

IN THE PRIVY COUNCIL

40, 1960
No. 36 of 1959

ON APPEAL
FROM THE WEST AFRICAN COURT OF APPEAL
GOLD COAST SESSION

B E T W E E N :

1. JOE APPIAH
2. J.W.K. APPIAH
3. MABEL OTCHERE
4. VICTORIA BANDO

As Executors to the Will
of Yaw Anthony (deceased)
Plaintiffs - Appellants

- and -

BASIL NOAH BASIL
Successor to Noah Basil
Basil Defendant - Respondent

RECORD OF PROCEEDINGS

A.L. BRYDEN & WILLIAMS,
53, Victoria Street,
London, S.W.1.

Solicitors and Agents
for the Appellants.

T.L. WILSON & CO.,
6, Westminster Palace Gardens,
London, S.W.1.

Solicitors for the Respondent.

IN THE PRIVY COUNCILNo. 36 of 1959ON APPEALFROM THE WEST AFRICAN COURT OF APPEALCOLD COAST SESSIONB E T W E E N :UNIVERSITY OF LONDON
W.C.1.

- 7 FEB 1961

INSTITUTE OF ADVANCED
LEGAL STUDIES

59006

1. JOE APPIAH
2. J.W.K. APPIAH
3. MABEL OTCHERE
4. VICTORIA BANDO

As Executors to the Will
of Yaw Anthony (deceased)
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RECORD OF PROCEEDINGSINDEX OF REFERENCE

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IN THE PRIVY COUNCIL

No. 36 of 1959

ON APPEAL
FROM THE WEST AFRICAN COURT OF APPEAL
GOLD COAST SESSION

B E T W E E N :

- 1. JOE APPIAH
- 2. J.W.K. APPIAH
- 3. MABEL OTCHERE
- 4. VICTORIA BANDO

10

As Executors to the Will
of Yaw Anthony (deceased)
Plaintiffs - Appellants

- and -

BASIL NOAH BASIL
Successor to Noah Basil
Basil Defendant - Respondent

RECORD OF PROCEEDINGS

No. 1
WRIT

In the
Supreme Court
No.1

20

IN THE SUPREME COURT OF THE GOLD COAST
ASHANTI JUDICIAL DIVISION
LAND COURT - KUMASI.

Writ,
2nd February,
1956.

1956. No.L.C.7/1956.

Between -

- 1. Joe Appiah. 2. J.W.K. Appiah
- 3. Mabel Otchere. 4. Victoria Bando
- as Executors to the Will of Yaw
Anthony (deceased) - Plaintiffs

and

30

Basil Noah Basil - Successor to Noah
Basil Basil Lebanon Street, Kumasi
- Defendant

ELIZABETH THE SECOND, by the Grace of God, of
the United Kingdom of Great Britain and Northern

In the
Supreme Court

No.1

Writ,
2nd February,
1956 -
continued.

Ireland and of Our other Realms and Territories
Queen, Head of the Commonwealth, Defender of the
Faith, TO

BASIL NOAH BASIL - Successor to Noah Basil
Basil.

of KUMASI

in the Country of GOLD COAST.

We command you, that within eight days after the
service of this Writ on you inclusive of the day
of such service, you do cause an appearance to be
entered for you in an action at the suit of

10

1. JOE APPIAH 2. J.W.K. APPIAH
 3. MABEL OTCHERE 4. VICTORIA BANDO
- As Executors to the Will of YAW ANTHONY
(deceased)

And take notice that in default of your so doing,
the plaintiff may proceed therein, and judgment
may be given in your absence.

WITNESS, MARK WILSON, KNIGHT BACHELOR

Chief Justice of the Gold Coast, the 2nd day of
February in the year of Our Lord One thousand
nine hundred and Fifty-Six (1956).

20

(Notices as to period of service and
method of entering appearance).

The Plaintiff's claim is for:

Plaintiffs seek a declaration that notwithstanding
the provision in a deed of mortgage dated 11th
November, 1927 between Yaw Anthony (deceased) and
Noah Basil Basil (deceased) that on the said Yaw
Anthony mortgagor paying £3,500. to Noah Basil
Basil the Mortgagee the said Basil will reconvey
only half of the premises on Plot No.435 Old Town
Section "B" the said Plot having been since divi-
ded into two and described as Plots 435 Old Town
Section "B" and Plot No. 435A Old Town Section "B"
they may also redeem the Plot and premises on 435A
Old Town Section "B", the principal sum of £3,500
having been already paid by the said Yaw Anthony.

30

(Sgd.) Victor Owusu
Solicitor for Plaintiffs.

40

THIS WRIT was issued by Barrister Victor Owusu of Kumasi whose address for service is K.O.35, Kumasi Solicitor for the said plaintiffs who reside at Kumasi.

In the
Supreme Court

No.1

Writ,
2nd February,
1956 -
continued.

(Indorsement of service on defendant).

No. 2

STATEMENT OF CLAIM.

No.2

Statement of
Claim,
6th March 1956.

IN THE SUPREME COURT OF THE GOLD COAST
ASHANTI JUDICIAL DIVISION
LAND COURT, KUMASI.

10

TITLE AS NO. 1

STATEMENT OF CLAIM

1. The Plaintiffs are the executors to Yaw Anthony (deceased).
2. The Defendant is the successor to and beneficiary under the Will of Noah Basil Basil (deceased).
3. By a deed of mortgage between Yaw Anthony and Noah Basil Basil dated 11th November, 1927 it was agreed that Yaw Anthony shall mortgage to the said Noah Basil Basil Plot No.435 on the Old Town Section "B" against an advance of £3,500 which was part of the sum of £7,000 required to erect buildings on the said plot.
4. The said mortgage deed contained a clog on the equity of redemption which said as follows :
"provided always that if the Mortgagor shall pay the Mortgagee the sum of £3,500 then the Mortgagee will at any time thereafter upon the request and the cost of the Mortgagor reconvey half of the said messuages hereditaments and premises with the building thereon as set forth in the agreement aforesaid unto the Mortgagor his heirs executors administrators or assigns."
5. In pursuance of the said mortgage agreement the Mortgagor surrendered unto the Government of Ashanti Plot No. 435 Old Town Section "B"

20

30

In the
Supreme Court

No.2

Statement of
Claim,
6th March 1956
- continued.

- and the Government of Ashanti divided the Plot 435 Old Town Section "B" into two separate Plots thenceforth known as Plots Nos. 435 and 435A and the Mortgagee took possession of both and erected buildings thereon.
6. In 1949 the present Defendant as successor and beneficiary to Noah Basil Basil assigned Plot No. 435 to Yaw Anthony, the sum of £3,500 having been paid to the Mortgagee but retained Plot No.435A which is the other half of the original Plot No.435 which was divided into two in pursuance of the Mortgage Agreement of 1927. 10
7. The Plaintiffs say that the provision in the mortgage agreement of 1927 "that if the mortgagor shall pay the mortgagee the sum of £3,500 then the Mortgagee will at any time thereafter upon the request and at the cost of the Mortgagor reconvey half of the said messuages hereditaments and premises with the building thereon as set forth in the agreement aforesaid unto the Mortgagor his heirs executors administrators or assigns or as he or they shall direct" .. if and in so far as it prevents the Plaintiffs from redeeming the whole mortgage property upon proper payment of the principal is illegal and void as a clog on the Plaintiffs' right to redeem and is not capable of being enforced against Plaintiffs. 20 30
8. Wherefore Plaintiffs claim declaration that notwithstanding the provision in a deed of mortgage dated 11th November, 1927 between Yaw Anthony (deceased) and Noah Basil Basil (deceased) that on the said Yaw Anthony Mortgagor paying £3,500 to Noah Basil Basil the Mortgagee the said Basil will reconvey only half of the premises on Plot No.435 Old Town Section "B" the said Plot having been since divided into two and described as Plots 435 Old Town Section "B" and Plot No.435A Old Town Section "B" they may also redeem the said Plot and premises on 435A Old Town Section "B" the principal sum of £3,500 having been already paid by the said Yaw Anthony. 40

DATED AT AKOMFOANOAKYE CHAMBERS, KUMASI THIS 6TH

DAY OF MARCH, 1956.

(Sgd.) Victor Owusu
SOLICITOR FOR PLAINTIFFS.

THE REGISTRAR,
LAND COURT,
KUMASI.

AND TO DEFENDANT HEREIN OR
HIS SOLICITOR J.B. SIRIBOE, ESQR.
JUABOATEN CHAMBERS, KUMASI.

In the
Supreme Court

No.2

Statement of
Claim,
6th March 1956
- continued.

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No. 3

STATEMENT OF DEFENCE

IN THE SUPREME COURT OF THE GOLD COAST
ASHANTI JUDICIAL DIVISION
LAND COURT - KUMASI.

TITLE AS NO. 1

STATEMENT OF DEFENCE

No.3

Statement of
Defence,
23rd March
1956.

20

1. The Defendant is not in a position to admit
or deny paragraph 1 of the Statement of Claim.

2. The Defendant admits paragraph 2 of the State-
ment of claim.

3. The Defendant admits paragraph 3 of the State-
ment of Claim and says that late Yaw Anthony
did not himself pay a cent out of the amount
of Seven thousand pounds (£7,000).

4. As to paragraphs 4, 5 and 6 of the Statement
of Claim, the Defendant says that late Yaw
Anthony later agreed that Noah Basil Basil
should build for himself on half of the plot
then known as Plot 435.

30

5. By a mutual consent and agreement of both
parties, late Yaw Anthony surrendered unto the
Government of Ashanti Plot 435, and the Govern-
ment divided it into two separate plots thence-
forth to be known as Plots Nos. 435 and 435A,
the former in the name of late Yaw Anthony and
the latter Noah Basil Basil.

In the
Supreme Court

No.3

Statement of
Defence,
23rd March
1956 -
continued.

6. The Government thereafter entered into separate leases in respect of the two (2) plots aforesaid with both late Anthony and Basil which leases were dated 4th February, 1931 respectively.
7. In further answer to the above, the Defendant says that by a form of Consent dated the 11th of March, 1931, signed by the Assistant Commissioner of lands for and on behalf of the Chief Commissioner of Ashanti, Consent was granted to late Yaw Anthony to assign by way of Mortgage to Noah Basil Basil the hereditaments and premises comprised in and demised by the Lease of 4th February, 1931, but no further formal mortgage other than the hereinbefore recited Indenture of Mortgage was executed to secure repayment of the Loan of Three thousand five hundred pounds (£3,500). 10
8. The Defendant says that it was agreed between late Anthony and Basil that the amount of £3,500 so lent in erecting Anthony's portion of the building on his Plot 435, was to be repaid by late Basil collecting the rents from the property less payments made for grounds rents, Town and Water rates, repairs and management expenses thereof, until the amount was finally settled and that law Yaw Anthony had the right at any time to pay off the balance of the principal remaining due and to redeem the Mortgage. 20
sic
9. The Defendant admits that Plot No. 435 was in 1949 reassigned by him to late Anthony upon the repayment of the mortgage debt of Three thousand five hundred pounds (£3,500) but denies that Plot 435 'A' formed part of the mortgage transaction as herein explained or that it belongs to late Anthony. 30
10. The defendant denies the construction placed on the Mortgage transaction as contained in paragraph 7 of the Statement of Claim and says that the amount of £3,500 therein referred to, related only to Anthony's portion of the building on Plot 435 which has been reassigned to him upon repayment of the said amount. 40
11. The Defendant states that the Plaintiffs action is misconceived and therefore denies that

they are entitled to the relief they seek or to any at all.

In the Supreme Court

DATED AT KUMASI THIS 23RD DAY OF MARCH, 1956.

No.3

(Sgd.) J. Boateng Siriboe
SOLICITOR FOR DEFENDANT.

Statement of Defence,
23rd March 1956 -
continued.

The Registrar,
Land Court,
Kumasi.

10

With copy for service on the Plaintiffs' Solicitor Mr. Victor Owusu, K.O.35, Kumasi.

No. 4

No.4

NOTICE OF MOTION AND AFFIDAVIT IN SUPPORT

Filed on 24.5.56 at 9.5 a.m.
(Ind.) F. T.
Registrar Land Court
Kumasi, Ashanti.

Notice of Motion and Affidavit in Support,
24th May 1956.

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IN THE SUPREME COURT OF THE GOLD COAST
ASHANTI JUDICIAL DIVISION
LAND COURT - KUMASI.

1. JOE APPIAH }
2. J.W.K. APPIAH }
3. MABEL OTCHERE }
4. VICTORIA BANDO } - Plaintiffs
As Executors to the }
Will of Yaw Anthony }
(Deceased) }

versus

30

BASSIL NOAH BASSIL - }
Successor to Noah }
Basil Basil - Lebanon } - Defendant.
Street - Kumasi. }

MOTION ON NOTICE UNDER ORDER 31 RULE 18 OF THE COURT RULES FOR AN ORDER FOR INSPECTION.

MOTION ON NOTICE by JOHNSON BOATENG SIRIBOE of Counsel for and on behalf of the Defendant herein

In the
Supreme Court

No.4

Notice of
Motion and
Affidavit in
Support,
24th May 1956
- continued.

humbly praying for an Order of this Honourable
Court for Inspection of Certain Document in con-
nection with the above Suit in terms of the Affi-
davit in support hereof And/or for any other Order
or Orders as to this Honourable Court may seem
meet:

COURT TO BE MOVED on THURSDAY THE 24TH DAY OF MAY,
1956, at 9 o'clock in the forenoon or so soon
thereafter as the Counsel for and on behalf of the
Defendant herein can be heard:

10

DATED AT KUMASI THIS 24TH DAY OF MAY, 1956.

(Sgd.) J. Boateng Siriboe
SOLICITOR FOR DEFENDANT.

THE REGISTRAR, LAND COURT,
KUMASI.

With copy for Service on the
Plaintiffs' Solicitor - Mr. V. Owusu
Kumasi/Ashanti.

CERTIFICATE OF SERVICE

Upon the 24th day of May, 1956 at 9.22
a.m. a copy of this Motion on Notice
together with attached Affidavit in
support was served by me on Victor
Owusu, Solicitor for the Plaintiffs
herein personally at Kumasi/Ashanti.

20

(Sgd.) N.A. Ankrah
Bailiff
24/5/56.

Filed on 24.5.56 at 9.5 a.m.
(Ind.) F.T.
for Registrar Land Court
Kumasi, Ashanti.

30

IN THE SUPREME COURT OF THE GOLD COAST
ASHANTI JUDICIAL DIVISION
LAND COURT - KUMASI.

1. JOE APPIAH)
2. J.W.K. APPIAH)
3. MABEL OTCHERE)
4. VICTORIA BANDO) - Plaintiffs
As Executors to the)
Will of Yaw Anthony)
(Deceased))

30

vs.

BASSIL NOAH BASSIL)
Successor to NOAH BASIL)
BASIL - LEBANON STREET) - Defendant.
KUMASI.)

In the
Supreme Court

No.4

Notice of
Motion and
Affidavit in
Support,
24th May 1956
- continued.

AFFIDAVIT OF JOHNSON BOATENG SIRIBOE

I, JOHNSON BOATENG SIRIBOE of Kumasi make Oath and say as follows :-

- 10 1. That I am Junior Counsel for the Defendant in this case and I am authorised to make this Affidavit.
- 2. That I prepared the Statement of Defence in this Action without having seen the Mortgage of 11th of November, 1927 referred to in paragraph three (3) of the Statement of Claim upon which Document the claim is founded.
- 3. That I applied for inspection of the said Document by letter dated 28th of March, 1956. The Defence took no notice of this letter.
- 20 4. That on the 10th day of May, 1956, I served a Notice to produce the said Document on the Plaintiffs' Solicitor under Order 31 Rule 16 of the Supreme Court Rules. No inspection has been granted under this Notice.
- 30 5. That both Senior Counsel for the Defence and myself are labouring under a handicap in that we have never seen this Mortgage and that I make this Affidavit in support of a Motion for an Order for Inspection under Order 31 Rule 18 of the Rules of the Supreme Court.

SWORN by the above-named)
Deponent at Kumasi this) (Sgd.) J. Boateng Siriboe.
24th day of May 1956.)

Before me,

(Sgd.) John Haizel

Commissioner for Oaths.

In the
Supreme Court

No.4A

Court Notes
granting leave
to amend
defence,
24th May 1956.

No. 4A

COURT NOTES GRANTING LEAVE TO
AMEND DEFENCE

In the Supreme Court of the Gold Coast Ashanti;
At the Land Court held at Kumasi on Thursday the
24th day of May 1956 before Smith, Ag. J.

Joe Appiah & ors.

v.

Basil Basil
(Successor).

10

Owusu for Plaintiffs.

Franklin (with him Siriboe) for Defendant.

Franklin - Motion - but can go on if he has right
of mortgage referred to in Affidavit.

Owusu - Yes.

Court:- Case to stand over until 11 a.m.

Appiah v. Basil.

From Page 367.

Franklin - I ask leave to amend the defence - by
deleting the word "later" in paragraph 4 of the
defence and substituting "by agreement recited in
the mortgage dated 11th November 1927 referred to
in paragraph 3 of the Statement of Claim" - and by
adding 2 further paragraphs to the defence.

20

No.12 "The defendant says that the said mortgage
of 11th November 1927 became null and of no ef-
fect upon the execution of the said further trans-
actions in 1931".

No.13 "Alternatively, if, which is denied, the
said mortgage is deemed to have present effect the
defendant says that he has been a mortgagee in pos-
session since 1927 and that the Plaintiff is barred
from his remedy by the operation of the Real Property
Limitation Act 1833".

30

Plaintiff in person: I have no objection.

Court: Leave to amend as sought is granted.

No. 5
J.E. APPIAH

In the
Supreme Court

Plaintiff: Joseph Emmanuel Appiah S.O.B. in English.

Plaintiffs'
Evidence.

Legal Practitioner, at present resident in Kumasi. I am one of the Executors to the Will of the late Yaw Anthony - the mortgagor in question.

No.5
J.E. Appiah,
24th May 1956.
Examination.

10 I produce the original Mortgage deed made the 11th November 1927 - between Yaw Anthony (Kumasi-Ashanti) Mortgagor and Noah Basil Basil (now decd.) - the Mortgagee. Exhibit "A"

I also produce a Permit (Consent) signed by John Maxwell - then Chief Commissioner Ashanti dated 22nd December 1927 - consenting to the Mortgagor, mortgaging his interest in plot No.435 Old Town (Section B) to said Noah Basil Basil - Exhibit "B".

At the time of the mortgage the land was known as a whole (undivided) as plot 435.

20 I also produce an Indenture made 25th November 1949 between Basil and Anthony purporting to reconvey half the property 435 "A" to Yaw Anthony - Exhibit "C".

Owusu at this stage for Plaintiff.

30 The £7000. 0. 0. mentioned in the mortgage has been repaid by the Mortgagor to the Mortgagee through the Mortgagee remaining in possession and collecting Rents since the buildings were completed £3500. 0. 0. was paid in cash and £3500. 0. 0. from the rents. Exhibit 'C' was executed in view of this payment.

Exhibit "C" is not signed by Yaw Anthony. I know the reason - he said because paragraph 3 of Exhibit "C" is incorrect.

I ask for an order of the Court that the clog on the Equity of Redemption be removed.

Cross-examined Franklin:

Cross-Examina-
tion.

You said Anthony refused to sign Exhibit "C".
Yes.

In the
Supreme Court

Plaintiffs'
Evidence.

No.5

J.E. Appiah,
24th May 1956.

Cross-
Examination
- continued.

But Exhibit "C" is a Reconveyance?
Yes.

What is the necessity for him to sign?
The face and terms of the Agreement.

In an Assignment, only the signature of the Assignor is required?
I do not agree.

Shown Exhibit "C" - why do you say there is a later agreement?
I do not.

10

Any agreement was prior to 1927?
I don't know.

In 1931 old Plot 435 was split into two?
Yes.

Old Plot 435 was surrendered by Yaw Anthony to Chief Commissioner?
Yes - for the division to be made. Two more leases were made - one to Yaw Anthony 435 and to Basil 435A?

Yes - but both were handed to Basil - on the strength of Exhibit "A".

20

Lease of 435A should have gone to Basil anyway?
Yes - he was entitled to that as Lessee.

Why did he get that of Plot 435?
Under Exhibit "A". All Yaw Anthony's action were done on the strength of Exhibit "A".

£7000. 0. 0 was paid back?
Yes - The reference to £3500. 0. 0 in Exhibit "C" was ingenious way by which it was sought to clog this equity of redemption.

30

Should not therefore paragraph 6 of Statement of Claim have read £7000. 0. 0?
No we were talking about that half (Plot) which was safely in our hands.

£7000. 0. 0 was against the two Plots?
Yes.

What about line 15 in Exhibit "A"?

That was also an ingenious way of clogging the equity of redemption - because the security was the whole of the building until 1949.

In the
Supreme Court

Plaintiffs'
Evidence.

No.5

J.E. Appiah,
24th May 1956.

Cross-
Examination
- continued.

The security was the whole of the plot between 1927-31 and afterwards the half of it?

I disagree.

You say the two properties remained in mortgage?

Yes.

10 The properties reassigned in 1949 should have been the two properties?

Yes - exactly.

But in fact only one property was reassigned?

Correct.

Date of death of Yaw Anthony?

About December 1952.

Yaw Anthony between 1949 and 1952 had been cheated out of half his property?

Yes.

20 Did he take any steps?

He had been bedridden about 20-27 years. Very old. In our family he and I were the only males left. I was away in England.

What was his condition in 1931?

His sickness had begun.

Was he not advised during that period?

He engaged several Counsel - I instructed Counsel in 1952.

Was he advised by Mr. Hinterman in 1949?

I don't know: they were friends.

30 Mr. Hinterman an astute man of business?

Yes - but not of law.

You are saying Exhibit "A" still subsists?

Yes.

What about the two leases in 1931?

Your client's ingenuity.

Have you a Receipt for £7000. 0. 0?

In the
Supreme Court

Plaintiffs'
Evidence.

No.5

J.E. Appiah,
24th May 1956.

Cross-
Examination
- continued.

Re-Examination.

No - but on face of the account I can say the
£7000. 0. 0 has gone back into the Defendant's
hands.

Shown paragraph 5 of Exhibit "C" - what is the con-
sent of 1951?

Consent to mortgage of the half - it goes back
to Exhibit "A" - one half being in your client's
hands already.

Re-examined Owusu - None.

- Case -

10

Defendant's
Evidence.

No.6

Hakim Kharam,
24th May 1956.

Examination.

No. 6

HAKIM KHARAM

Hakim Kharam S.O.K. in English.

Examined Franklin.

I have been in Gold Coast 24 years - Merchant
of Kumasi. I knew the late Bassil - I am of his
family. In 1927 Bassil took 3 plots from Yaw Anthony
- one of which was 435. Yaw Anthony said he had
not money to build on Plot 435. He offered half of
his plot to Bassil - who said he would build to
value of £3500. 0. 0 on half the plot for Yaw An-
thony and he would have mortgage - Exhibit "A".

20

Bassil finished the house in 1929 - before he
was in 1931 he made a "good paper" until Yaw Anthony
- i.e. a lease. In 1931, Bassil was collecting
rents from all properties. He built the properties
on either half of the plot. He made accounts - to
lawyer Johnston for Yaw Anthony.

Bassil died 1937. His wife left Power of
Attorney with Lawyer Mead - 1938-1953. There was
a letter from Asantehene's land office threatening
to enter on to a part of 435A - I built a two sto-
rey more on plot 435A in 1954.

30

Cross-
Examination.

Cross-examined Owusu.

Accounts were made to lawyer Johnston?

Yes - I don't know anything about the offer
of 435 or 435A.

One continuous building in 435?
Yes.

In the
Supreme Court

How much did Bassil pay for Plot 435A?
£3500. 0. 0. The consideration for the half
plot was no interest on £3500. 0. 0.

Defendant's
Evidence.

No.6

Where is the Agreement for that?
I cannot speak English. It is common custom
to take half of one plot and build on it with
the whole given as security. They agreed Yaw
Anthony and Bassil to keep half.

Hakim Kharam,
24th May 1956.

Cross-
Examination
- continued.

10

How much Rent was got from building a Plot 435A?
I don't know. Yaw Anthony had a plot - he
and Bassil agreed to divide it into two -
he would build for Anthony on the plot and
after its completion he Bassil would take
rent for half the building and that half if
it reaches £3500. 0. 0 Yaw Anthony could take
that part of building for himself.

20

Two separate lease for Anthony and for Bassil in
that Agreement?
Yes.

Re-examined: Bassil built the whole house half for
himself and half for Anthony.

Re-Examination.

No. 7

No.7

J.W. MEAD

John William Mead
Examined Franklin

J.W. Mead,
25th May 1956.

Examination.

30

Legal Practitioner Kumasi - Gold Coast. I
managed Plots 435 and 435A in Kumasi - from 1938
until 1948/49. Throughout that period there were
two separate plots held under two separate leases
I prepared Exhibit "C". The £3500. 0. 0. was the
amount referred to in the Mortgage - in Exhibit "C".
The £3500.0.0 had been paid off by the net profits
which had arisen out of the two plots 435 and 435A
- rents from buildings on outgoings. I set half the
net proceeds against each plot. When I took over
in 1938 - Dr. De Graft Johnston had been acting
for Yaw Anthony. There was an agreed figure at the
beginning of my stewardship - as to the amount

40

In the
Supreme Court
Defendant's
Evidence.

No.7

J.W. Mead,
25th May 1956.

Examination
- continued.

credited to Yaw Anthony. Yaw Anthony's affairs were managed by Mr. Hinterman who died in 1954. I made accounts with him, before the execution of Exhibit "C". He wanted to know the state of the mortgage and to get the property reassigned.

By 1949 Yaw Anthony had been credited with £3500. 0. 0.

I know of no payment of £3500. 0. 0 in cash. I advised the widow of Basil that as £3500. 0. 0 was the only amount secured, she could not recover more, although Defendant's accounts showed a considerable greater sum had been spent on the buildings. Yaw Anthony was never asked to execute the document - Exhibit "C". Exhibit "C" has my usual testimonium clause - my practice for a document of Reassignment. The title deeds were handed over to Mr. Hinterman for Yaw Anthony. Mr. Hinterman knew of Exhibit "C", he asked for it to be drawn up. I had no complaint from 1949 onwards.

10

Cross-
Examination

Cross-examined Owusu.

20

Before Mr. Hinterman died, Mr. Tamakloe wrote you for an account and deed of surrender in respect of Plot 435A?

I was asked for account - but not for a surrender of the lease of Mr. Basil. I cannot recollect about the surrender of the lease.

Mr. Hinterman was not a lawyer?
Not a professional one.

Yaw Anthony was bedridden for many years?

Yes, in June 1949 - a net amount of £7000.0.0 had been collected - half being paid under the mortgage of 1927 - referred to in paragraph 5 of Exhibit "C".

30

2 leases executed in pursuance of the Mortgage of 1927?

No - I don't think so. I don't know of any written agreement in existence. For paragraph 3 of Exhibit "C" there must have been some agreement - before I drafted it. But I cannot recollect if there was any written document. I must have been satisfied of the agreement however.

40

Would you be surprised if defendant said there was

a prior agreement to 1927?

I would not be - Defendant might have some other evidence.

Have you a Power of Attorney - from Yaw Anthony to deal with Mr. Hinterman?

Something was signed - I cannot recollect the form of authority.

You never wrote to Yaw Anthony about what Defendant's widow said?

10 I do not recollect.

Re-examined Franklin - There is nothing in paragraph 3 as to the terms of the prior agreement in which paragraph 3 was drafted. I had Exhibit "A" when I drew Exhibit "C". I had something more than that before I drafted paragraph 3 of Exhibit "C".

- Case -

No. 8

ARGUMENTS OF COUNSEL

20 Victor Owusu for Plaintiffs.

Franklin for Defendant.

Argument:

Franklin Equity:

1. Yaw Anthony refused to execute reassignment of 1949 wherefore he did not agree with paragraph 3 of that document. Document not executed. Testimonium. See Mr. Mead's evidence. It was divestment of Basil of his rights in the new plot 435.

30 Mr. Mead's document of 1949: Mortgage of 1927 - he had to give something back upon payment of the principal sum mentioned in that mortgage. He would not give back the original security - he gave back what he could - new block.

Submits - All the recitals in the Reassignment 1949 are binding on the Plaintiffs - they were acquiesced in by the Plaintiffs predecessors.

See para. 8 of the Statement of Claim.

In the
Supreme Court

Defendant's
Evidence.

No.7

J.W. Mead,
25th May 1956.

Cross-
Examination
- continued.

Re-Examination.

No.8

Arguments of
Counsel,
11th June 1956.

In the
Supreme Court

No.8

Arguments of
Counsel,
11th June 1956
- continued.

Kremlinger vs. New Patagonia Meat & Cold Storage Co. Ltd. 1914 A.C. - page 25. Judgment Viscount Haldane - page 33. Substance of transaction examined. I do not agree that the provision in the mortgage of 1927 was not a clog. It was a clog. Between 1927 - 31 Yaw Anthony could have come to equity and got a declaration that the whole of Plot 435 should be assigned to him. Mortgage can stipulate for collateral advantage - if fair - and not unconscionable.

10

Fact - what was the true character of the transaction?

Lord Mersey: Judgment - Position therefore is that - all conditions may be in a mortgage except those which impede the Reconveyance.

Samuel v. Jarrah Timber Corporation 1904 A.C. Page 323.

Lord Halsbury's Judgment.

Franklin.

Mortgage with proviso for redemption to be forfeited - the Court will hold against that mortgage - but a loophole must be looked for. That loophole in this case I submit is that this transaction is not one primarily of mortgage although a mortgage deed for a limited period form a part of it.

20

Recital 3 of the 1949. Reassignment. If that agreement is after 1927 (as Plaintiffs contend not admitted) then Reeve v. Lyle 1902 A.C. 461.

Refers to original Mortgage of 1927. Parties had come to same agreement aforesaid prior to the execution of the mortgage. 1927 Anthony had land no money - Basil money but no land - in 1927 -: Bargain. Anthony gets after a period of years buildings on his land - Perfectly fair agreement. Tacked on to that Agreement was a security by mortgage of 1927.

30

Basil never clearly clogged the equity, he actually created an equity against himself. Between 1927 - 1931 agrees his client is bound by the doctrine of clogging the equity. In 1931 circumstances changed - subject matter surrendered to the Government.

40

sic Transactions in 1931 took place because I am agree-
ment. Original contract was for the sale of land.

(1) What was Basil's object? To lend money
or obtain half the plot.

and (2) Yaw Anthony - did he go to borrow money
and give Basil land for the remainder of
the lease.

In the
Supreme Court

No.8

Arguments of
Counsel,
11th June 1956
- continued.

10 Only one thing - the intention was to sell land.
Difference of terms of this Mortgage - the usual
one. No loan - no interest - no time limit. In
1927 is only a security document - not intended to
set out the whole of the bargain.

Plaintiff must show

20 (1) Even if the events of 1931 took place in
consequence of the mortgage deed - that
equity will interfere after the position
had been changed. That change took place
by the Action of Yaw Anthony. Submits:
even if Anthony acting under mortgage -
the court will not interfere, when it was
he who changed the position.

and (2) Yaw Anthony in 1931 was not acting under
the mortgage - he was acting under a wider
agreement of which the mortgage was only
a small part.

Mortgage of 1927 - did not exist after 1931. Whole
purpose of the Agreement was that Basil gave half
to Yaw Anthony. Surrender to the Government was
necessary.

30 Argument so far that Basil is the lessee from gov-
ernment. If that is not so, then Mortgagee in pos-
session. Plaintiff is barred from recovering the
property under Real Property Limitation Act of 1833.

Period that affected here is 20 years - the legal
period of limitation - There is an equitable limi-
tation, which usually follows the law. Period now
of 25 years - nearly 30 years after Anthony made an
agreement, the effect of which was to transfer
property - and not to borrow money.

40 Most cogent reasons, to reopen after 30 years -
submit matters ended in 1931. No evidence of

In the
Supreme Court

No.8

Arguments of
Counsel,
11th June 1956
- continued.

fraud or pleasure. Yaw Anthony carried out his bargain to the full made a transfer of both halves - and accepted a retransfer of half. Submits this Court is being asked to reopen a matter on a technicality.

Owusu -

Salmon v. Jarrah 1904 A.C. Page 325.
Principle of equity - must be - founded and given effect to. If principle of clogging the equity is offended - it must be put right: Right to redeem accrued in 1949 - (when rents were paid) - Rights go on for 20 years thereafter from 1949.

10

Collateral advantage only if right to redeem is not clogged. Defendant agree there is a clog. No prior agreement. Onus is on the Defendant. Speculative - Amendment to clause 4 of Statement of Defence. Where was the Agreement - and when. Prior or subsequent? No proof. Submits nothing before 1927 - and everything followed from then.

In Exhibit "C" there were many recitals - the other party has not been called on to sign - how can it be binding on Yaw Anthony? It is not unilateral - it refers to material agreement. e.g. paragraph 3.

20

Court -

In effect Reassignment is only what Basil says!

- (1) One Mortgage Deed 1927.
- (2) It contained clog.
- (3) Same plot 435 (merely subdivided - 435 and 435A).
- (4) See para. 5 of Reassignment.
- (5) No other mortgage or collateral Agreement other than that of 1927 has been established by the Defence.
- (6) Judiciary relationship between Mortgagor and Mortgagee.
- (7) Giving up the land to the government - and transferring half was in pursuance of the clog of 1927.

30

Basil got a means of (1) investing money - building on land that was not his.

(2) He would get a great deal of interest in 20 years.

(3) Clearly no sale. Simple mortgage transaction.

40

Why should Yaw Anthony give one half of the land to Basil - unless in pursuance of the clog in the mortgage. There are money and other advantages a Syrian has, by owing property or land.

One building extends over the whole plot.

Lands Department not called - if the Reassignment was a separate transaction.

Defence refer to Exhibit "A" as a Mortgage. Referred to in all other documents as a mortgage.

10 Refers to :-

Bradley v. Garritt - 1903 A.C. page 261.

Division only took place in pursuance of mortgage together with the clog for redemption.

Re Biss - 2 Ch. 1903. (C.A.)

Page 51 - line 1 -

A portion in this case - the benefit of 1931 transaction was for the mortgagor

and at page 62

Leigh vs. Bennet. 2 Ch. Div. Page 234.

20 Following these authorities-Counsel submits - If 1927 Document accepted as mortgage - any lease advantage got by Basil was so done and grafted on the old security.

Adjei vs. Dabanka and or. 1 W.A.C.A. page 68.

Agreement 1931 in pursuance of the Mortgage of 1927.

In 1923 - Yaw Anthony was given a lease for 50 years - lease of Basil was for 42 years - after 7 years of Anthony's lease had expired.

30 Why not for usual for 50 years - if not in continuation of Yaw Anthony's lease and security. From this the continuation of the proceedings can clearly be seen.

1927 - Mortgage - relationship - clog was created and while relationship existed Basil got a separate lease of half this plot in pursuance of the agreement of 1927. That lease should be engrafted on the whole security. (In re Biss).

(Sgd.) H. C. Smith
Ag. Judge.

40

In the
Supreme Court

No.8

Arguments of
Counsel,
11th June 1956
- continued.

November, 1927 mortgaged to Noah Basil Basil the Plot 435 on the Old Town Section B, Kumasi against an advance of £3500.0.0d part of a larger sum required to put up buildings on that land. The Mortgage also stipulated "provided always that if the mortgagor shall pay the Mortgagee the sum of £3,500 then the Mortgagee will at any time thereafter upon the request and the costs of the Mortgagor reconvey half of the said messuages hereditaments and premises with the building thereon as set forth in the agreement aforesaid unto the Mortgagor his heirs executors administrators or assigns."

In the
Supreme Court

No.9

Judgment,
3rd July 1956
- continued.

This provision was a clog on the equity of redemption. There is no doubt about that and in fact it was conceded. Mr. Franklin's argument is that it only persisted between 1927 and 1931. In this latter year Plot 435 was surrendered by Yaw Anthony to the Government of Ashanti. It was then divided into two parts known as plots 435 and 435A which were leased by the Government to Anthony and Basil respectively, the leases being deposited with Basil by way of Equitable Mortgage. It was argued by the Plaintiff that this was in pursuance of the Mortgage of 1927, by the defendant that it was in implementation of the wider agreement, whereby one half of Yaw Anthony's land was to go to Basil. It may be either I do not think the words "on an agreement made between them" in line 18 of the Mortgage of 1927 necessarily refer to a Prior agreement to sell the land in question and the events of 1931 are equally consistent with, and as Mr. Owusu submits, in pursuance of the clog on the equity of redemption referred to in the Mortgage deed of 1927.

As regards the re-assignment of 25th November, 1949, Exhibit "C" I have these comments to make. Paragraph 3 reads: "By the mutual consent and agreement of the Mortgagor and the said Noah Basil Basil the Mortgagor surrendered unto the Government of Ashanti the hereditaments and premises comprised in the hereinbefore recited indenture of lease and the Government of Ashanti divided the said hereditaments and premises known as Plot Number 435 into two separate plots thenceforth to be known as Plots number 435 and number 435A respectively".

There is no reference to any document on details of the Agreement referred to. From the mere fact of surrender, I do not consider there is sufficient evidence to warrant the inference that

In the
Supreme Court

No.9

Judgment,
3rd July 1956
- continued.

I am asked to draw by Mr. Franklin from that clause. As a re-assignment it is of course, signed only by the Assignor but the opening narrative refers to "This Indenture made between Basil Noah Basil ... of the one part and Yaw Anthony of the other part." Moreover, it must be noted that this "Basil Noah Basil" is not the original mortgagee, who died in 1937. I do not see therefore that in the absence of Yaw Anthony's signature to this document or proof that he acquiesced in the contents, he is any way bound by the Recitals. Again it is unfortunate that Mr. Hinterman who I understand managed Yaw Anthony's affairs for him is also dead.

10

As I have said accepting that Exhibit "A" is a Mortgage, I cannot hold that it came to an end in 1931. While there is no rule which prohibits a borrower agreeing to deal with the property after the mortgage loan has been advanced I do not find evidence of an agreement subsequent to the Mortgage bargain which would bring the matter within the principle decided in the case of Reeve versus Lyle 1902, Appeal Cases, page 461. In my opinion the plaintiffs are entitled to a declaration that they may redeem the plot and premises on 435A Old Town Section B. Costs to Plaintiffs 50 guineas.

20

(Sgd.) H.G. Smith,
Ag. Judge.

By Court: Mr. Owusu - I have limited my judgment to making a declaration that your clients are entitled to redeem in view of the clog on the equity of redemption. I have not seen the Accounts nor is there sufficient evidence to justify me making an Order for conveyance at this stage.

30

Mr. Owusu: As your Lordship pleases, I will consider the further steps.

(Sgd.) H.C. Smith,
Ag. Judge.

No.10
NOTICE OF APPEAL

In the West
African Court
of Appeal

IN THE WEST AFRICAN COURT OF APPEAL
COLD COAST SESSION
VICTORIABURG - ACCRA

No.10

Notice of
Appeal,
27th July 1956.

BETWEEN 1. JOE APPIAH)
2. J.W.K. APPIAH) PLAINTIFFS-
3. MABEL OTCHERE) RESPONDENTS
4. VICTORIA BANDO)

10

- and -

BASSIL NOAH BASSIL) DEFENDANT-
LEBANON STREET-KUMASI) APPELLANT.

NOTICE OF APPEAL (RULE 12) WEST AFRICAN
COURT OF APPEAL RULES, 1950

TAKE NOTICE THAT the Defendant-Appellant being dissatisfied with the Decision of the Land Court Kumasi, contained in the Judgment of Mr. Justice Smith dated the 3rd day of July, 1956, doth hereby appeal to the West African Court of Appeal upon the grounds set out in paragraph 3 and will at the hearing of the Appeal seek the Relief set out in paragraph 4:

20

AND THE APPELLANT further states that the names and addresses of persons directly affected by the Appeal are those set out in paragraph 5:

2. Part of the Decision of the Lower-Court complained of :- WHOLE DECISION.

3. GROUND OF APPEAL

30

(a) That the Learned Trial Judge was wrong in holding that there was insufficient evidence of another Agreement than the mortgage of 1927 herein.

(b) That the Learned Trial Judge was wrong in holding that the said mortgage of 1927 could be affected only by an Agreement subsequent to the mortgage loan.

(c) That the Learned Trial Judge was wrong in holding that the said mortgage of 1927

In the West
African Court
of Appeal

No.10

Notice of
Appeal,
27th July 1956
- continued.

persisted after the transactions and equitable mortgage of 1931.

- (d) That the Learned Trial Judge was wrong in holding that the said events of 1931 were in consequence of the said mortgage of 1927.
 - (e) That the Learned Trial Judge was wrong in holding that equity will interfere after the said events of 1931.
 - (f) That the Learned Trial Judge was wrong in underestimating the value as evidence of the Re-assignment of 1949. 10
 - (g) That the Learned Trial Judge was wrong in not considering the effect of the Real Property Limitation Act 1833.
4. RELIEF SOUGHT FROM THE WEST AFRICAN COURT OF APPEAL is for Reversal of the Land Court's Judgment.
5. Persons directly affected by the Appeal are :-
- | | | | |
|---|-----------------------|---|----|
| 1. JOE APPIAH
2. J.W.K. APPIAH
3. MABEL OTCHERE
4. VICTORIA BANDO
all of Kumasi Ashanti |)
)
)
)
) | c/o Victor Owusu Esqr.,
Barrister-at-Law &
Solicitor, Kumasi. | 20 |
|---|-----------------------|---|----|

DATED AT KUMASI THIS 27TH DAY OF JULY, 1956.

(Sgd.) J. Boateng Siriboe
pp. Franklin & Siriboe
Joint SOLICITORS FOR
DEFENDANT-APPELLANT.

THE REGISTRAR,
LAND COURT,
KUMASI.

30

With copy for Service on
The Plaintiff-Respondents'
Solicitor - Victor Owusu Esqr.,
Barrister-at-Law & Solicitor,
Supreme Court, Kumasi.

No.11
APPLICATION TO ADDUCE
FRESH EVIDENCE

In the West
African Court
of Appeal

IN THE WEST AFRICAN COURT OF APPEAL
GOLD COAST SESSION
A C C R A

No.11
Application to
adduce Fresh
Evidonce.
Undated.

On Appeal from Land Court, Kumasi

IN THE MATTER OF

10 1. Joe Appiah)
 2. J.W.K. Appiah }
 3. Mabel Otchere } Plaintiffs-
 4. Victoria Bandoh } Respondents
 As Executors to the Will }
 of Yaw Anthony (Deceased))

versus

 Basil Noah Basil)
 Successor to Noah Basil } Defendant-
 Basil, Lebanon Street, } Appellant.
 Kumasi

20 AND IN THE MATTER OF AN APPLICATION HEREIN FOR
LEAVE TO BRING FRESH EVIDENCE.

MOTION ON NOTICE by Harry Verney Alfred Franklin,
Counsel for Defendant-Appellant, for leave to ad-
duce fresh evidence from the files of the Lands
Department not previously available viz:-

1. An original letter dated 1st December, 1927
from Noah Basil Basil to the Secretary of the
Kumasi Public Health Board.
- 30 2. A duplicate letter in answer to the above
dated 22nd December, 1927, from the Secretary
of the Kumasi Public Health Board to Noah
Basil Basil, the original of which has been
lost.

TO BE MOVED on Monday the 26th day of November,
1956 at 9 o'clock in the forenoon.

(Sgd.) H.V.A. Franklin
Solicitor for Defendant-Appellant

To the Registrar, West African Court of Appeal.
And to the Plaintiffs-Respondents.

In the West African Court of Appeal

No.12

Affidavit in support of Application, 30th August 1956.

No.12

AFFIDAVIT IN SUPPORT OF APPLICATION

IN THE WEST AFRICAN COURT OF APPEAL
GOLD COAST SESSION
A C C R A

On Appeal from Land Court, Kumasi

1. Joe Appiah)		
2. J.W.K. Appiah)		
3. Mabel Otchere)	Plaintiffs-	
4. Victoria Bandoh)	Respondents	10
As Executors to the Will)		
of Yaw Anthony (Deceased))		

versus

Basil Noah Basil)		
Successor to Noah Basil)	Defendant-	
Basil, Lebanon Street,)	Appellant.	
Kumasi)		

A F F I D A V I T

I, BASIL NOAH BASIL make Oath and say :-

1. That I am the Defendant-Appellant in this appeal and crave leave to refer to various pages in the Record of Appeal herein. 20
2. That the Defence was prepared without sight of the mortgage of 11th November 1927 referred to in the writ and the Statement of Claim.
3. That from the re-assignment dated 25th November 1949 (Exhibit "C") (which was the only document available to the Defence) it was assumed that the Mortgagor Yaw Anthony and the late Noah Basil Basil had entered into an agreement to divide the land mortgaged in 1927 subsequently to the said mortgage and in paragraph 4 of the Defence it was so pleaded. 30
4. That on 28th March 1956 my Solicitor applied for inspection of the said mortgage, as appears in paragraph 3 of his affidavit, but no notice was taken of his request.
5. That on 10th May 1956 my Solicitor served a

notice to produce the said mortgage under Order 31 Rule 16 as appears in paragraph 4 of his said affidavit, but no inspection was granted under this notice.

In the West
African Court
of Appeal

No.12

Affidavit in
support of
Application,
30th August
1956 -
continued.

6. That on 24th May 1956 my Solicitor made a Motion for an order for inspection of the said mortgage.

10 7. That on the said 24th May 1956 my Solicitors saw the said mortgage for the first time at the hearing of the case. It appeared to them that the agreement mentioned in paragraph 3 above was not subsequent to the said mortgage since it was mentioned in the said mortgage and an application was granted to amend the defence by deloting the word "later" in paragraph 4 thereof and substituting "by agreement recited in the mortgage dated 11th November 1927 referred to in paragraph 3 of the Statement of Claim"

20 8. That my Solicitors based the said amendment on two extracts from the said Mortgage (Exhibit "A")

30 "AND WHEREAS the Mortgagor has requested the Mortgagee and the Mortgagee has agreed to erect a building with stores and out-buildings on the said Plot No.435 Old Town Section "B" to the value of Seven Thousand Pounds (£7,000) more or less on the Mortgagor giving security for the repayment of half of the amount to be expended on the said buildings namely the sum of Three thousand five hundred pounds (£3,500) and the Mortgagor has agreed to execute this Mortgage for that purpose on an Agreement made between them"

"And the Mortgagor doth hereby covenant with the Mortgagee that he the mortgagor will pay the mortgagee the said sum of Three thousand five hundred pounds (£3,500) as provided for in the aforesaid Agreement."

40 9. That my Solicitors thought that these extracts were sufficient evidence of an agreement separate from the mortgage but the learned Trial Judge did not accept this. I crave leave to refer to his Judgment -

"It was argued by the Plaintiff that this was

In the West
African Court
of Appeal

No.12

Affidavit in
support of
Application,
30th August
1956 -
continued.

in pursuance of the Mortgage of 1927, by the Defendant that it was in implementation of the widor agreement whereby one half of Yaw Anthony's land was to go to Basil. It may be either. I do not think the words "on an agreement made between them" on line 16 of the Mortgage of 1927 necessarily refer to a Prior Agreement to sell the land in question."

10. That before the hearing of the action I am informed and verily believe that my Solicitor went to the Lands Department in Kumasi and was shown two files dealing with the land involved herein which contained nothing of importance. 10
11. That after the hearing of the action I was informed by the said Lands Department in Kumasi that further files had been discovered bearing hereon in which were

(1) an original letter as follows -

"Kumasi.
1st December, 1927. 20

The Secretary,
Kumasi Public Health Board,
Kumasi.

Sir,

I have the honour to forward you herewith a deed of Mortgage and a deed of Agreement between Mr. Yaw Anthony and myself for your information, and beg to apply for His Honour the Chief Commissioner's consent for endorsement of Mortgage in my favour. 30

I enclose my cheque for 21/- being the fee payable.

I have the honour to be,
Sir,
Your obedient Servant,

(Sgd.) N.B. Basil."

- (2) a duplicate letter as follows, original of which is lost:-

"THE KUMASI PUBLIC HEALTH BOARD,
SECRETARY & TOWN CLERK'S OFFICE,
P.O. BOX 40,
KUMASI.

22nd December, 1927.

In the West
African Court
of Appeal

No.12

MR. N.B. BASIL,
K U M A S I.

LEASE NO.1671, PLOT NO.435, OLD TOWN
SEC. "B"

Affidavit in
support of
Application,
30th August
1956 -
continued.

10

With reference to your letter of the 1st instant, I am sending you herewith the Mortgage Indenture made between yourself and Mr. Yaw Anthony, dated 11th November, 1927, together with the consent of the Chief Commissioner of Ashanti, for which kindly acknowledge receipt.

(Sgd.) ?
Secretary
Kumasi Public Health Board."

20

12. That I respectfully submit that the said letters prove that there was in fact an agreement separate from the said mortgage, which the learned Trial Judge held not to have been proved. It would seem from the said letters that while the said Mortgage was returned to N.B. Basil the Agreement was not returned; but no trace of it can be found despite search.

30

13. That I make this affidavit in support of a motion to adduce fresh evidence viz:- the two letters set out in paragraph 11 above.

SWORN this 30th day of August)
1956, after the contents)
thereof had been read over)
and translated to the)
Deponent in the Arabic) (Sgd.) B.N. Basil.
language by M.D. BASIL when)
he expressed himself fully)
to understand and approve)
its)

40

BEFORE ME
(Sgd.) R.A. Bannerman,
COMMISSIONER FOR OATHS.

In the West African Court of Appeal

No.13

AFFIDAVIT BY JOE APPIAH OPPOSING APPLICATION

No.13

Affidavit by Joe Appiah opposing Application, 22nd November 1956.

IN THE WEST AFRICAN COURT OF APPEAL
GOLD COAST SESSION
A C C R A

1. JOE APPIAH	}	PLAINTIFFS- RESPONDENTS
2. J.W.K. APPIAH		
3. MABEL OTCHERE		
4. VICTORIA BANDO		
AS EXECUTORS TO THE WILL OF YAW ANTHONY (DECEASED)		

10

versus

BASIL NOAH BASIL, SUCCESSOR TO NOAH BASIL BASIL, LEBANON STREET, KUMASI	}	DEFENDANT- APPELLANT.
---	---	--------------------------

I, JOSEPH EMMANUEL APPIAH make Oath and say as follows:-

1. That I am the first Plaintiff-Respondent herein and have the authority of the other Respondents to swear to this Affidavit. 20
2. That paragraphs 2 - 7 of Appellant's Affidavit even if admitted which are denied in parts as for example an alleged letter of 28th March, having been written to me, are quite immaterial.
3. That on Defendant-Appellant's own Affidavit he had already filed his defence on 24th March, 1956 before ever seeking to inspect the mortgage deed of 1927 so subsequent inspection could only result in his amending a defence already filed which opportunity he had on 24th May, 1956. 30
4. That the motion for an order for inspection of the mortgage deed was fixed for hearing on the 24th of May, 1956 and on this day I did produce the mortgage deed in Court.
5. That Counsel for the Appellant intimated to the Court that he wanted an adjournment of only about two (2) hours and would then be prepared to go on with the case.

6. That such an adjournment was granted and on resumption at about 11 a.m. Counsel for Appellant asked leave to amend his defence in the manner indicated in the record. The Application was not opposed the amendment was granted and the hearing of the case proceeded.
7. That in any event this could not have prevented the Defendant from making the necessary searches at the Lands Department if he had diligently intended to prosecute his case and to discover the correspondence which he now seeks leave to adduce as fresh evidence.
8. That in any event the correspondence would be quite immaterial to the issue since the letter dated 1st December, 1927 cannot possibly bear the interpretation sought to be assigned to it.
9. That the phrase "a deed of mortgage and a deed of agreement" can only possibly mean a mortgage deed of agreement but erroneously otherwise stated by a layman.
10. That the letter of the Secretary of the Kumasi Public Health Board of 22nd December, 1927 makes it quite clear that only one mortgage deed of agreement was sent to the secretary.
11. That if it is sought to allege that 2 documents were sent and only one returned then the other alleged agreement should still be on the file for production and it has not been alleged now or in the pleadings before trial that the said alleged agreement got lost whilst on the files of the Kumasi Public Health Board.
12. That therefore I swear to this Affidavit to oppose appellant's application which only seeks to burden the hearing with immaterial evidence.
13. That however if their Lordships should feel disposed to grant the application then Respondents shall also ask for leave in the interest of justice to tender a certified true copy of a document recently discovered on the files of the Lands Department Kumasi and which document annexed and marked "A", it

In the West
African Court
of Appeal

No.13

Affidavit by Joe
Appiah opposing
Application,
22nd November
1956 -
continued.

In the West African Court of Appeal

No.13

Affidavit by Joe Appiah opposing Application, 22nd November 1956 - continued.

is submitted will put the matter beyond doubt.

SWORN AT KUMASI 22ND DAY)
OF NOVEMBER, 1956 IN THE) (Sgd.) J.E. Appiah
PRESENCE OF:

BEFORE ME
(Sgd.) E.K. Ofori
COMMISSIONER FOR OATHS.

THE REGISTRAR,
WEST AFRICAN COURT OF APPEAL,
ACCRA.

10

Copy to be served on Appellant herein or his Solicitor H.V.A. FRANKLIN, ESQR., or J.B. SIRIBOE, ESQR.

CERTIFICATE OF NON-SERVICE

Upon the 23rd day of November 1956 at 7.50 a.m. at Kumasi, I went to the office of Mr. J.B. Siriboe to effect service of a copy of this affidavit with attached exhibit marked "A" on Mr. J.B. Siriboe Counsel for the defendant-appellant herein, but he refused to accept service, with the grounds that he did not know anything about it; he asked service to be effected on Mr. H.V.A. Franklin at Accra.

20

(Sgd.) ? ?

Bailiff

23/11/56.

No.14

Court Notes on Motion for leave to adduce Fresh Evidence, 17th January 1957.

No.14

COURT NOTES ON MOTION FOR LEAVE TO ADDUCE FRESH EVIDENCE

30

17th January, 1957.

In the West African Court of Appeal, Gold Coast Session

Cor: Coussey, P., Korsah, C.J. and Verity, Ag.J.A.

67/56.

Joe Appiah & ors.

v:

Basil Noah Basil

Motion on Notice for leave to adduce as fresh evidence

- (1) Letter dated 1/12/27, Noah Basil to Secretary, Kumasi Public Health Board.
- (2) Duplicate letter dated 22nd December 1927 from Secretary, Kumasi Public Health Board to Basil.

Mr. Franklin for mover.

Mr. Owusu for opposer.

sic
10 By Counsel the letter referred to are admitted in evidence as W.A.C.A.1 and W.A.C.A.2 and a memorandum produced by Mr. Owusu dated 24th January 1930 is admitted in evidence as W.A.C.A.2.
sic

In the West African Court of Appeal

No.14

Court Notes on Motion for leave to adduce Fresh Evidence, 17th January 1957 - continued.

No.15

COURT NOTES OF ARGUMENTS OF COUNSEL

48/56.

Joe Appiah & ors.

v:

Basil Noah Basil.

Substantive Appeal.

20 Mr. Franklin for Defendant-Appellant

Mr. Owusu for Plaintiffs-Respondents

Mr. Franklin:-

Yaw Anthony had plot of land but no money. Made agreement common in Kumasi for Basil to build on whole plot.

Basil would take half plot and half building for his own. Anthony would keep half the building and half the plot after Basil had recouped himself his utley. A mortgage was added as Exhibit "A".

30 About 2 years after this mortgage, Anthony surrendered lease of plot to Government. About 1936, the Land Department granted 2 new leases, one to Basil of half the plot and to Anthony of other half, plots 435 and 435A.

Court.

Consent was given by Government to mortgage of

No.15

Court Notes of Arguments of Counsel, 17th January 1957.

In the West
African Court
of Appeal

No.15

Court Notes of
Arguments of
Counsel,
17th January
1957 -
continued.

sic

Anthony's Plot No.435 but mortgage never executed.

By 1949 sufficient money had accrued in Basil's hands to pay off the cost of building on Anthony's plot of land No.435.

A Re-assignment was prepared Exh. "C" and executed by Basil's executor.

The Draughtsman was in a difficulty because the new mortgage of Plot 435 had not been made. It would have been better if a three party Deed had been drawn up. New Plot 435 was re-assigned although there had been in fact no assignment by way of mortgage. Basil had died before 1949. Anthony or Hinterman his Attorney were alive. No complaint was made as to the transaction after deaths of Yaw Anthony in 1952 and Hinterman (1953), Executions of Yaw Anthony claimed that there was a clog on mortgagee's equity of redemption. Undoubtedly a clog in the equity of redemption in the mortgage of 1927 existed.

10

Grounds a & b.

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G. and C. Kreglinger v: New Patagonia Meat and Cold Storage Company, Limited

1914 A.C. 25 at p.35 p.45.

(What was the character of transaction).

Samuel v: Jarrah Timber and Wood Paving Corporation, Ltd.

1904 A.C. 323, p.328.

De Beers Consolidated Mines Limited v: British South Africa Company

30

1912 A.C. 52 - Earl Loreburn L.C. p.72.

sic

If there is a clog in the equity the Court is bound but the Court is undivided to escape from it where it is possible.

Defendant contended that the mortgage subsisted only until 1936 where the Lease of whole plot was surrendered.

Refer p.13 - cross-examination of Appiah.

Refer mortgage Deed Exh. "A". p. 25.

The Deed contains no provision for surrender to

40

Government or obtaining leases of 2 plots or of consent of Government to a further mortgage.

Clear that those things that did happen did not happen in conveyance of mortgage of 1927.

The agreement referred to in the Deed has been lost; It was with the Kumasi Public Health Board.

10 The terms of that agreement may be deduced partly from the Deed of mortgage and partly from the events that took place. Submits this transaction was not primarily for a mortgage but for a sale of land.

The surrender was not in pursuance of the mortgage. Nothing on mortgage to indicate that it would take place.

Court refers to *Reeve v: Lisle and others*
1902 A.C. 461.

Ground (b)

20 Cites *Reeve v: Lisle* as not being against appellant's contention.

Ground (c) Already touched on there was an equitable mortgage of new plot 435 inconsistent with continuance of the old mortgage of 1927.

Ground (e) A Court of Appeal in Equity - Equity will not interfere where there has been a change of position. After 1931, Yaw Anthony could not have pleaded this clog on the equity.

30 Ground (f) Refers to Exh. "C" - the Re-assignment was not complained of at the time although its recitals are not binding on Yaw Anthony.

Ground (g) If the mortgage of 1927 still subsists the defendant has been a mortgagee in possession since 1929: After 20 years, Real Property Limitation Act, 3 & 4 William IV applies.

There has been no acknowledgment.

Alderson v: White.

In the West
African Court
of Appeal

No.15

Court Notes of
Arguments of
Counsel,
17th January
1957 -
continued.

In the West
African Court
of Appeal

No.15

Court Notes of
Arguments of
Counsel,
17th January
1957 -
continued.

Mr. Owusu contra

Deed of mortgage does not stipulate time for redemption. Refer 20 Hailsham, 2nd Edition Note 992 p.734.

Alderson v: White.

In 1938, Mead made an account and informed mortgagor. That is an acknowledgment of mortgagor's title - An acknowledgment of whole transaction as to both plots. As there was a surrender to Court and a redemise in 1931, the time would run from that year as before 1931, mortgagee was not in possession. Time runs from 1931 and in 1949 there was acknowledgment by growing account.

10

Grounds (a) & (b):

Once the clog on the equity is admitted, the bar is there no matter how far the bargain is fair.

Samuel v: Jarrah.

1904 A.C. 325.

Reeve v: Lisle applies where there is no clog in the Deed. But where the clog is in the mortgage deed any subsequent agreement is void.

20

22 Hailsham 306 para 460.

Ex. W.A.C.A.2 Puts clearly that the new demised were based on the original Deed of Mortgage which had the clog.

In re Biss

Biss v: Biss

1903, 2 Ch. 62.

The new Lease obtained by Basil is engrafted on the original security.

30

Bradley v: Garritt

1903 A.C. 253. at 261

Fetter impaired indirectly on Equity of redemption, not permitted.

Leigh v: Burnett

29 Ch. Div. 231

All flows from Deed containing clog.

The whole £7000 has been recovered from profits on the property - New Lease held on original terms.

Continuing contrivance to clog Equity of redemption. The letter W.A.C.A.1 does not suggest that was a prior written agreement. A layman's letter -

10 A Deed of mortgage agreement - fee remitted for stamping only one document. In reply one document only was returned. No evidence of loss of other document, the agreement.

The agreement is in fact set out in the mortgage deed. Onus on appellants to prove other agreement.

In defence paragraph 4 'later agreement pleaded' - amended subsequently after inspection.

Mead's evidence p.16.

Ground (d) Decision of trial Judge right. Exh. W.A.C.A.2 puts this beyond doubt.

20 Events of 1931 flowed from clog in mortgage of 1927.

Franklin in reply:

When Defence prepared only Re-assignment available. Paragraph 3 of Exh. "C" seem to indicate that the agreement was after mortgage. When Counsel saw Exh. "A" the mortgage containing these references to an agreement, it seemed that the Agreement would have been before Exh. "A".

As to acknowledgment:

1927 is date to be considered.

30 Appellant in possession then. See Recital - Any rendering of accounts was not in respect of that mortgage, but in respect of new Plot 435.

Accounts are not acknowledgments at all.

C. A. V.

(Sgd.) J.H. Coussey, P.

In the West
African Court
of Appeal

No.15

Court Notes of
Arguments of
Counsel,
17th January
1957 -
continued.

In the West
African Court
of Appeal

No.16

Judgment,
11th February
1957.

No.16

J U D G M E N T

IN THE WEST AFRICAN COURT OF APPEAL
GOLD COAST SESSION

Coram:

Coussey, P.
Korsah, C.J.
Verity, Ag. J.A.

Civil Appeal
No.48/56

10

11th February, 1957

Basil Noah Basil,
Successor to Noah Basil Basil,
Lebanon Street, Kumasi, Defendant-Appellant.

v:

1. Joe Appiah,
2. J.W.K. Appiah,
3. Mabel Otchere,
4. Victoria Bandoh
As Executors to the
Will of Yaw Anthony
(Deceased),

20

Plaintiffs-Respondents.

JUDGMENT

KORSAH, C.J.: By an Indenture dated 11th November 1927 made between Yaw Anthony as mortgagor of the one part and Noah Basil Basil as mortgagee of the other part, it is recited that the mortgagor as lessee from the Colonial Government of plot No.435 requested the mortgagee to erect a "building with stores and out-buildings" on the plot to the value of £7,000 more or less, upon the mortgagor agreeing to give security for the payment of half of the amount to be expended on the said building namely the sum of £3,500. The mortgagor agreed to execute a mortgage for that purpose on an agreement made between them; in consideration of the sum of £3,500 to be advanced by the mortgagee to the mortgagor for the purpose of erecting the said building the mortgagor granted and conveyed his interest in the said plot of land with the building to the mortgagee, provided that if he should pay to the mortgagee the sum of £3,500 then the mortgagee would

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40

reconvey half of the said "messuages hereditaments and premises with the building thereon unto the mortgagor."

In the West
African Court
of Appeal

No.16

Judgment,
11th February
1957--
continued.

10 About two years later the mortgagor surrendered the lease of the plot of land to the Government, and in 1931 the Government divided the said land into two plots, Nos.435 and 435A and granted a new lease of plot No.435 to Yaw Anthony the mortgagor by a document dated 4/2/31 and a lease of 435A to Noah Basil Basil, the mortgagee. By an instrument dated 11th March 1931 the Government granted to Yaw Anthony permission to assign by way of mortgage to Noah Basil Basil the hereditaments and premises comprised in and demised to him by the new lease dated 4th February 1931. No document was executed but Yaw Anthony deposited the new lease with Noah Basil Basil, presumably as security for the repayment of the sum of £3,500.

20 No date was fixed for repayment of the loan, nor interest charged on the capital, but Noah Basil Basil, and after his death his successor was permitted to collect rents accruing from the portion of the building on the new plot 435 which is separated by partition wall from the portion of the building on plot No.435A.

30 By 1949 sufficient money had accumulated from the rents to pay off the cost of the building on Yaw Anthony's plot, No.435. By an indenture dated 25th November 1949 Noah Basil Basil re-assigned the said property to Yaw Anthony and discharged him from all moneys secured and all claims and demands in respect of the hereditaments and premises comprised in and demised by the lease of plot No.435. Noah Basil Basil died in 1938 and Yaw Anthony also died in 1952. No objection had been raised by Yaw Anthony to the transaction or to the recitals in the deed of re-assignment.

40 This suit was instituted by the executors of Yaw Anthony four years after his death seeking: "a declaration that notwithstanding the provision in a deed of mortgage dated 11th November 1927 between Yaw Anthony (deceased) and Noah Basil Basil (deceased) that on the said Yaw Anthony mortgagor paying £3,500 to Noah Basil Basil the mortgagee the said Basil will reconvey only half of the premises on plot No.435 Old Town Section 'B' the said plot having been since divided into two and described as plots 435 Old Town Section 'B' and plot No.435A

In the West
African Court
of Appeal

No.16

Judgment,
11th February
1957 -
continued.

Old Town Section 'B' they may also redeem the plot and premises on 435A Old Town Section 'B', the principal sum of £3,500 having been already paid by the said Yaw Anthony." The plaintiffs contend that "If and in so far as the clause referred to in the writ prevents the plaintiffs from redeeming the whole property upon payment of the principal it is illegal and void as a clog on plaintiffs right to redeem and cannot be enforced against them."

10

It is clear from evidence that the subsequent transaction after execution of the mortgage of 1927 both in form and substance cannot be said to be harsh or unconscionable. Looking at all the circumstances and not by mere reliance on some abstract principle, it will be observed that it was the intention of the original parties to enter into a separate and collateral contract independent of the mortgage upon which plaintiffs rely. This view is amply supported by the fact that Yaw Anthony surrendered to the Government the lease of the original plot, and the Government subsequently divided it into two plots and demised No.435 to Yaw Anthony and 435A direct to Noah Basil Basil in 1931, the Government's consent granted to Yaw Anthony to demise his new plot 435 to Noah Basil Basil and the subsequent deposit of the title deeds with Noah Basil Basil by Yaw Anthony, the re-assignment in 1949 of the building on Yaw Anthony's new plot 435 by the defendant after cost thereof was paid are circumstances from which may be inferred that the parties acted upon a separate and independent agreement which cannot be described as a clog on the equity of redemption under the mortgage of 1927. G. & C. Kreglinger v: New Patagonia Meat & Cold Storage Co. Ltd., 1914 A.C. p.25.

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If the clause in the original mortgage of 1927 were deemed to be a clog on the equity of redemption and thus make the agreement void as contended by plaintiffs, the result would be that the mortgagee has spent £7,000 in erecting buildings on the original plot under the mortgage in which no date was fixed for repayment of the capital and no interest charged. The mortgagor would be the beneficiary of the whole building and stores on both plots, Nos.435 and 435A without any outlay by him. It would mean that the surrender to the Government of the original lease and the subsequent division of the original plot into two, and the demise by

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Government of one plot to Yaw Anthony and the other to Noah Basil Basil would have no legal effect whatsoever.

In the West
African Court
of Appeal

No.16

Judgment,
11th February
1957 -
continued.

10 The defendant contends that the parties made a subsequent agreement to divide the property, that it has been lost, but its terms can be deduced partly from the deed of mortgage, and partly from the events which took place when the mortgagor surrendered the lease of the entire plot to the Government for the express purpose of obtaining a demise as to half of the plot to himself and half of the plot to the mortgagee as plots 435 and 435A respectively. Yaw Anthony deposited his lease of 435 with Basil as security for £3,500 owing by him until discharged by rents to be collected by Basil.

20 No deed of mortgage was executed after Yaw Anthony deposited his lease as might have been expected. The position there was that the mortgagor had obtained by re-conveyance half the property in terms of the mortgage which had been surrendered. At the time of the action there was no threat of foreclosure by the mortgagee as to that half. As to the other half in the hands of defendant-appellant there is no clog because: (a) there is no agreement to reconvey it (b) Yaw Anthony has surrendered his title to it and (c) Basil holds plot 435A by direct demise from Government unfettered by any equities in favour of the mortgagor or his executors. It should be noted that there is no appointed time in the deed of mortgage for repayment. No date line which a mortgagee could press for payment. Indeed the mortgage was all in favour of the mortgagor. He was the lessee of the bare land in 1927 but the mortgagee spent his money to put up the buildings.

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40 After recouping himself the mortgagee reconveyed plot 435 which he held on an equitable mortgage to the mortgagor free from incumbrances. All that the mortgagor has had to do was to sit and wait some years to secure a building he did not erect.

This was not an ordinary mortgage transaction. It was in fact, as the conduct of the parties show a building agreement whereby in consideration of a speculator building upon an entire plot of land one party the owner should take half of the property and the other party the speculating builder should take the other half of the property.

In the West African Court of Appeal

No.16

Judgment, 11th February 1957 - continued.

In view of the conclusion we have reached it is unnecessary to deal with the contention of the defendant-appellant that if the mortgage of 1927 still subsists, he has been a mortgagee in possession since 1927 and that by virtue of Real Property Limitation Acts 3 & 4 William IV the plaintiffs' claim is barred by statute.

This appeal should be allowed.

(Sgd.) K.A.Korsah, C.J.

COUSSEY, P.: I concur. (Sgd.) J.H. Coussey, P. 10

VERITY, Ag.J.A.: I concur. (Sgd.) John Verity, Ag. J.A.

Franklin for the appellant.
Owusu for the respondents.

No.17

Notice of Motion for Final Leave to appeal to Privy Council.

Undated.

No.17

NOTICE OF MOTION FOR FINAL LEAVE TO APPEAL TO PRIVY COUNCIL

IN THE COURT OF APPEAL.

BEFORE A SINGLE JUDGE.

W.A.C.A. Civil Appeal No.48 of 1956. 20

BETWEEN:

JOE APPIAH & OTHERS, Plaintiffs
(Appellants to Privy Council)
and
BASIL N. BASIL, etc. Defendant
(Respondent to Privy Council)

TAKE NOTICE that this Honourable Court will be moved by VICTOR OWUSU, ESQUIRE, of Counsel for the Plaintiffs would-be Appellants to the Privy Council herein and on their behalf on Monday the 24th day of June, 1957, at 9 o'clock in the forenoon or as soon thereafter as Counsel can be heard for an Order granting Final Leave to appeal from the Judgment of the West African Court of Appeal delivered on or about the 11th day of February, 1957 to Her Majesty's Judicial Committee of the Privy Council AND/OR for such further or other Order as to this Honourable Court shall seem meet. 30

DATED AT OKONFO ANOKYE CHAMBERS, KUMASI, THIS DAY OF JUNE, 1957.

(Sgd.) Victor Owusu,
COUNSEL FOR PLAINTIFFS (APPELLANTS TO PRIVY COUNCIL.)

In the West African Court of Appeal

No.17

Notice of Motion for Final Leave to appeal to Privy Council.

Undated.

- continued.

THE REGISTRAR,
COURT OF APPEAL,
A C C R A

AND TO

10 BASIL NOAH BASIL, successor to Noah Basil Basil the Defendant (Respondent to Privy Council) herein of Kumasi.

CERTIFICATE OF SERVICE.

Upon the 14th day of June 1957 at 4.30 p.m. a copy of this Motion Paper was served by me on Basil Noah Basil the defendant-respondent herein personally at Kumasi, Ashanti.

(Sgd.) Nunoo
Bailiff.

15/6/57.

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No.18

COURT NOTES GRANTING FINAL LEAVE TO APPEAL TO THE PRIVY COUNCIL

24th June, 1957.

In the Court of Appeal, Monday the 24th day of June, 1957.

Cor: Quashie-Idun, Ag. C.J., sitting as a single Judge of Appeal.

30 Civil Motion
No. 30/57.

Joe Appiah & ors.

v.

Basil N. Basil, etc.

Motion on Notice for an order for final leave to appeal to Privy Council.

Mr. Quashie-Sam (holding Mr. Victor Owusu's brief) for applicants.

40

Mover in terms of Motion Paper and Affidavit in support.

BY COURT: Final Leave to appeal granted.

(Sgd.) Quashie-Idun
Ag. C.J.

No.18

Court Notes granting Final Leave to appeal to the Privy Council, 24th June 1957.

Plaintiff's
Exhibits

"A"

Indenture made
between Yaw
Anthony and
Noah Basil
Basil,
11th November
1927.

EXHIBIT "A"

INDENTURE MADE BETWEEN YAW ANTHONY
AND NOAH BASIL BASIL

THIS INDENTURE made the 11th day of November One thousand nine hundred and twenty-seven (1927) BETWEEN YAW ANTHONY of Kumasi Ashanti in the Gold Coast Colony West Africa (hereinafter called the MORTGAGOR which expression shall where the context so admits include his heirs executors and administrators) of the one part and NOAH BASIL BASIL also of Kumasi Ashanti in the Colony aforesaid (hereinafter called the MORTGAGEE which expression shall where the context so admits include his heirs executors administrators and assigns) of the other part Whereas the Mortgagor is the Lessee from the COLONIAL GOVERNMENT of Kumasi Ashanti in the Colony aforesaid of Plot No.435 Old Town Section "B" AND WHEREAS the Mortgagor has requested the Mortgagee and the Mortgagee has agreed to erect a building with stores and outbuildings on the said Plot No. 435 Old Town Section "B" to the value of SEVEN THOUSAND POUNDS (£7,000) more or less on the Mortgagor giving security for the repayment of half of the amount to be expended on the said buildings namely the sum of THREE THOUSAND FIVE HUNDRED POUNDS (£3,500) and the Mortgagor has agreed to execute this Mortgage for that purpose on an Agreement made between them NOW THIS INDENTURE WITNESSETH that in consideration of the said sum of THREE THOUSAND FIVE HUNDRED POUNDS (£3,500) to be advanced by the Mortgagee to the Mortgagor for the purpose of erecting the said building with stores and outbuildings on the said Plot No.435 Old Town Section "B" he the Mortgagor doth hereby grant and convey to the said Mortgagee his heirs executors administrators and assigns All his interests in the said Plot No.435 Old Town Section "B" with the building now erecting on the land TOGETHER with all rights easements advantages and appurtenances whatsoever to the said land messuages and hereditaments expressed to be hereby granted appertaining or with the same held or enjoyed or reputed as part thereof or appurtenant thereto AND ALL the estate right title interest claim and demand of him the Mortgagor into and upon the said messuages hereditaments and premises TO HOLD the same unto and to the use of the Mortgagee his heirs executors administrators and assigns PROVIDED ALWAYS that if the Mortgagor shall pay to the Mortgagee the sum of

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THREE THOUSAND FIVE HUNDRED POUNDS (£3,500) then the Mortgagee will at any time thereafter upon the request and at the cost of the Mortgagor reconvey half of the said messuages hereditaments and premises with the building thereon as set forth in the Agreement aforesaid unto the Mortgagor his heirs executors administrators or assigns or as he or they shall direct And the Mortgagor doth hereby covenant with the Mortgagee that he the Mortgagor will pay the Mortgagee the said sum of THREE THOUSAND FIVE HUNDRED POUNDS (£3,500) as provided for in the aforesaid Agreement AND IT IS HEREBY AGREED AND DECLARED that if the sum of THREE THOUSAND FIVE HUNDRED POUNDS (£3,500) or any part thereof shall not be paid as provided for in the Agreement aforesaid it shall be lawful for the Mortgagee his heirs executors administrators or assigns at any time or times without any further consent on the part of the Mortgagor his heirs executors administrators and assigns with the approval of the Chief Commissioner of Kumasi Ashanti in the Colony aforesaid to sell the messuages hereditaments and premises hereby granted and conveyed or any part or parts thereof either together or in lots and either by Public Auction or Private Contract and either with or without special conditions or stipulations relative to title or otherwise with power to buy in at sales by auction and to rescind contracts for sale without being answerable for any loss or diminution in price and with power also to execute assurances give effectual receipts for the purchase money and do all other acts and things for completing the sale which the Mortgagee his heirs executors administrators or assigns shall think fit AND IT IS HEREBY AGREED AND DECLARED that the Mortgagee his heirs executors administrators or assigns shall out of the proceeds of the sale first pay and satisfy the monies which shall then be owing on this security and shall pay the balance (if any) to the Mortgagor his heirs executors and administrators PROVIDED ALWAYS AND IT IS HEREBY AGREED AND DECLARED that the power of sale hereinbefore contained shall not be exercised unless default shall be made in payment of the sum of THREE THOUSAND FIVE HUNDRED POUNDS (£3,500) or any less amount as aforesaid on demand and also for the space of Three (3) Calendar months next after a notice in writing requiring such payment shall by or on behalf of the Mortgagee his heirs executors administrators or assigns have been given to or left at the usual or last known place of abode in Kumasi Ashanti in the Colony

Plaintiff's
Exhibits

—
"A"

Indenture made
between Yaw
Anthony and
Noah Basil
Basil,
11th November
1927 -
continued.

Plaintiff's Exhibits

"A"

Indenture made between Yaw Anthony and Noah Basil Basil, 11th November 1927 - continued.

aforesaid of the Mortgagor or one of his heirs executors or administrators or left upon or affixed to some part of the land messuage and premises hereby granted and conveyed or some building thereon PROVIDED ALSO AND IT IS HEREBY DECLARED that no purchaser upon any sale under the power hereinbefore contained shall be bound or concerned to see or inquire whether any such default has been made or whether any such notice has been given or left or affixed as aforesaid or otherwise as to the necessity or propriety of such sale or be affected by notice that no such default has been made or notice given or left or affixed as aforesaid or that the sale is otherwise unnecessary or improper AND IT IS HEREBY DECLARED that the power of sale hereinbefore contained may be exercised by any person or persons for the time being entitled to receive and give a discharge for the money owing upon the security of these presents.

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IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first above written

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SIGNED SEALED AND DELIVERED) by the said YAW ANTHONY in the presence of :- (Sgd.) Yaw Anthony.

{Sgd.} Francis Anthony {Sgd.} D. Karam {Sgd.} G. Daddaie

SIGNED SEALED AND DELIVERED) by the said NOAH BASIL BASIL in the presence of :- (Sgd.) N.B. Basil

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{Sgd.} E.J. Matthews {Sgd.} D. Karam {Sgd.} G. Daddaie

Witness to Signatures, (Sgd.) E. Kwabena Gyebi Lcc. No. 3847/27, Central Officer, Queensway-Kumasi. Free.

40

This is the Instrument marked "A" referred to in the Oath of E.K. Gyebi.

Sworn before me this 17th day of

November, 1927.

(Sgd.) ? ?

Police Magistrate - Ksi.

Plaintiff's Exhibits

"A"

On the 17th day of November 1927 at 11 o'clock in the forenoon this Instrument was proved before me by the Oath E.K. Gyebi to have been duly executed by the within-named Yaw Anthony.

Indenture made between Yaw Anthony and Noah Basil Basil, 11th November 1927 - continued.

GIVEN UNDER MY HAND AND OFFICIAL SEAL

(Sgd.) M. H. ?

POLICE MAGISTRATE, KUMASI.

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EXHIBIT "B"

"B"

LETTER FROM CHIEF COMMISSIONER OF ASHANTI TO YAW ANTHONY

Letter from Chief Commissioner of Ashanti to Yaw Anthony, 22nd December 1927.

THE KUMASI PUBLIC HEALTH BOARD,
ADMINISTRATIVE BRANCH,
P.O. BOX 40,
KUMASI.

MR. YAW ANTHONY,
KUMASI.

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LEASE NO.1671, PLOT NO.435, OLD TOWN SECTION "B"

Pursuant to Clause 2(h) of the above Indenture of lease I the undersigned Chief Commissioner of Ashanti subject to all rights of Government do hereby consent to your Mortgaging your interest in the above Property to Noah Basil Basil of Kumasi.

Dated this 22nd day of December, 1927.

(Sgd.) John Maxwell

CHIEF COMMISSIONER OF ASHANTI.

Plaintiff's
Exhibits

"C"

Indenture made
between Bassil
Noah Bassil
and Yaw Anthony,
25th November
1949.

EXHIBIT "C"

INDENTURE MADE BETWEEN BASSIL NOAH BASSIL
AND YAW ANTHONY

"B.N.B."

THIS INDENTURE made the Twenty-fifth day of November One thousand nine hundred and forty-nine BETWEEN BASSIL NOAH BASSIL of Kumasi Ashanti Trader (hereinafter called "the Mortgagee" which expression shall where the context so admits or requires include his executors administrators and assigns) of the one part and YAW ANTHONY of Kumasi Ashanti aforesaid (hereinafter called "the Mortgagor" which expression shall where the context so admits or requires include his executors administrators successors according to native customary law and assigns) of the other part

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W H E R E A S :-

1. By an Indenture of Lease dated the Sixteenth day of February One thousand nine hundred and twenty-three and made between the Government of Ashanti of the one part and the Mortgagor of the other part ALL THAT piece or parcel of land known as Plot Number 435 situate in the Old Town Section "B" District of Kumasi aforesaid was demised unto the said Mortgagor for the term of Fifty (50) Years from the first day of January One thousand nine hundred and twenty-three subject to the payment of the rent and the performance and observance of the covenants and conditions therein reserved and contained
2. By an Indenture of Mortgage dated the eleventh day of November One thousand nine hundred and twenty-seven and made between the Mortgagor of the one part and NOAH BASIL BASIL of the other part the Mortgagor assigned by way of mortgage unto the said Noah Basil Basil the hereditaments and premises comprised in and demised by the hereinbefore recited Indenture of Lease to secure the payment of the sum of Three Thousand Five Hundred Pounds (£3,500)
3. By the mutual consent and agreement of the Mortgagor and the said Noah Basil Basil the Mortgagor surrendered unto the Government of Ashanti the hereditaments and premises comprised in the

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hereinbefore recited indenture of lease and the Government of Ashanti divided the said hereditaments and premises known as Plot Number 435 into two separate plots thenceforth to be known as Plots Number 435 and Number 435A respectively

Plaintiff's
Exhibits

—
"C"

Indenture made
between Bassil
Noah Bassil
and Yaw Anthony,
25th November
1949 -
continued.

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4. By an Indenture of Lease dated the fourth day of February One thousand nine hundred and thirty-one (hereinafter referred to as "the Lease") made between the Government of Ashanti of the one part and the Mortgagor of the other part ALL THAT piece or parcel of land situate in the Old Town Section "B" District of Kumasi aforesaid and thenceforth known as Plot Number 435 was demised unto the Mortgagor for the term of Forty-two (42) Years from the first day of January One thousand nine hundred and thirty subject to the payment of the rent and the observance and performance of the covenants conditions and stipulations as therein reserved and contained

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5. By a form of consent dated the Eleventh day of March One thousand nine hundred and thirty-one and signed by the Assistant Commissioner of Lands for and on behalf of the Chief Commissioner of Ashanti consent was granted to the Mortgagor to assign by way of Mortgage to the said Noah Basil Basil the hereditaments and premises comprised in and demised by the Lease but no formal mortgage other than the hereinbefore recited Indenture of Mortgage was executed and the documents of title of the last hereinbefore recited premises known as Plot Number 435 were deposited with the Mortgagee by way of Equitable Mortgage

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6. The said Noah Basil Basil duly made and executed his last Will dated the Twenty-seventh day of October One thousand nine hundred and thirty-one thereby appointed Marone Noah Basil the sole executrix of the said Will

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7. The said Noah Basil Basil died on the twenty-first day of March One thousand nine hundred and thirty-seven without having revoked or altered his said Will which was duly proved by the said Marone Noah Bassil the executrix therein named on the eleventh day of December One thousand nine hundred and thirty-seven in the Supreme Court of the Gold Coast

Plaintiff's Exhibits

"C"

Indenture made between Bassil Noah Bassil and Yaw Anthony, 25th November 1949 - continued.

8. On the Sixth day of December One thousand nine hundred and forty-three the said Marone Noah Basil as executrix of the estate of the said Noah Basil Basil assented to the bequest to the said Basil Noah Basil of the right title interest and claim of the said Noah Basil Basil in and to the hereinbefore recited indenture of mortgage dated the eighteenth day of June One thousand nine hundred and thirty

9. The principal sum of Three Thousand Five Hundred Pounds (£3,500) secured by the hereinbefore recited Indenture of Mortgage has been paid to the Mortgagee

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NOW THIS INDENTURE WITNESSETH as follows :-

1. In consideration of the principal sum of Three Thousand Five Hundred Pounds (£3,500) secured by the hereinbefore recited indenture of mortgage having been paid (the receipt whereof the Mortgagee hereby admits and acknowledges) the Mortgagee hereby assigns unto the Mortgagor ALL THAT the hereditaments and premises comprised in and demised by the lease and now vested in the Mortgagee TO HOLD the same unto the Mortgagor from the first day of June One thousand nine hundred and forty-nine for all the residue of the term now subsisting therein freed and discharged from the hereinbefore recited mortgage or by any means now charged and from all moneys secured thereby and all claims and demands in respect thereof

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IN WITNESS WHEREOF BASSIL NOAH BASSIL and the Mortgagor have hereunto set their hands and seals the day and year first above written

SIGNED SEALED AND DELIVERED)
by the above-named BASSIL)
NOAH BASSIL after the con-)
tents hereof had been read)
over and interpreted and)
explained to him in the)
Arabic language by Joseph)
Peter. Shedrawy of Kumasi)
when he seemed perfectly)
to understand the same)
before setting his hand and)
seal hereto in the presence)
of :-

(Sgd.)
Bassil Noah Bassil

40

(Sgd.) R. Arthur
Clerk to J.J. Peele & Co.
Kumasi.

(Sgd.) Joseph P. Shedrawy
P.O. Box 279
Kumasi
General Trader.

Plaintiff's
Exhibits

—
"C"

10 I Robert Arthur of Kumasi Ashanti clerk to Messieurs
J.J. Peele & Company Solicitors of the same place
make oath and say that on the twenty-fifth day of
November 1949 I saw BASSIL NOAH BASSIL duly execute
the instrument now produced to me and marked "B.N.B"
and that the said BASSIL NOAH BASSIL cannot read
and write in the English language but can read and
write in the Arabic language and that the said in-
strument was read over and interpreted to him in
the Arabic language at the time of its execution by
Joseph Peter Shedrawy of Kumasi and he appeared to
understand its provisions.

Indenture made
between Bassil
Noah Bassil
and Yaw Anthony,
25th November
1949 -
continued.

SWORN at Kumasi this }
28th day of November } (Sgd.) R. Arthur.
1949.

20 Before me,
(Sgd.) Roger van de Puije
REGISTRAR DIVISIONAL COURT, KUMASI.

On the 28th day of November 1949 at 11.50 o'clock
in the forenoon this instrument was proved before
me by the oath of the within-named Robert Arthur to
have been duly executed by the within-named BASSIL
NOAH BASSIL.

GIVEN UNDER MY HAND AND OFFICIAL SEAL.

(Sgd.) Roger van de Puije
30 REGISTRAR DIVISIONAL COURT, KUMASI.



ON APPEAL
FROM THE WEST AFRICAN COURT OF APPEAL
GOLD COAST SESSION

B E T W E E N :

1. JOE APPIAH
2. J.W.K. APPIAH
3. MABEL OTCHERE
4. VICTORIA BANDO

As Executors to the Will
of Yaw Anthony (deceased)

Plaintiffs - Appellants

- and -

BASIL NOAH BASIL

Successor to Noah Basil
Basil.

Defendant - Respondent

RECORD OF PROCEEDINGS

A.L. BRYDEN & WILLIAMS,
53, Victoria Street,
London, S.W.1.

Solicitors and Agents
for the Appellants.

T.L. WILSON & CO.,
6, Westminster Palace Gardens,
London, S.W.1.

Solicitors for the Respondents.