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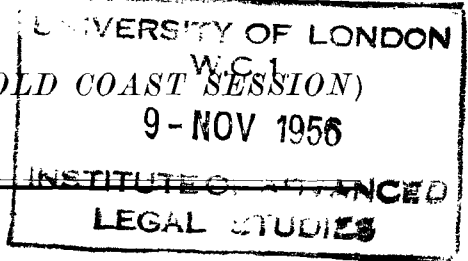
No. 22 of 1950.

31338

In the Privy Council.

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL (GOLD COAST ^{W.C.A.} SESSION)
ACCRA.



BETWEEN

F. & M. KHOURY (Defendants) *Appellants*

AND

PHILIP SAID AZAR (Plaintiff) *Respondent.*

(Consolidated with Appeals Nos. 21 and 23 of 1950.)

RECORD OF PROCEEDINGS

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EXHIBITS

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| | <i>Plaintiff's Exhibits.</i> | | |
| A | Promissory Note and Charge, G. B. Moukarzel to P. S. Azar (This is Exhibit 1 in Record 21/23 of 1950 and is printed on page 77 of that Record.) | 16th November 1946 | |
| B | Cheque No. 57/C69480 for £400 made on Barclays Bank payable to Philip Azar and drawn by G. B. Moukarzel (original) | 30th November 1946 | <i>not printed</i> |
| | <i>Defendants' Exhibits.</i> | | |
| C | Eleven cheques :— Cheque No. 57/C69481 for £400 made on Barclays Bank payable to Philip Azar and drawn by G. B. Moukarzel (original) | 31st December 1946 | „ |
| | The like cheque No. 57/C69482 for £400 (original) | 31st January 1947 | „ |

| EXHIBIT MARK | DESCRIPTION OF DOCUMENT | DATE | PAGE |
|------------------------------|---|---------------------|--------------------|
| | The like cheque No. 57/C69483 for £400 (original) | 28th February 1947 | <i>not printed</i> |
| | The like cheque No. 57/C69484 for £400 (original) | 31st March 1947 | „ |
| | The like cheque No. 57/C69485 for £400 (original) | 30th April 1947 | „ |
| | The like cheque No. 57/C69486 for £400 (original) | 31st May 1947 | „ |
| | The like cheque No. 57/C69487 for £400 (original) | 30th June 1947 | „ |
| | The like cheque No. 57/C69488 for £400 (original) | 31st July 1947 | „ |
| | The like cheque No. 57/C69489 for £400 (original) | 31st August 1947 | „ |
| | The like cheque No. 57/C81791 for £250 (original) | 30th September 1947 | „ |
| | The like cheque No. 57/C81792 for £250 (original) | 31st October 1947 | „ |
| D | Receipt for £4,000, G. B. Moukarzel to P. Azar .. (This is Exhibit 2 in Record 21/23 of 1950 and is printed on page 80 of that Record.) | 16th November 1946 | |
| E | Letter, P. Azar to G. B. Moukarzel | 10th December 1946 | 27 |
| <i>Plaintiff's Exhibits.</i> | | | |
| F | Motion Paper and Affidavit in re A. G. Leventis & Co. Ltd. v. G. B. Moukarzel | 7th December 1946 | 26 |
| G | Forms of Application and permit to transfer used motor vehicles | 30th November 1946 | 23 |
| H | Letter, E. O. Asafu-Adjaye, Solicitor for P. S. Azar, to Licensing Department, Kumasi | 10th December 1946 | 28 |
| J | Letter, J. J. Peele & Co. to the District Transport Control Officer, Kumasi, and Court Order in re A. G. Leventis and Co. Ltd. v. G. B. Moukarzel | 18th December 1946 | 29 |
| <i>Defendants' Exhibits.</i> | | | |
| K | Letter, G. A. Heward-Mills, Solicitor for F. & M. Khoury, to the D.T.C.O., Kumasi | 18th December 1946 | 31 |

| EXHIBIT MARK | DESCRIPTION OF DOCUMENT | DATE | PAGE |
|-----------------|---|--------------------|------|
| L | Bill of Sale, G. B. Moukarzel to F. & M. Khoury (This is Exhibit C in Record 21/23 of 1950 and is printed on page 80 of that Record.) | 22nd November 1946 | |
| M | Undertaking, G. B. Moukarzel to F. & M. Khoury (This is Exhibit D in Record 21/23 of 1950 and is printed on page 83 of that Record.) | 28th November 1946 | |
| N1 | Certified Copy of Interpleader Summons No. 1/47 (This is Item 1 in Record 21/23 of 1950 and is printed on page 1 of that Record.) | 4th January 1947 | |
| N2 | Affidavit of F. Khoury (This is Item 2 in Record 21/23 of 1950 and is printed on page 2 of that Record.) | 30th December 1946 | |
| N3 | Judgment in re Azar v. Moukarzel and F. & M. Khoury .. (This is Item 15 in Record 21/23 of 1950 and is printed on page 22 of that Record.) | 19th March 1947 | |
| O | Insurance Policy (This is Exhibit G1 in Record 21/23 of 1950 and is printed on page 74 of that Record.) | 19th August 1946 | |

**LIST OF DOCUMENTS TRANSMITTED TO THE PRIVY COUNCIL
BUT NOT PRINTED**

| DESCRIPTION OF DOCUMENT | DATE |
|---|-----------------|
| <i>IN THE SUPREME COURT (DIVISIONAL COURT—ASHANTI).</i> | |
| Motion on behalf of Plaintiff for an Order for sale of motor vehicles in dispute | 31st March 1947 |
| Affidavit of P. S. Azar in support | 31st March 1947 |
| Affidavit of M. Khoury that proceeds of sale of vehicles be deposited in Court to abide the result of the action | 16th April 1947 |
| Order directing sale of vehicles by public auction | 16th April 1947 |
| Notice of Motion for conditional leave to Appeal and stay of execution .. | 17th June 1947 |
| Affidavit of P. S. Azar in support | 17th June 1947 |
| Telegram reporting service of Motion on F. & M. Khoury | 20th June 1947 |
| Order granting conditional leave to Appeal | 21st June 1947 |

| DESCRIPTION OF DOCUMENT | DATE |
|---|--------------------|
| Notice of Appeal | 9th July 1947 |
| Motion for Final Leave to Appeal | 9th July 1947 |
| Affidavit of P. S. Azar in support | 15th July 1947 |
| Bond for costs on Appeal and Justification of Surety | 15th July 1947 |
| Notes granting Final Leave to Appeal | 26th July 1947 |
| <i>IN THE WEST AFRICAN COURT OF APPEAL.</i> | |
| Notice of intention to Appeal to His Majesty in Council | 23rd December 1947 |
| Notice of Motion for conditional leave to Appeal | 31st December 1947 |
| Affidavit of M. Khoury in support | 31st December 1947 |
| Court Notes granting conditional leave to Appeal to His Majesty in Council .. | 17th June 1948 |
| Motion for approval of sureties together with Affidavit in support | 3rd August 1948 |
| Notice of Appeal | 23rd August 1948 |
| Court Notes approving sureties | 24th August 1948 |
| Justification of sureties | 4th September 1948 |
| Bond for costs on Appeal | 4th September 1948 |
| Motion for final leave to Appeal together with Affidavit in support | 4th September 1948 |

In the Privy Council.

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL
(GOLD COAST SESSION) ACCRA.

BETWEEN

F. & M. KHOURY (Defendants) *Appellants*

AND

PHILIP SAID AZAR (Plaintiff) *Respondent.*

10

(Consolidated with Appeals Nos. 21 and 23 of 1950.)

RECORD OF PROCEEDINGS

No. 1.

WRIT OF SUMMONS.

Suit No. 35/1947.

IN THE SUPREME COURT OF THE GOLD COAST, ASHANTI.
Divisional Court holden at Kumasi.

Between PHILIP SAID AZAR Plaintiff

and

F. & M. KHOURY and G. B. MOUKARZEL . Defendants.

*In the
Supreme
Court.*

No. 1.
Writ of
Summons,
28th March
1947.

20 To F. & M. Khoury of Nsawam and G. B. Moukarzel of Kumasi.

You are hereby commanded in His Majesty's name to attend before this Court at Kumasi on Monday, the 14th day of April, 1947, at 8.30 o'clock in the forenoon, then and there to answer a suit by Philip Said Azar of Kumasi against you.

30 1. By a Deed dated the 16th day of November, 1946, and made between the Plaintiff of the one part and the 2nd Defendant of the other part, the said 2nd Defendant, to secure the repayment of a loan of Four Thousand Pounds (£4,000) with the interest thereon at the rate of 12½ per cent. per annum advanced to him by Plaintiff, charged his property namely fourteen lorries Nos. A.T. 8416, A.T. 8750, A.T. 8074, A.T. 8495, A.C. 6559, A.T. 8826, A.T. 8827, A.T. 8872, A.T. 8828, A.T. 8830, A.T. 9087, A.T. 8420, A.T. 5616, and A.T. 5258 and fourteen trailers Nos. A.T. 8263,

In the
Supreme
Court.

No. 1.

Writ of
Summons,
28th March
1947,
continued.

A.T. 8215, A.T. 7819, A.T. 8409, A.T. 8350, A.T. 8608, A.T. 7827, A.T. 7832, A.T. 8262, A.T. 6640, A.T. 6734, A.T. 7461, A.T. 7658 and A.T. 7760 to the said Plaintiff, of which said charge the 1st Defendants had notice.

2. By a Bill of Sale dated the 22nd day of November, 1946, and a written Undertaking dated the 28th day of November, 1946, the said 2nd Defendant purported to mortgage, *inter alia*, the aforesaid fourteen lorries and fourteen trailers to the said 1st Defendants.

3. On or about the 16th day of December, 1946, the said Plaintiff obtained judgment against the 2nd Defendant for the aforesaid sum of 10 Four Thousand Pounds (£4,000) plus interest of Sixty-eight Pounds Sixteen Shillings (£68 16s.) with costs in an action on the covenant to pay, contained in the aforesaid Deed of the 16th day of November, 1946.

The said Plaintiff caused the aforesaid fourteen lorries and fourteen trailers the subject-matter of the aforesaid Deed of the 16th day of November, 1946, to be seized in execution, but the said 1st Defendants interpleaded and judgment in the said interpleader suit was given on the 19th day of March, 1947, whereby the said Bill of Sale and the written Undertaking were given priority to the claim of the Plaintiff as Judgment-Creditor.

20

AND THE PLAINTIFF CLAIMS—

(1) (A) A declaration that the said Deed dated the 16th day of November, 1946, executed in his favour by the 2nd Defendant has priority in point of law and equity to both the Bill of Sale dated the 22nd day of November, 1946, and the written undertaking dated the 28th day of November, 1946, so far as regards the said fourteen lorries and fourteen trailers affected by the 1st Defendants' Bill of Sale and Undertaking.

(B) That the Plaintiff is entitled to be treated as first mortgagee and to all the rights and remedies of a first mortgagee. 30

(2) The right to sell the said fourteen lorries and fourteen trailers described in the said Deed of the 16th day of November, 1946, and to apply the proceeds in payment of the debt therein contained.

Issued at Kumasi the 28th day of March, 1947.

| | | | | | |
|----------------|----|----|----|----|-------------------|
| Sum claimed | .. | .. | .. | .. | Judicial Reliefs. |
| Court fees | .. | .. | .. | .. | £6 0 0 |
| Bailiff's fees | .. | .. | .. | .. | £0 3 0 |
| Total | .. | .. | .. | .. | £6 3 0 |

No. 2.
COURT NOTES.

*In the
Supreme
Court.*

IN THE SUPREME COURT OF THE GOLD COAST, ASHANTI.
At a Divisional Court held at Kumasi on Monday, the 14th day of
April, 1947, before HIS HONOUR MR. JUSTICE SMITH.

No. 2.
Court
Notes,
14th April
1947.

35/47

AZAR Plaintiff

v.

10 KHOURY
 MOUKARZEL Defendants.

Asafu-Adjaye & A. G. Heward-Mills for Plaintiff.

G. A. Heward-Mills for 1st Defendants.

2nd Defendant in person.

G. A. Heward-Mills :—

Notice of motion only served Saturday 12th. Too short notice.

Court—

Motion adjourned to Wednesday, 16th.

As to claim :—

G. A. Heward-Mills.

20 Pleads matter *res judicata*, in that in interpleader between same parties the question in this suit was raised and decided. Also on document Plaintiff could either sue for money owed or demand transfer of vehicles. He elected to sue and is bound by his election. Document on which Plaintiff relies does not in any event give Azar a prior charge on the lorries.

Document of Plaintiff although dated 16th November, by its terms did not become operative until 30th November. Negligence of Plaintiff leaving documents of title in Moukarzel's hands postpones his security to Khoury's.

30 Moukarzel.

I have nothing to add.

Hearing of case adjourned to Wednesday, 23rd April.

A. C. SMITH,
J.

*In the
Supreme
Court.*

No. 3.

COUNSEL'S OPENINGS.

No. 3.
Counsel's
Openings,
11th June
1947.

IN THE SUPREME COURT OF THE GOLD COAST, ASHANTI.
At a Divisional Court held at Kumasi on Wednesday the 11th day of
June, 1947, before HIS HONOUR MR. JUSTICE SMITH.

35/47.

AZAR

v.

KHOURY ET AL.

A. G. Heward-Mills & Asafu-Adjaye for Plaintiff.

10

G. A. Heward-Mills for 1st Defendants.

2nd Defendant in person.

A. G. Heward-Mills opens for Plaintiff.

Before action taken on covenant in deed, Plaintiff took steps to get the lorries transferred to him and both Plaintiff and 2nd Defendant applied to District Transport Control Officer for permit to transfer, but he refused application on ground that there were proceedings pending in Court.

G. A. Heward-Mills :—

Defence that deed creates no mortgage and that we had no notice of the prior charge, if any. That matter *res judicata*. It is an issue that 20 could have been raised in interpleader suit 1/47 in which 1st Defendant was claimant and present Plaintiff was respondent.

Plaintiff having elected to sue on the covenant can no longer take alternative remedy in the document if any. Plaintiff's document, although dated 16th November, by its terms did not become operative until 30th, and Defendants' document of 22nd November has priority.

Negligence of Plaintiff in leaving in hands of 2nd Defendant the Insurance Policy and Licences covering the vehicles estops him from asserting a prior claim to 1st Defendants.

PLAINTIFF'S EVIDENCE.

No. 4.

Philip Said Azar, Plaintiff.

*In the
Supreme
Court.**Plaintiff's
Evidence.*

PHILIP SAID AZAR, sworn.

Merchant and money-lender, Kumasi. I know 2nd Defendant. Had monetary transactions with him. He mortgaged 14 lorries and trailers to me to secure £4,000. This is the mortgage he gave me. (Tendered—Exhibit “A”—no objection—admitted.)

No. 4.
Philip Said
Azar, 11th
June 1947.
Examina-
tion.

I paid the £4,000 on 16th November, 1946. There is a receipt
10 embodied in the document. Second Defendant did not carry out the terms of
the document and on 30th November the 2nd Defendant gave me a cheque
for £400 which the Bank dishonoured. This is the cheque—(Tendered
Exhibit “B”—no objection—admitted). In consequence of this I saw
Moukarzel and he told me he would transfer some of the lorries to me in
accordance with the document. I went to the Transport Officer to get
transfer forms, couldn't get any. Form typed in Moukarzel's office, and
we both signed it and 1 or 2 days later took the form and the lorries to
Transport Officer to be valued. Transport Officer told us Order for
interim attachment by A. G. Leventis and he couldn't transfer any of the
20 lorries. Left signed form with Transport Officer. He kept it. When
couldn't get transfer I consulted my lawyer and sued Moukarzel for the
£4,000 and interest, and got judgment. Writ issued 10th December,
1946. Judgment £3,350 and costs on 16th December, 1946, and for £691
on 24th December, 1946. Suit on Exhibit “A.” Got order interim
attachment on 14th December on 14 lorries and trailers. After judgment,
seized the lorries under *fi. fa.* 1st Defendant interpleaded claiming under
a Bill of Sale. Judgment given 19th March, 1947, that Khoury's Bill of
Sale took priority over my judgment. Then brought this present action.

Application for Transport Permit signed on 30th November. Took
30 the application and the lorries to Transport Officer some days later when
the lorries had come in from the road. First heard Khoury claimed
the lorries one or two days before I got my judgment. Khoury came to
Kumasi on the Saturday or Sunday before the 16th and he was present in
Court when I got judgment. Two or three days after the judgment
Khoury wrote his name on the lorries which were not under Interim
attachment. At that time about 9-10 of the 14 lorries were under
attachment.

When 2nd Defendant executed Exhibit “A” he showed me the
licences for the lorries and trailers and an Insurance Policy covering all his
40 lorries including the 14. Except lorry 8872 which he said he hadn't got
the licence for as he hadn't bought it yet. The Policy covered about
50-60 lorries. I let him retain the licences so that he could get petrol
for the lorries. The 14 lorries and trailers are specified in the writ.

Cross-examined :

I was the Judgment-Creditor in the interpleader suit by Khoury as
claimants. Khoury claimed a prior right to the lorries. Not sure if I
presented cheque on 30th November or a day or two later. Not sure if
made out a paying-in slip for it. I presented the cheque before I took
action. In my first case Moukarzel filed an affidavit. I did not agree to

Cross-
Examina-
tion.

*In the
Supreme
Court.*

*Plaintiff's
Evidence.*

No. 4.
Philip Said
Azar, 11th
June 1947.
Cross-
examina-
tion,
continued.

take just 4 lorries on 29th November to cover my £4,000. Moukarzel told me he would transfer 4 lorries at first and if that did not make up the £4,000 he would transfer more. Application for permit was for 4 lorries and took 4 lorries to be valued by Transport Officer. Can't remember date when Transport Officer refused permit. The post-dated cheques were given at the same time that we signed the mortgage. I produce the cheques. (Exhibit "C") Eleven. Moukarzel said needed the licences to get supplementary petrol for them. I first heard on 25th November at a meeting at Moukarzel's house that Moukarzel owed Khoury £7,100 which Khoury had paid the Bank to clear the Bank charges on Plots 571 and 568. First heard of Khoury's additional claims when he made his interpleader. Moukarzel did not mention them at the meeting on 25th November. I now know that Undertaking was given 28th November. There was another meeting of some of Moukarzel's creditors in Birdi's house on 29th November. I did not agree to take 4 lorries in full settlement at that meeting. Exhibit "A" drawn by Peele & Co. The £4,000 was paid to Moukarzel. Howarth told me transfer could not be effected. My lawyer wrote letter to Licensing Office and Transport Office saying not to permit any transfer of the 14 lorries. Letter written before judgment.

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*Re-examina-
tion.*

Re-examined :

Lorries to remain in Moukarzel's possession to work them. Khoury claimed against me as Execution-Creditor. Khoury swore affidavit filed 4th January.

I paid Moukarzel the £4,000. Made up of £2,300 old account at interest, £965 old account without interest, £85 cash, £650 in five cheques. Later returned the five cheques and I gave him cash instead. This transaction on 16th November, 1946. This is the receipt which gives the details. (Exhibit "D.") Moukarzel made out the receipt himself. Moukarzel showed me the licences for 14 vehicles and saw that they were all in Moukarzel's name, except the licence for 8872 which was in an African's name. I accepted it because Moukarzel said he was going to complete the purchase in a few days. I presented cheque dated 30th November either on 30th or a day or two later. Moukarzel asked me to hold on a day or two. Bank marked it "A/c Closed." I know difference between "R.D." and "A/c Closed." I don't remember cheque presented 10th December. Don't know Moukarzel's account not closed until 9th December. Signed transfer application form for four vehicles on 30th November, and before cheque presented to Bank. Many Syrians present at meeting 29th November including Kamel. Don't remember if D. N. Hage present. William Joseph present. Bridi present and many others. Meeting at Bridi's house. My writ issued 10th December. Order interim attachment on 14th Application filed on 11th. Had applied to Transport Officer before came to Court. Leventis had got order for attachment before I sued. After interpleader judgment, notice served on Moukarzel to transfer the vehicles and letter to Transport Officer submitted for Moukarzel's signature. When Transport Officer refused permit, sent a letter to Moukarzel asking lorries to be handed over to me. No answer. Notice served on Moukarzel to hand over lorries before action. This is the letter. (Produced by 2nd Defendant—Exhibit "E.") Took action same day. After judgment, levied on the 14 lorries and later on all the lorries and other properties.

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No. 5.

G. F. L. Howarth.

GEORGE FREDERICK LEE HOWARTH, sworn.

10 Last year Senior District Transport Control Officer, Ashanti. No motor vehicles could be transferred without a permit signed by me. I also fixed maximum value for transfer of used vehicles. Application form has to be signed by proposed vendor and purchaser. I got notice (Exhibit "F") dated 9th December, 1946, relating to four lorries either on 9th or 10th December. I have application from Moukarzel and Azar (Exh. "G") for permission to transfer A.C. 6200, A.T. 8826, A.T. 8829, A.T. 8830, dated 30th November, signed by both parties. Can't say what date I received them, but I got them before I got Exhibit "F". I did not approve the transfer as there were several applications for transfer of the same and other vehicles to other parties received in my office about the same time, and I thought there was something peculiar about it. Before I finally decided what to do I received the motion paper. I have had these application forms in my custody since. On 10th December I received a letter from Azar's solicitor. (Exh. "H.")

20 Later I received order in Suit 80 by Leventis. Order dated 14th December, 1946. (Exh. "J.")

Each application for transfer requires investigation and the vehicles have to be inspected. Only 6200 was brought for inspection. The others were not.

Cross-examined :

I also received a letter from Khoury dated 18th December (Exh. "K"), which included all Moukarzel's vehicles, so far as I know.

No Re-examination.

No. 6.

COURT NOTES.

30 Plaintiff's application to call 2nd Defendant as Witness.

A. G. Howard-Mills :

I apply to call 2nd Defendant.

Court :

You cannot do that.

Case for Plaintiff.

1st DEFENDANTS' EVIDENCE.

No. 7.

M. Khoury.

MAGID KHOURY, sworn.

40 Partner in firm F. & M. Khoury. Know Moukarzel. In November, 1946, had transaction with me and he gave me a Bill of Sale dated 22nd November, 1946. This is it. (Exh. "L.") Document prepared at Accra and he gave the numbers of the lorries to myself and Mr. Eve.

On 28th November, 1946, Moukarzel gave me this Undertaking. (Exh. "M.") Moukarzel did not tell me that any of the lorries had been

*In the
Supreme
Court.*

*Plaintiff's
Evidence.*

No. 5.

George
Frederick
Lee
Howarth,
11th June
1947.
Examina-
tion.

Cross-
examina-
tion.

No. 6.
Court
Notes.
Plaintiff's
application
to call 2nd
Defendant
as witness,
11th June
1947.

*1st
Defendants'
Evidence.*

No. 7.

M. Khoury,
11th June
1947.
Examina-
tion.

*In the
Supreme
Court.*

*1st
Defendants'
Evidence.*

*No. 7.
M. Khoury,
11th June
1947,
Examina-
tion,
continued.*

*Cross-
examina-
tion.*

charged. Came to Kumasi 14th December, 1946, and found Moukarzel in much trouble with his creditors. On 15th December I seized the lorries and trailers listed in Bill of Sale by writing my firm's name on them. I saw some of the 14 lorries enumerated in Plaintiff's documents but I didn't seize them as I saw the Sheriff's seals on them. I was claimant in Interpleader suit against Azar. Relied on Bill of Sale and the Undertaking. Moukarzel never told me anything about any transaction with Azar over the 14 lorries. Wouldn't have accepted them in the Bill of Sale if had known.

Cross-examined :

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I was in Court for the whole of the interpleader hearing. Heard Moukarzel give evidence. Don't know that he was subpoenaed for me. He was called by Azar. I heard Moukarzel say charged 14 lorries to Azar on 16th November and that my Bill of Sale included these 14 lorries and that he informed me of the charge before he executed the Bill of Sale and that he had showed me the list of numbers. Moukarzel said Eve said Bill of Sale temporary one and would be replaced by new one excluding Azar's lorries and including spare parts. Not sure if he said this in cross-examination. This subpoena tendered in evidence in Interpleader. (Tendered. Objected—irrelevant. Objection upheld.) Moukarzel's 20 evidence on these points not true. I had been cross-examined on these points and had denied them. Moukarzel had not disclosed Azar's charge to me. I did seize some of the 14 lorries which came in later and did not bear the Sheriff's seal. I was in Court when Azar got judgment on 16th December. I had started to seize lorries on 15th. My Bill of Sale had become operative then. Bill of Sale executed on 22nd November. Stamped 17th December. Not true I knew of Azar's charge.

No cross-examination by 2nd Defendant.

*Re-
examina-
tion.*

Re-examined :

When in Eve's office, Eve's clerk witnessed signatures. Clerk gave 30 evidence in interpleader.

Case for 1st Defendants.

*No. 8.
2nd Defen-
dant's
Statement,
11th June
1947.*

No 8

2nd DEFENDANT'S STATEMENT.

2nd Defendant :

I have nothing to say. I rely on the evidence I gave in the interpleader action.

No. 9.
COURT NOTES.

Renewal of Plaintiff's application to call 2nd Defendant as witness.

A. G. Heward-Mills :

With regard to my application to call 2nd Defendant, refers Court to sections 81 and 77 of Cap. 4 and to 1943 White Book, p. 664. Asks Court to review ruling.

G. A. Heward-Mills :

Nothing to add.

*In the
Supreme
Court.*

No. 9.
Court
Notes.
Renewal of
Plaintiff's
application
to call 2nd
Defendant
as witness,
11th June
1947.

10 *Court :*

My previous ruling was wrong. Plaintiff may call 2nd Defendant. Leave granted to both sides to re-open their case.

PLAINTIFF'S EVIDENCE.

No. 10.

George Bechir Moukarzel.

*Plaintiff's
Evidence.*

No. 10.
George
Bechir
Moukarzel,
11th June
1947.
Examina-
tion.

GEORGE BECHIR MOUKARZEL, sworn.

20 2nd Defendant in this action. On the 16th November all the 14 lorries were mine except one. This one was then in my possession and I was operating it. I executed Exhibit "A" to Azar. I expected to pay off Azar out of the earnings of all my vehicles. Have to produce licences to get petrol permits. Had Fleet Insurance on all my petrol lorries. I had about 48 in all. I executed these documents (Exhs. "L" & "M") in favour of Khoury. These documents included the 14 lorries. On 24th December, 1946, I gave evidence in suit against me by Azar. Suit No. 87/46. I may have said that I told Khoury of the charge to Azar. I might have told Khoury this. What I said in Court was true. In Interpleader Suit 1/47 on 24th January I gave evidence. Both sides had subpoenaed me. Khoury didn't call me, but Azar did. So far as I remember it is true that I told Khoury of Azar's charge before I executed 30 Bill of Sale and gave him the list of numbers and Eve said the Bill of Sale was a temporary one and would be replaced by proper Bill of Sale omitting Azar's lorries. Eve's clerk present when Bill of Sale signed. Don't remember if clerk present when we discussed the document.

Cross-examined for 1st Defendants :

I was not forced to sign the Bill of Sale. I didn't ask Eve for any qualifying letter in regard to the 14 lorries. Returned to Kumasi after

Cross-
examina-
tion.

*In the
Supreme
Court.*

*Plaintiff's
Evidence.*

No. 10.
George
Bechir
Moukarzel,
11th June
1947,
Cross-
examina-
tion,
continued.

executing Bill of Sale and saw Azar. We had two creditors meetings and I told them all my liabilities to Khoury, £7,100 to release my properties, and also of the other debt of £15,000. Didn't tell creditors had executed Bill of Sale. Eve still included 14 lorries in Bill of Sale after I told him about Azar's charge and Eve said would prepare another Bill of Sale. This second Bill of Sale not prepared. Signed Undertaking (Exh. "M") on 28th November. Eve added the amendment in ink and initialled it. 29th November meeting at Bridi's house. Azar agreed to take 4 lorries and trailers in liquidation of his account and applications for transfer referred to by Howarth made in consequence. I gave Azar this cheque 10 (Exh. "B"). It was tendered on 10th December. My account closed on 9th. I gave the other post-dated cheques (Exh. "C"). Azar agreed to postpone tendering cheque because he agreed to take the lorries. If Azar had presented cheque on 30th November it would have been honoured. I gave evidence at interpleader.

Re-examina-
tion.

Re-examined :

No cheque paid after 30th November. Cheque on 30th was for £51 in favour of U.A.C.

(Claim and Judgment in Interpleader.) (Exh. N 1-3.)

No. 11.

20

COURT NOTES OF EVIDENCE.

No. 11.
Court
Notes of
Evidence,
13th June
1947.

G. A. Heward-Mills :

I put in the Fleet Insurance Policy (no objection—admitted—Exhibit "O").

No. 12.

COURT NOTES.

No. 12.
Court
Notes.
Address by
Mr. G. A.
Heward-
Mills for 1st
Defendants,
13th June
1947.

Address by Mr. G. A. Heward-Mills for 1st Defendants.

G. A. Heward-Mills :

Question of priority—Exhibit "A" or Exhibit "L." Azar's document Exhibit "A." Prior in time to Exhibit "L." Submits Exhibit "A" 30 not a mortgage. Does not pass any interest in the lorries unless and until default made on 30th November. Does not assign the lorries to Azar. It is a mere promise to do something in the future, and Azar's only right to sue on covenant for his money or for specific performance if legal possession in lorries has not already passed out of Moukarzel's hands.

On construction of Exhibit "A," lorries were free in Moukarzel's hands until 30th November. Azar could sue, but had no estate. Snell, 1872 Edition, p. 243. Effect of a mortgage. Leake, Property in Land, p. 293. Mortgagee has charge in the mortgaged land. *Id.*: p. 510. Effect of Notice. Tacking.

Seizure: Does not arise. Khoury had legal estate. Priority determined by the two documents, not by subsequent acts. Interim attachment did not affect the rights already vested in Khoury under his Bill of Sale.

Azar cannot now contest validity of Bill of Sale. *Res judicata* in
10 Interpleader 1/47. 13 Hailsham, p. 413, para. 468. Interpleader estops Plaintiff from bringing this present claim, in that the 14 lorries was the subject-matter of both suits, the parties were the same.

Claim now put forward by Azar could have been raised by him in the interpleader suit. Order 44 rule 25. *Humphries v. Humphries*, 1910, 2 K.B. 531. First action: defence—no agreement. Second action: Statute of frauds. Held Defendant estopped from setting up defence of Statute of Frauds in second action.

Cooke v. Rickman [1911] 2 K.B. 1125. *Kershaw, Leese & Co. v. Stockport Overseers* [1923] 2 K.B. 129. *Mackenzie-Kennedy v. Air Council*
20 [1927] 2 K.B. 517. *Brobbeey v. Yaw Kyere*, 3 W.A.C.A. 106.

Submits that in interpleader Azar could have raised the same claim which he now puts forward on the same document on which he obtained his first judgment.

Moukarzel's evidence as to notice of Azar's document manifestly untrue, particularly as to his telling Eve about Azar's document.

Onus on Plaintiff to prove notice—Phipson, p. 27. Coote on Mortgages, Vol. II, p. 1308. Onus of proving notice lies on person claiming adversely to the mortgagee.

Azar's rights under his document (Exh. "A") purely equitable and
30 is postponed to Khoury's legal mortgage which he got without notice of the prior equitable claim. Document does not actually charge the lorries, only promises to do so.

Election:—Azar had two alternatives. He chose one; cannot now pursue the other alternative.

No. 13.

Address by Mr. A. G. Heward-Mills for Plaintiff.

A. G. Heward-Mills :

As to *res judicata*. Claim and judgment in interpleader suit. Plaintiff's claim on writ. Issue in interpleader was as to whether claimant
40 took priority over Judgment-Creditor. Azar was not a claimant in interpleader and his rights under document of 16th November were not in issue, and Azar could not have raised them.

*In the
Supreme
Court.*

—
No. 12.

Court
Notes.
Address by
Mr. G. A.
Heward-
Mills for 1st
Defendants,
13th June
1947,
continued.

No. 13.
Address by
Mr. A. G.
Heward-
Mills for
Plaintiff,
13th June
1947.

*In the
Supreme
Court.*

No. 13.
Address by
Mr. A. G.
Heward-
Mills for
Plaintiff,
13th June
1947,
continued.

Submits Azar is a mortgagee under his document of 16th November, and as mortgagee he could pursue all his remedies at once.

IX ed. Coote, pp. 895-6. All remedies may be pursued at once in the same action both against original mortgagor and against subsequent incumbrancers.

p. 896—Mortgagee may execute on judgment under covenant.

900—Mortgagee may use the easiest remedies.

901—May first enforce personal remedy against mortgagor and then to resort to the mortgaged estate for the unsatisfied balance of the debt.

Deed of 16th November is a mortgage.

10

Coote, p. 8. No particular form of words is required to create an equitable charge, but if it is clear that the parties intended that the person in whose favour the charge is given should have a present right to realise the security, the agreement constitutes an equitable charge. An instrument charging without conveying property may give the creditor the right to call for a legal mortgage.

p. 71.—Any agreement to create a mortgage is sufficient or deposit of documents of title.

80—Agreements operating as equitable mortgage. Any agreement in writing however informal by which any property, real or personal, is to be a security for a sum of money owing or advances is an equitable charge. 20

Pages 82, 83 and 84.

83—A covenant that if payment be not made the creditor may by entry, foreclosure, sale or mortgage, levy the amount from the lands of the debtor is an equitable mortgage.

84—Effect will be given to an intent to create a security notwithstanding any mistake in the manner of making it, and security will take effect according to the intention of the parties both as to nature of property charged and as to the extent of the mortgagor's interest in it. 30

Sweet's Dictionary, p. 140. Charge an obligation or a security for payment of a debt and includes mortgage, etc.

21 Halsbury, p. 74, paragraph 132. Equitable mortgage creates a charge etc.

Page 83, para. 161. Equitable charge does not convey but gives right to pay out of the property.

Sweet, p. 774—Security definition.

Recites that it is a security. Default in performing covenant money immediately payable.

When Moukarzel gave Bill of Sale to Khoury on 22nd, he broke this covenant and Azar became entitled to seize under Clause 3. 40

Paragraph 2 gave Azar right to sue or in alternative to get transfer. He tried to get transfer and when he couldn't, he then sued. Rights in para. 2 are independent of rights in para. 3.

As to notice—

Sweet Dictionary, 560. Actual or constructive notice. Evidence that Moukarzel gave Khoury notice of Azar's charge. Moukarzel said this in Suit 87/46—he might have said he told Khoury of Azar's charge and said "so far as I remember it is true I told Khoury of Azar's charge."

Undertaking (Exh. "M") 28th November, para. 3, provides for formal Bill of Sale.

10 Kerr on Fraud, V ed., 265-6. Where both equities then priority in time takes precedence. Notice not necessary. Exhibit "A" became operative before 30th November.

Exhibit "L" dated 22nd November didn't become operative until 31st December. If Defendant seized on 15th December, he did so before execution was levied and he had no right to do so.

Khoury's Bill of Sale creates an equitable mortgage on the lorries only by reason of the Defence (Control of Transfer of Used Motor Vehicles) Order 1943 made under Regulation 41 of Defence Regulations.

20 A proper legal mortgage transfers the property subject to an equity of redemption. Order prohibits transfers without permit. In absence of permit the Bill of Sale couldn't transfer and therefore could not make it a legal mortgage, the most it could do would be to make it an equitable mortgage.

Kerr on Fraud, p. 379—priority of equities. Kerr, 127.

In the Supreme Court.

No. 13.
Address by
Mr. A. G.
Heward-
Mills for
Plaintiff,
13th June
1947,
continued.

No. 14.

JUDGMENT.

No. 14.
Judgment,
17th June
1947.

IN THE SUPREME COURT OF THE GOLD COAST, ASHANTI.
At a Divisional Court held at Kumasi on Tuesday, the 17th day of June, 1947, before HIS HONOUR MR. JUSTICE SMITH.

Suit No. 35/1947

PHILIP SAID AZAR Plaintiff

30

v.

F. & M. KHOURY and G. B. MOUKARZEL Defendants.

40 In this case the Plaintiff claims a declaration that a deed dated 16th November, 1946, executed in his favour by the 2nd Defendant has priority in law and equity over a Bill of Sale dated 22nd November, 1946, and a written Undertaking dated 28th November, 1946, executed and given by the 2nd Defendant in favour of the 1st Defendants, and (2) that the Plaintiff is entitled to be treated as first mortgagee of the lorries and trailers described in the deed. He also claims the right to sell the lorries and trailers and to apply the proceeds in payment of the debt secured by the deed.

In answer to this claim the 1st Defendants pleaded, *inter alia*, that the Bill of Sale made in their favour gave them a legal mortgage of the property in dispute which they took without notice of the Plaintiff's deed and that their Bill of Sale consequently takes priority over it.

*In the
Supreme
Court.*

No. 14.
Judgment,
17th June
1947,
continued.

The material parts of the Plaintiff's deed, which is "An Agreement" dated 16th November, 1946, and made between the 2nd Defendant of the one part and the Plaintiff of the other part and executed under seal are as follows :—

After reciting that the Plaintiff has agreed to lend the 2nd Defendant the sum of £4,000 "upon having the repayment thereof together with interest thereon as hereinafter mentioned secured in the manner hereinafter appearing", the 2nd Defendant then covenanted to repay the sum of £4,000 and interest by monthly instalments commencing on the 30th November, 1946, "IN DEFAULT of any one payment being made 10 when it becomes due or if the Borrower shall make default in the performance or observance of any covenant or agreement hereinafter contained then on any such default as aforesaid the whole of the said Principal sum or so much thereof as may then remain unpaid together with the interest thereon then due shall become immediately payable".

The deed then went on to provide that if such default should be made as aforesaid the Plaintiff should forthwith be at liberty to sue the 2nd Defendant for the amount then due and owing "or in the alternative may require the Borrower to transfer to the Lender all or so many of the motor vehicles particulars whereof are set out in the schedule hereto the 20 aggregate value whereof at the date of such default shall be sufficient to satisfy the principal sum and interest so owing as aforesaid"; and the clause then proceeded to make provision for the transfers to be made subject to the approval of and at the valuation fixed by the District Transport Control Officer, Kumasi.

The Deed then provided in Clause 3 "If default shall be made as aforesaid" the Plaintiff should be entitled to seize and take possession of the vehicles and to give notice to the 2nd Defendant as to whether or not he desired to exercise his right to have all or any of the vehicles transferred to him and if the District Transport Control Officer did not approve such 30 transfer or if the Plaintiff did not desire to exercise the right of transfer the Plaintiff should be entitled to retain possession of the vehicles until the principal sum and interest due was paid or until execution should be levied thereon consequent upon any judgment or order obtained by the Plaintiff in respect of the premises.

In Clause 4 the 2nd Defendant covenanted (*inter alia*)—

"(g) Not to permit or suffer any writ of *fiery facias* or other writ of execution or distress for rent rates or taxes to be levied or taken against or distrained upon the vehicles or any of them or to become bankrupt or compound with his creditors. 40

"(h) Not to transfer part with the possession of charge or in any way encumber the vehicles or any of them."

The 2nd Defendant remained in possession of the vehicles and continued to operate them. He also retained the Licences relating to them and the Insurance Policy covering his whole fleet of lorries.

Notwithstanding the covenants which I have quoted from Clause 4 of the Plaintiff's deed, the 2nd Defendant on the 22nd November, 1946, executed a Bill of Sale (Exhibit "L") in favour of the 1st Defendants of all his motor vehicles, including those listed in the Plaintiff's deed, to secure the sum of £16,140 and interest. 50

The Bill of Sale which is made under seal states that "the Borrower doth hereby assign unto the Lenders . . . all and singular the several chattels and things specifically described in the schedule hereto by way of security for the payment of the sum of £16,140 and interest." Then follows a covenant to pay the principal sum and interest "by monthly instalments of £1,500 on the last day of each calendar month the first of such instalments to be paid on the 31st day of December, 1946," and (*inter alia*) another covenant entitling the 1st Defendants to seize and take possession of the vehicles if default should be made in the payments or if the vehicles should be distrained upon or taken in execution.

*In the
Supreme
Court.*

No. 14.
Judgment,
17th June
1947,
continued.

On the 28th November, 1946, the 2nd Defendant gave the 1st Defendants a written undertaking concerning other matters and in paragraph 4 he undertook "to execute a formal Bill of Sale covering all the transport and trailers which I at present own together with spare parts in stock. The Bill of Sale will be to cover the sum of £16,140 and the rate of interest will be 8 per cent. and with the same provisions as to repayment of principal."

In Interpleader Suit No. 1/1947 in which the same parties were involved as in this present action, the Plaintiff argued that the Bill of Sale was void as being in contravention of the Defence (Control of Transfer of Used Motor Vehicles) Order, 1943—Gazette of 27th March, 1943, at page 173—and I then held that this Order did not affect mortgages but only out and out transfers. I am still of this opinion for the reasons I then gave.

But the Plaintiff now argues that although the Order does not render the Bill of Sale void, it does have the effect of changing it from a legal mortgage to an equitable one, as it prevents the 1st Defendants from obtaining the legal estate in the vehicles assigned.

The Order uses the words "purchase" and "sell." These words in their usual meaning do not include transactions for the giving of security. They are defined in the Order as "'purchase' includes any acquisition of the property in the vehicle" and "'sell' includes any transfer of the property."

A legal mortgagee does acquire the property mortgaged to him subject to the equity of redemption; but nevertheless I think that, taking the Order as a whole, it is clearly not intended to affect mortgages either by making them illegal or by changing what would otherwise be a legal mortgage into an equitable one.

I therefore decide that the 1st Defendants hold a legal mortgage on the vehicles, which can only lose its priority over the security created by the deed of the 16th November, if it can be shown that the 1st Defendants had prior notice of the latter.

Magid Khoury in his evidence denied that he knew of the deed of the 16th November at the material times or had any knowledge to lead him to suspect its existence.

Against this denial the only evidence the Plaintiff could put before me came through the mouth of the 2nd Defendant who, having said in previous proceedings in this Court that he did tell Khoury of Azar's deed, now gave his evidence in a very hesitant way and said:—

"I may have said that I told Khoury of the charge to Azar. I might have told Khoury this. What I said in Court was true.

*In the
Supreme
Court.*

No. 14.
Judgment,
17th June
1947,
continued.

In Interpleader Suit 1/47 on 24th January I gave evidence. Both sides subpoenaed me. Kkoury didn't call me, but Azar did. So far as I remember it is true that I told Khoury of Azar's charge before I executed the Bill of Sale and gave him the list of numbers and Eve said the Bill of Sale was a temporary one and would be replaced by a proper Bill of Sale omitting Azar's lorries."

Under cross-examination he said :—

"I didn't ask Eve for any qualifying letter in regard to the 14 lorries . . . Eve still included the 14 lorries in Bill of Sale after I told him about Azar's charge and Eve said he would prepare 10 another Bill of Sale. This second Bill of Sale was not prepared."

While I am not prepared to place much reliance on Khoury's word, I feel I can place even less upon Moukarzel's, and the only suspicion I have in my mind that he might have been telling the truth arises from the hesitant manner in which he spoke it.

On the other hand I find it difficult to believe that Khoury's solicitor would have prepared the Bill of Sale and Undertaking in the forms in which they appear if he had been told anything about Azar's deed.

The onus of proving that the 1st Defendants had notice of the deed lies on the Plaintiff and I am unable to say that I am satisfied by the 20 evidence that the balance of probability is that such notice was given.

Several other questions were argued before me, but in view of the conclusions at which I have arrived, I think that no useful purpose would be served by discussing them, and I therefore give judgment for the Defendants dismissing the Plaintiff's claim.

A. C. SMITH,
Judge.

17th June, 1947.

Counsel :

Mr. A. G. Heward-Mills & Hon. E. O. Asafu-Adjaye for the Plaintiff. 30

Mr. G. A. Heward-Mills for 1st Defendants.

G. B. Moukarzel—2nd Defendant—in person.

No. 15.
COURT NOTES OF JUDGMENT.

*In the
Supreme
Court.*

IN THE SUPREME COURT OF THE GOLD COAST, ASHANTI.
At a Divisional Court held at Kumasi on Tuesday, the 17th day of
June, 1947, before HIS HONOUR MR. JUSTICE SMITH.

No. 15.
Court
Notes of
Judgment,
17th June
1947.

35/47.

AZAR

V.

KHOURY & MOUKARZEL.

- 10 Attoh for Asafu-Adjaye for Azar.
 G. A. Heward-Mills for 1st Defendants.
 2nd Defendant in person.
 Judgment read.
 Judgment for Defendants dismissing Plaintiff's claim.

Heward-Mills :

I ask for costs.

Court :

Costs to 1st Defendants assessed at £23 8s.

Moukarzel :

- 20 I ask for costs.

Court :

Costs to 2nd Defendant assessed at £5 5s.

A. C. SMITH.

Heward-Mills :

Lorries and trailers sold and proceeds now in Court.

Court :

Order payment out to 1st Defendants of the amount secured by Bill
of Sale, and the balance (if any) to Plaintiff.

A. C. SMITH,

30

J.

*In the
West
African
Court of
Appeal.*

No. 16.

PLAINTIFF'S GROUNDS OF APPEAL.

IN THE WEST AFRICAN COURT OF APPEAL.

No. 16.
Plaintiff's
Grounds
of Appeal,
30th July
1947.

Between PHILIP SAID AZAR . . . Plaintiff-Appellant

and

1. F. & M. KHOURY
2. G. B. MOUKARZEL . . . Defendants-Respondents.

The Appellant, being dissatisfied with the Judgment of the Divisional Court, Kumasi, delivered on the 17th day of June, 1947, and having obtained Final Leave to appeal therefrom dated the 26th day of July, 1947, hereby appeals to the West African Court of Appeal on the grounds hereinafter set forth.

GROUND'S OF APPEAL.

1. Judgment is wrong in law.
2. Judgment is against the weight of evidence.
3. Judgment is contrary to law, equity and good conscience.
4. Inadmissible evidence was wrongly accepted by the Court.
5. Admissible evidence was wrongly rejected by the Court.
6. Judgment is otherwise erroneous.

Dated this 30th day of July, 1947.

20

S. A. ATTOH,
for Solicitor for Appellant.

The Registrar,
West African Court of Appeal,
Accra.

and to :

F. & M. Khoury of Nsawam,

and

G. B. Moukarzel of Kumasi
Defendants-Respondents.

30

No. 17.

ADDITIONAL GROUNDS OF APPEAL.

*(Title as last item.)**In the
West
African
Court of
Appeal.*

Please Take Notice that the Appellant herein will ask leave of this Honourable Court at the hearing of the above Appeal to amend his grounds of Appeal herein by the addition of the following grounds :—

No. 17.
Additional
Grounds
of Appeal,
18th
November
1947.

1. The Learned Trial Judge was wrong in holding that the Bill of Sale under which the first Defendants claimed created a legal mortgage of the properties named therein because the law of the Gold Coast does not
10 recognise any rights created by Bills of Sale.

2. The Learned Trial Judge was wrong in his decision because the most he could have held was that the Bill of Sale created no more than an Equity which was equal to the "Equity" created by "the Charge Exhibit 1" (under which the Appellant claimed), and the Equities being equal the Learned Judge should have held that the Appellant's "Equity" had priority over the first Respondent's "Equity," because the former was earlier in point of time.

3. The Learned Trial Judge should have declared the Bill of Sale null and void because the Agreement contained therein for the transfer
20 of the Motor Vehicles was contrary to the Defence (Transfer of Used Motor Vehicles) Order (1943) and therefore illegal.

Dated at Kumasi this 18th day of November, 1947.

E. O. A. ADJAYE,
Solicitor for Plaintiff-Appellant.

The Registrar,
West African Court of Appeal,
Accra.

And to the above-named
Messrs. F. & M. Khoury and
30 G. B. Moukarzel,
their Agents or Solicitors.

*In the
West
African
Court of
Appeal.*

No. 18.
Court
Notes, 12th
December
1947.

**No. 18.
COURT NOTES.**

IN THE WEST AFRICAN COURT OF APPEAL, GOLD COAST SESSION, held at Victoriaborg, Accra, on Friday, the 12th day of December, 1947, before THEIR HONOURS SIR JOHN VERITY, C.J., Nigeria (Presiding J.), LESLIE ERNEST VIVIAN M'CARTHY, and JAMES HENLEY COUSSEY, JJ., Gold Coast.

AZAR

v.

KHOURY & ANOR.

10

Asafu-Adjaye and Akufo Addo for Appellants.
Ollennu for Respondent.

Adjaye :

Question of notice.
p.16. Finding of fact.
Suit 1/47. Appeal record pp. 16, 17 and 18.

Ollennu :

Evidence to justify findings of fact.
Proceedings in suits 87/46 and 1/47 not in evidence.

Akufo Addo replies :

Judgment Reserved.

20

(Sgd.) JOHN VERITY.

No. 19.
JUDGMENT.

*In the
West
African
Court of
Appeal.*

IN THE WEST AFRICAN COURT OF APPEAL, GOLD COAST
SESSION, held at Victoriaborg, Accra, on Saturday, the 13th day of
December, 1947 before THEIR HONOURS SIR JOHN VERITY, C.J.,
Nigeria (Presiding J.), LESLIE ERNEST VIVIAN M'CARTHY,
and JAMES HENLEY COUSSEY, JJ., Gold Coast.

No. 19.
Judgment,
13th
December
1947.

Civil Appeal No. 55 of 1947.

PHILIP SAID AZAR Plaintiff-Appellant

10

V.

F. & M. KHOURY and G. B. MOUKARZEL Defendants-Respondents.

JUDGMENT

Read by Verity, C.J., Nigeria.

The facts in this case are the same as those in case of *Azar v. G. B. Moukarzel and F. & M. Khoury* in which judgment has been delivered this day in so far as relates to the subject matter of the present action. It was agreed by the parties that the judgment in this case should follow that which has been delivered in the other. One issue alone was argued, in relation to a question of notice. In view of the decision in the former case, however, this question does not arise, though we should express the opinion that on his view of the evidence, which was a reasonable view, the trial Judge was right in holding that there had been no notice.

20

*For the
Judgment
referred to
see page 34
of Record
21/23 of
1950.*

In the event, however, the appeal is allowed, the judgment of the Court below is set aside and it is declared that the Appellant is entitled to be treated as first mortgagee and to all the rights and remedies of a first mortgagee including the right to sell the fourteen lorries and fourteen trailers described in the Deed of the 16th November, 1946, and to apply the proceeds in payment of the debt thereby secured.

30

The Respondents to pay the Appellant's costs in the Court below to be taxed and the Appellant's costs in this Court assessed at £35 5s. 9d.

(Sgd.) JOHN VERITY,

Chief Justice, Nigeria.
(Presiding Judge.)

„ L. E. V. M'CARTHY,
Judge, Gold Coast.

„ J. HENLEY COUSSEY,
Judge, Gold Coast.

Counsel :—

Mr. E. O. Asafu-Adjaye (with him Mr. Akufo Addo) for Appellant.

40

Mr. N. A. Ollennu for Respondents.

No. 20.

ORDER granting Final Leave to Appeal to His Majesty in Council.*In the
West
African
Court of
Appeal.*No. 20.
Order
granting
Final Leave
to Appeal
to His
Majesty in
Council,
13th
September
1948.IN THE WEST AFRICAN COURT OF APPEAL, GOLD COAST
SESSION held at Victoriaborg, Accra, on Monday, the 13th day of
September, 1948, before HIS HONOUR ALLAN CHALMERS SMITH,
Ag. C.J. Gold Coast, sitting as a single Judge of Appeal.

AZAR

V.

KHOURY & ANOR.

Ollennu for Appellants.

10

A. Addo for Respondents.

Ollennu :

Conditions fulfilled.

Court :

Final leave granted.

(Sgd.) A. C. SMITH,
J.

EXHIBITS.

Plaintiff's Exhibit.

Exhibits.

Plaintiff's Exhibit "G"

Forms of Application and permit to transfer used motor vehicles, 30th November 1946.

"G"—FORMS of Application and Permit to Transfer Used Motor Vehicles.

Vehicle No. A.C. 6200.

We, the undersigned G. B. Moukarzel (intending vendor) and Philip Azar (intending purchaser) hereby make application for a Permit to transfer the used motor vehicle, particulars whereof are herein-below set forth.

I, the said G. B. Moukarzel (intending vendor) hereby declare that :—

(1) The particulars of vehicle are :—

10

Registered No. A.T. 6200 Petrol.
District Kumasi. Make G.M.C.
Type Lorry. Year 1939/40.
Horse-power 30. Gross weight 110 cwt.

(2) The reasons (in full) for intended sale are no more required for use because of lack of spares.

(3) I bought the said vehicle on the 30th day of September, 1945, from Philip Azar for the sum of £275 and I undertake that if a permit to transfer the said vehicle is issued, I will not sell the said vehicle otherwise than in accordance with the terms of the Permit.

20

Dated the 30th day of November, 1946.

G. B. MOUKARZEL,

(Signature of intending vendor).
Address P.O. Box 447, Kumasi.

I, the said Philip Azar (intending purchaser), hereby declare that—

(1) The reasons (in full) for intended purchase are—For General Transport.

(2) The district in which I propose to use the vehicle is Kumasi, and I undertake that, if a permit to transfer the said vehicle is issued, I will not purchase the said vehicle otherwise than in accordance with the terms of the Permit.

30

(Sgd. PHILIP AZAR,

(Signature of intending purchaser).
Address P.O. Box 238, Kumasi.

I recommend that this transfer be/be not approved.

.....
Signature of the District Transport Control Officer of intending vendor's district.

40

District

Date.....

Exhibits.

Plaintiff's
Exhibit
" G "

Forms of
Application
and permit
to transfer
used
motor
vehicles,
30th
November
1946,
continued.

I recommend that this transfer be/be not approved and I agree/do not agree to accept the vehicle for petrol in my district.

.....
Signature of the District Transport
Control Officer of intending purchaser's
district.

District

Date.....

Permission is hereby given for this transfer to take place, provided that the purchase price of the said vehicle shall not exceed the sum of 10 £.....

Date.....

.....
Director of Supplies
(Competent Authority).

(N.B.—Application must be made in triplicate.)

Vehicle Nos. AT. 8826, AT. 8827, AT. 8830.

FORMS OF APPLICATION AND PERMIT TO TRANSFER USED
MOTOR VEHICLES.

We, the undersigned G. B. Moukarzel (intending vendor) and Philip 20
Azar (intending purchaser) hereby make application for a Permit to
transfer the used motor vehicle, particulars whereof are herein-below
set forth.

I, the said G. B. Moukarzel (intending vendor) hereby declare that :—

- (1) The particulars of vehicle are :—
Registered No. AT. 8826, AT. 8827, AT. 8830.
Petrol District—Kumasi. Make—Ford V.8.
Type 110 cwt. lorry. Year—1946.
Horse-power—33. Gross weight—110 cwts.

(2) The reasons (in full) for intended sale are no more required 30
for use because of lack of spares.

(3) I bought the said vehicle on the 1st day of January, 1946,
from U.A.C. Motors for the sum of £525—each, and I undertake
that if a Permit to transfer the said vehicle is issued, I will not
sell the said vehicle otherwise than in accordance with the terms of
the Permit.

Dated the 30th day of November, 1946.

G. B. MOUKARZEL,
(Signature of intending vendor).
Address : P.O. Box 447, Ksi.
Date :

I, the said Philip Azar (intending purchaser) hereby declare that :—

Exhibits.

(1) The reasons (in full) for intended purchase are—For General Transport.

Plaintiff's Exhibit "G"

(2) The district in which I propose to use the vehicle is Kumasi and I undertake that, if a Permit to transfer the said vehicle is issued, I will not purchase the said vehicle otherwise than in accordance with the terms of the Permit.

Forms of Application and permit to transfer used

Dated the 30th day of November, 1946.

motor vehicles, 30th November 1946,

(Sgd.) PHILIP AZAR,

(Signature of intending purchaser).
Address : P.O. Box 238, Kumasi.

continued.

10

I recommend that this transfer be/be not approved.

.....

Signature of the District Transport Control Officer of intending vendor's district.

District

Date.....

I recommend that this transfer be/be not approved and I agree/do not agree to accept the vehicle for petrol in my district.

.....

Signature of the District Transport Control Officer of intending purchaser's district.

District

Date.....

Permission is hereby given for this transfer to take place, provided that the purchase price of the said vehicle shall not exceed the sum of £.....

30

.....

Director of Supplies
(Competent Authority).

(N.B.—Application must be made in triplicate.)

Exhibits.

Plaintiff's Exhibit.

Plaintiff's
Exhibit
" F "Motion
Paper and
Affidavit
in re A. G.
Leventis
& Co. and
G. B.
Moukarzel,
7th
December
1946.

" F "—MOTION PAPER and Affidavit in re A. G. Leventis & Co. and G. B. Moukarzel.
IN THE SUPREME COURT OF THE GOLD COAST, ASHANTI.
Divisional Court, Kumasi.

Between A. G. Leventis & Company Limited whose
registered office is situate at Accra . . . Plaintiff-Company
and
George Bechir Moukarzel (of Kumasi) . . . Defendant.

Motion on notice by George Addison Heward-Mills of Counsel for and on behalf of the Plaintiff-Company herein praying for an Order 10 restraining the Defendant from transferring his movable properties enumerated in the attached affidavit in order to delay or obstruct the execution of any decree that may be made by this Honourable Court against him in the above-mentioned suit and/or for such other or further orders as to this Honourable Court may deem meet in the premises.

Court to be moved on Monday, the 16th day of December, 1946, at 8.30 o'clock in the forenoon or so soon thereafter as Counsel for the Plaintiff-Company herein can be heard.

Dated at Kumasi this 7th day of Decmber, 1946.

(Sgd.) G. A. Heward-Mills, 20
for Solicitor for Plaintiff Company.

The Registrar,
Divisional Court, Kumasi.

And to

1. George Bechir Moukarzel, Defendant herein, Kumasi.
2. The Transport Officer, Kumasi.

(*Title as last item.*)

I, George Christodoulou Leventis of Kumasi, Ashanti, make oath and say as follows :—

1. That I am one of the Directors of the Plaintiff-Company and I am 30 duly authorised by the Plaintiff-Company to make this affidavit.

2. That the Plaintiff-Company herein have instituted in this Honourable Court a suit claiming from the Defendant the sum of £750 being money lent by the Plaintiff-Company to the Defendant.

3. That the Defendant has applied to the Transport Officer and is about to transfer the following lorries from his possession with a view to obstructing or delaying the execution of any decree that may be made against him in this suit, namely :—

A.T. 8826
A.T. 8827
A.T. 8829
A.T. 8830.

4. That the Plaintiff-Company derived this information from the Transport Officer, Kumasi, upon investigations he was forced to make upon matters precedent and the Transport Officer did confirm the said information received by the Plaintiff-Company.

Exhibits.
—
Plaintiff's
Exhibit
" F "

5. That the Plaintiff-Company require the attachment of the aforesaid lorries enumerated in paragraph 3 hereof, all valued approximately £800 (Eight hundred pounds).

Motion
Paper and
Affidavit
in re A. G.
Leventis
& Co. and
G. B.
Moukarzel,
7th
December
1946,
continued.

6. That I make this affidavit in support of application for and on behalf of the Plaintiff-Company for the Defendant to furnish security to fulfil any decree that may be made herein or for the attachment of the
10 aforesaid lorries in default of such security.

Sworn at Kumasi this 9th day of } (Sgd.) G. C. Leventis.
December, 1946

Before me,

(Sgd.) Roger van der Puije,
Commissioner for Oaths.

2nd Defendant's Exhibit.

2nd
Defendant's
Exhibit
" E "

Letter,
P. Azar to
G. B.
Moukarzel,
10th
December
1946.

" E "—LETTER, P. Azar to G. B. Moukarzel.

20

Philip S. Azar,
Trader,
Kumasi.

10th December, 1946.

G. B. Moukarzel, Esq.,
Transport Owner,
Kumasi.

Dear Sir,

As you have defaulted in the payment of the amount due to me under Promissory Note dated 16th November 1946 made between us, I hereby require you under the terms of the aforesaid Promissory Note
30 to transfer to me forthwith the lorries with their respective trailers specified in the Schedule to the said Promissory Note particularly AT 8750, AT 8074, AT 8495, AT 8826, AT 8827, AT 8830 and AT 8420.

2. Take Notice further that I hereby require you forthwith to deliver to me all the vehicles specified in the Schedule to the said Promissory Note possession of which said vehicles I shall retain until full payment of the amount of Four thousand five hundred pounds (£4,500) due to me.

3. And Take Notice further that I propose to institute a Writ of Summons against you for recovery of the amount due and owing by you to me.

40

Yours faithfully,

(Sgd.) PHILIP AZAR.

Exhibits.

Plaintiff's Exhibit.

Plaintiff's
Exhibit
" H "

" H "—LETTER, E. O. Asafu-Adjaye to Licensing Department, Kumasi.

Letter,
E. O. Asafu-
Adjaye to
Licensing
Depart-
ment,
Kumasi,
10th
December
1946.Hon. E. O. Asafu-Adjaye,
Barrister & Solicitor.Adontene Chambers,
P.O. Box No. 234,
Kumasi,
Ashanti.

10th December, 1946.

The Licensing Department,
Kumasi.

Sir,

10

I am instructed by Mr. Philip Said Azar of Kumasi to bring to your notice that he has a legal charge dated the 16th day of November, 1946, and made between George Bechir Moukarzel and himself in respect of the undermentioned vehicles which have been secured to my client for a sum of four thousand pounds (£4,000) with interest.

| Registration Number of Lorries. | Make. | Registration Number of Trailers. | |
|------------------------------------|---------------|-------------------------------------|----|
| AT 8416 | Ford V.6 | AT 8263 | |
| AT 8750 | Ford V.8 | AT 8215 | |
| AT 8074 | G.M.C. | AT 7819 | 20 |
| AT 8495 | International | AT 8409 | |
| AC 6559 | Ford V.8 | AT 8350 | |
| AT 8826 | Ford V.8 | AT 8608 | |
| AT 8827 | Ford V.8 | AT 7827 | |
| AT 8872 | Ford V.8 | AT 7832 | |
| AT 8828 | Ford V.8 | AT 8263 | |
| AT 8830 | Ford V.8 | AT 6640 | |
| AT 9087 | Dodge | AT 6734 | |
| AT 8420 | Ford V.6 | AT 7461 | |
| AT 5616 | Bedford | AT 7658 | 30 |
| AT 5258 | Bedford | AT 7760 | |

2. I am instructed therefore to request that no transfer of the said vehicles should be effected any other person without reference to my client.

3. For your information I quote hereunder a clause in the Document which restricts transfer by Mr. George Bechir Moukarzel of the said Vehicles.

" (g) Not to permit or suffer any writ of *fieri facias* or other writ of execution or distress for rent rates or taxes to be levied or

taken against or distrained upon the vehicles or any of them or to become bankrupt or compound with his creditors.”

“(h) Not to transfer part with the possession of charge or in any way encumber the vehicles or any of them.”

Yours faithfully,

(Sgd.) E. O. ASAFU-ADJAYE,

Solicitor for Philip Said Azar.

The D.T.C.O.,
Kumasi.

10 Sir,

The above copy of letter addressed to the Licensing Department Kumasi is for your information and necessary action.

(Sgd.) E. O. ASAFU-ADJAYE,

Solicitor for P. S. Azar.

Exhibits.

Plaintiff's
Exhibit
“ H ”

Letter,
E. O. Asafu-
Adjaye to
Licensing
Depart-
ment,
Kumasi,
10th
December
1946,
continued.

Plaintiff's Exhibit.

“ J ”—LETTER, J. J. Peele & Co. to the District Transport Control Officer, Kumasi, and Court Order in re A. G. Leventis & Co. Ltd. v. G. B. Moukarzel.

J. J. Peele & Co.
Solicitors.

P.O. Box 2,
Kumasi,
Gold Coast.

18th December, 1946.

The District Transport Control Officer,
Government Transport Department,
Kumasi.

Sir,

A. G. Leventis & Company Limited

v.

G. B. Moukarzel

Plaintiff's
Exhibit
“ J ”

Letter,
J. J. Peele
& Co. to
the District
Transport
Control
Officer,
Kumasi,
and Court
Order in re
A. G.
Leventis
& Co. Ltd.
v. G. B.
Moukarzel,
18th
December
1946.

30 We have the honour to enclose herewith a certified copy of an Order of Attachment made by the Divisional Court of Kumasi in the above-mentioned suit on the 14th instant, your acknowledgment of receipt of which will oblige.

We have the honour to be, sir,

Your obedient Servants,

for J. J. Peele & Co.,

(Sgd.) JOHN W. MEAD.

Exhibits. IN THE SUPREME COURT OF THE GOLD COAST.

Ashanti.

Plaintiff's
Exhibit
" J "

Divisional Court, Kumasi.

Suit No. 80/1946.

Letter,
J. J. Peele
& Co. to
the District
Transport
Control
Officer,
Kumasi,
and Court
Order in re
A. G.

A G. LEVENTIS & COMPANY LIMITED

whose registered office is situate at Accra . Plaintiff-Company

V.

GEORGE BECHIR MOUKARZEL . . Defendant.

Leventis
& Co. Ltd.
v. G. B.
Moukarzel,
18th
December
1946,
continued.

Upon motion made to this Honourable Court on the 14th day of December, 1946, by George Addison Heward-Mills, Counsel for the Plaintiff- 10
Company for Interim Attachment of four (4) vehicles belonging to the Defendant herein, and Upon Reading the affidavit of George Christodoulou Leventis in support, and the affidavit of George Bechir Moukarzel, the Defendant, in opposition thereto, and Upon Hearing Counsel for the parties, this Court doth hereby order that the following vehicles belonging to the Defendant and specified in the Plaintiffs' motion filed herein be attached until the further order of the Court :—

A.T. 8826

A.T. 8827

A.T. 8829

A.T. 8830.

20

Given under my hand and the Seal of the said Court this 14th day of December, 1946.

(Sgd.) ROGER VAN DER PUIJE,
Ag. Registrar, Divisional Court.

Office Copy.

(Sgd.) ROGER VAN DER PUIJE,
Ag. Registrar, Divisional Court,
Kumasi.



1st Defendants' Exhibit.

Exhibits.

“ K ”—LETTER, G. A. Heward-Mills, Solicitor for F. & M. Khoury, to the District
Transport Control Officer, Kumasi.

1st
Defendants'
Exhibit
“ K ”
Letter,
G. A.
Heward-
Mills,
Solicitor for
F. & M.
Khoury, to
the District
Transport
Control
Officer,
Kumasi,
18th
December
1946.

Geo. A. Heward-Mills,
Barrister-Solicitor,
Accra & Kumasi.

“ Dantu ” Chambers,
Post Office Box No.,
Gold Coast Colony,
West Africa,

December 18, 1946.

The D.T.C.O.,
10 Government Transport Office,
Kumasi.

Dear Sir,

I attach hereto a schedule of vehicles which by a Bill of Sale dated 22nd November, 1946, have been secured to my clients Messrs. Fred Khoury and Magid Khoury for a debt owed by the said G. B. Moukarzel to my clients above-mentioned.

It is understood, however, that no transfer will take place without any purchaser first obtaining a permit from you to buy and this list is sent as notice to you of the existence of the said Bill of Sale in order to estop
20 Mr. Moukarzel from effecting a transfer of any of the lorries appearing on the list attached hereto.

Under and by virtue of the powers of sale vested in my clients by the Bill of Sale hereinbefore mentioned, I would state that they have started to seize the lorries in question, and will proceed to sell according to the terms of clause 4 of the said Bill of Sale which provides that after seizure sale should take place after the expiration of five clear days.

In any event this serves as necessary notice of the Bill of Sale and preparatory to your permit which will first be had and obtained before the transfer of any of the lorries to would-be purchasers of same.

30 Thanking you,

Yours faithfully,

(Sgd.) G. A. HEWARD-MILLS,
Solicitor for Messrs. Fred Khoury
and Magid Khoury.

Exhibits.

SCHEDULE OF VEHICLES referred to.

Inter alia.

1st
 Defendants'
 Exhibit
 " K "

Letter,
 G. A.
 Heward-
 Mills,
 Solicitor for
 F. & M.
 Khoury, to
 the District
 Transport
 Control
 Officer,
 Kumasi,
 18th
 December
 1946,
continued.

| MAKE | YEAR | REGISTERED NO. |
|------------------|------------|----------------|
| G.M.C. | 1943 .. | AT.8074 |
| Ford | 1944 .. | AT.8416 |
| Ford | 1944 .. | AT.8420 |
| Ford | 1944 .. | AC.6559 |
| International .. | 1942/43 .. | AT.8495 |
| Ford | 1945/46 .. | A.T.8826 |
| Ford | 1945/46 .. | AT.8827 |
| Ford | 1945/46 .. | AT.8828 |
| Ford | 1945/46 .. | AT.8830 |
| Bedford | 1938 .. | AT.5616 |
| Bedford | 1938 .. | AT.5258 |
| Ford | 1945/46 .. | AT.8750 |
| Ford | 1945/46 .. | AT.8872 |
| Dodge | 1945/46 .. | AT.9087 |

10