arrears be capitalized or added to or form part of the principal money payable thereunder, and whether the same is payable before or after the commencement of this Ordinance;
- (d) any instrument affecting immovable property situate in any municipality or township;
- (e) any instrument affecting immovable property situate outside the Colony;
- (f) any instrument affecting immovable property made or created after the commencement of this Ordinance.

Ordinance to apply to Chattels Transfer Ordinance, No. 24 of 1930.

4. The provisions of this Ordinance shall apply to an instrument under the Chattels Transfer Ordinance, 1930, given on the security of crops, stock and other chattels normally used in the course of farming operations as if such instrument were an instrument affecting immovable property.

5. (1) Notwithstanding the provisions of the Indian Prohibition of Transfer of Property Act 1952 as applied to the Colony, no person shall (except in respect of immovable property which the mortgagor has abandoned)

- (a) take or continue proceedings in court by way of Proceedings in foreclosure or sale or otherwise or proceed to execution or otherwise to the enforcement of a decree, judgment or order of court entered or made after the commencement of this Ordinance, for the recovery of the principal money secured by any instrument.
- (b) take proceedings out of court under a power of sale, Proceedings or levy a distress, or take, resume or enter into possession of immovable property for the recovery of principal money under a power contained in any instrument or in any law.
- (c) take or continue proceedings in or out of court to Proceedings for declare or cause a forfeiture of immovable property or a sum of money paid or deposited for or on account of the purchase price of immovable property under any instrument by reason of the non-payment of principal money payable under such instrument.
- (d) take or continue proceedings in or out of court for Proceedings on the recovery of principal money payable under any instrument by a mortgagor upon any covenant or agreement as principal or guarantor or otherwise, whether expressed or implied.
- (e) file a bankruptcy petition against the mortgagor in Proceedings in respect of any debt of principal money arising out of any covenant, condition or agreement expressed or implied in the instrument or in any guarantee in respect of such instrument.

except as hereinafter provided.

(2) For the purposes of this Ordinance, the exercise of a power of sale shall be deemed to be completed when the vendor becomes bound by an agreement or contract of sale, and the onus of proving that any immovable property has been abandoned by a mortgagor shall rest upon the mortgagee.

Notice by mortgagee of intention to exercise powers.

6. (1) A mortgagee before proceeding to do any such act or exercise any such power as is defined in the last preceding section shall give to the mortgagor notice in writing of his intention to do such act or exercise such power.

(2) Such notice shall contain an address for service, and shall be signed by the mortgagee, or by some duly authorized attorney or agent of the mortgagee, and shall be deemed to be duly given if delivered to the mortgagor personally, or if posted by registered letter addressed to the mortgagor at his last known place of abode in the Colony. A notice so posted shall be deemed to have been given seven days after the time when the registered letter would be delivered in the ordinary course of post.

(3) If the mortgagor does not within one month after the giving of such notice apply to the Supreme Court for relief as hereinafter provided, and serve a copy of such application on the mortgagee, the mortgagee may on the expiration of the said month proceed to do such act or exercise such power as aforesaid.

(4) If the mortgagor makes such application and serves a copy thereof in accordance with the last preceding subsection the mortgagee shall not do such act or exercise such power until such application has been disposed of by the Supreme Court or otherwise than subject to and in accordance with any order made by the Supreme Court as hereinafter provided.

Procedure.

7. (1) An application by a mortgagor under this Ordinance shall be by motion on notice supported by affidavit, and shall state the date on which such notice as aforesaid was given by the mortgagee, and shall also set forth the specific grounds on which relief is sought.

(2) An application under this Ordinance may be made and disposed of by a Judge in Chambers.

(3) The Judge may give directions as to the service of notice of the hearing of the application upon any person whom he deems a proper party to the proceedings, and may adjourn the hearing for that purpose, or he may dispense with service of notice of the application upon any party who appears to have abandoned his interest in the immovable property, if the Judge considers that service of the notice would occasion useless or unnecessary expense or delay.

(4) No appeal shall lie from any order made under this Ordinance.

8. (1) On the hearing of an application for relief under this Ordinance the mortgagor shall satisfy the court that he has maintained the security on which the mortgage is created in the same condition as it was at the date of the mortgage, and has effected and maintained all necessary improvements as may be specified in the instrument or as may be necessary to maintain the security and has kept any buildings and other erections on the property in a proper state of repair (fair wear and tear excepted) and subject to the provisions of section 11 of this Ordinance has performed and observed all the covenants and provisions in the instrument except the covenant for payment of the principal money.

Matters to be considered by court on application of mortgagor.

(2) If the court, being satisfied regarding the matters mentioned in the first sub-section of this section and having regard to all other relevant considerations, is satisfied that relief should be granted to the mortgagor, it may, in its discretion, order that the mortgagee shall not, before a date specified in such order (being not later than twelve months after the date of the mortgagor's application for relief), do any act or exercise any power mentioned in section 5 of this Ordinance.

Nature of relief that may be granted by court.

Provided that no such order shall operate to postpone the exercise of any right or remedy to a date subsequent to the expiry of this Ordinance.

9. Subject to the provisions of this Ordinance, the order may be upon such terms, conditions and limitations, including the giving of any undertaking, the deposit in court or otherwise of any security, the appointment of a receiver, the granting of an injunction, and the reservation of leave to apply to vary the same as the Judge may deem proper.

Scope of order.

10. When an order postponing the exercise of any right or remedy has been made under any of the foregoing provisions of this Ordinance and the mortgagor during the time of such postponement fails or neglects to pay interest on or within forty-two days after the date on which such interest becomes due such order shall thereupon become null and void and the person to whom such interest is due may take action for the recovery of the principal sum and interest due in such manner as he may think fit as if this Ordinance has never been passed.

Order granting relief to be null and void if mortgagor fails to pay interest.

Notice by mortgagee of intention to exercise powers

6. (1) A mortgagee before proceeding to do any such act or exercise any such power as is defined in the last preceding section shall give to the mortgagor notice in writing of his intention to do such act or exercise such powers.

(2) Such notice shall contain an address for service, and shall be signed by the mortgagee, or by some duly authorized attorney or agent of the mortgagee, and shall be deemed to be duly given if delivered to the mortgagor personally, or if posted by registered letter addressed to the mortgagor at his last known place of abode in the Colony. A notice so posted shall be deemed to have been given seven days after the time when the registered letter would be delivered in the ordinary course of post.

(3) If the mortgagor does not within one month after the giving of such notice apply to the Supreme Court for relief as hereinafter provided, and serve a copy of such application on the mortgagee, the mortgagee may on the expiration of the said month proceed to do such act or exercise such power as aforesaid.

(4) If the mortgagor makes such application and serves a copy thereof in accordance with the last preceding subsection the mortgagee shall not do such act or exercise such power until such application has been disposed of by the Supreme Court or otherwise than subject to and in accordance with any order made by the Supreme Court as hereinafter provided.

Procedure.

7. (1) An application by a mortgagor under this Ordinance shall be by motion on notice supported by affidavit, and shall state the date on which such notice as aforesaid was given by the mortgagee, and shall also set forth the specific grounds on which relief is sought.

(2) An application under this Ordinance may be made to and disposed of by a Judge in Chambers.

(3) The Judge may give directions as to the service of notice of the hearing of the application upon any person whom he deems a proper party to the proceedings, and may adjourn the hearing for that purpose, or he may dispense with service of notice of the application upon any party who appears to have abandoned his interest in the immovable property, if the Judge considers that service of the notice would occasion useless or unnecessary expense or delay.

(4) No appeal shall lie from any order made under this Ordinance.

8. (1) On the hearing of an application for relief under this Ordinance the mortgagor shall satisfy the court that he has maintained the security on which the mortgage is created in the same condition as it was at the date of the mortgage, and has effected and maintained all necessary improvements as may be specified in the instrument or as may be necessary to maintain the security and has kept any buildings and other erections on the property in a proper state of repair (fair wear and tear excepted) and subject to the provisions of section 11 of this Ordinance has performed and observed all the covenants and provisions in the instrument except the covenant for payment of the principal money.

(2) If the court, being satisfied regarding the matters mentioned in the first sub-section of this section and having regard to all other relevant considerations, is satisfied that relief should be granted to the mortgagor it may, in its discretion, order that the mortgagee shall not, before a date specified in such order (being not later than twelve months after the date of the mortgagor's application for relief), do any act or exercise any power mentioned in section 5 of this Ordinance.

Provided that no such order shall operate to postpone the exercise of any right or remedy to a date subsequent to the expiry of this Ordinance.

9. Subject to the provisions of this Ordinance, the order may be upon such terms, conditions and limitations, including the giving of any undertaking, the deposit in court or otherwise of any security, the appointment of a receiver, the granting of an injunction, and the reservation of leave to apply to vary the same as the Judge may deem proper.

10. When an order postponing the exercise of any right or remedy has been made under any of the foregoing provisions of this Ordinance and the mortgagor during the time of such postponement fails or neglects to pay interest on or within forty-two days after the date on which such interest becomes due such order shall thereupon become null and void and the person to whom such interest is due may take action for the recovery of the principal sum and interest due in such manner as he may think fit as if this Ordinance has never been passed.

Matters to be considered by court on application of mortgagor

Nature of relief that may be granted by court

Scope of order

Order granting relief to be null and void if mortgagor fails to pay interest

Power to add interest due to mortgage debt.

11. Notwithstanding the provisions of section 3 (2) (c) and section 8 of this Ordinance it shall be lawful for the court, in any case in which it is satisfied that although the interest reserved by any instrument has not been paid in full, interest has been paid at a rate which in all the circumstances of the case the court deems to be reasonable, not in any case being less than half the rate reserved by the instrument, and the covenants and provisions of the mortgage have been otherwise observed, to order that the amount due and unpaid in respect of interest be added to the mortgage or other debt, and the amount so added shall be deemed to be part of the principal money and shall carry interest as from the date of its being so added at the rate reserved under the instrument.

Costs.

12. In any proceedings under this Ordinance no order shall be made for the payment of costs by a mortgagee unless the court certifies that in its opinion the conduct of the mortgagee has been for the purpose of causing delay or has in any other respect been vexatious.

Order at trial.

13. Where a suit, action or other proceeding has been taken in court on any instrument, then upon the trial of any issue arising in the suit, action or proceedings, the trial Judge, whether an application has or has not been made under this Ordinance, may make an order as provided for under this Ordinance.

Powers to add additional.

14. The powers conferred by this Ordinance shall be in addition to and not in substitution for or derogation of any other powers of the court or Judge.

Procedure.

15. Proceedings under this Ordinance shall, so far as not expressly provided for by this Ordinance, be conducted in accordance with the ordinary practice of the Supreme Court in dealing with such matters.

Effect of contravention of Ordinance.

16. Every decree, judgment or order, foreclosure or forfeiture, made, declared or taken advantage of, distress levied, possession taken or sale made in contravention of this Ordinance or of any order made thereunder shall be absolutely null and void.

Duration of Ordinance.

17. This Ordinance shall continue in force until the thirty-first day of December, one thousand nine hundred and thirty-four, and shall then expire.

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END

Provided that the Governor may by proclamation, with the approval of the Legislative Council, declare that this Ordinance shall remain in force until a date to be fixed in such proclamation.

Power to add interest due to mortgage debt.

11. Notwithstanding the provisions of section 3 (2) (c) and section 8 of this Ordinance it shall be lawful for the court, in any case in which it is satisfied that although the interest reserved by any instrument has not been paid in full, interest has been paid at a rate which in all the circumstances of the case the court deems to be reasonable, not in any case being less than half the rate reserved by the instrument, and the covenants and provisions of the mortgage have been otherwise observed, to order that the amount due and unpaid in respect of interest be added to the mortgage or other debt, and the amount so added shall be deemed to be part of the principal money and shall carry interest as from the date of its being so added at the rate reserved under the instrument.

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