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UNIVERSITY OF LONDON  
W.C.1.  
- 7 FEB 1959  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

1.

IN THE PRIVY COUNCIL

No. 36 of 1959

59008

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

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

- and -

BASIL NOAH BASIL

Successor to Noah Basil  
Basil (Defendant) Respondent

CASE FOR THE RESPONDENT

Record

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1. This is an appeal from a Judgment and Order of the West African Court of Appeal, dated the 11th day of February, 1957, whereby the Appeal of the Respondent from a Judgment of the Land Court at Kumasi, being part of the then Supreme Court of the Gold Coast, dated the 3rd day of July, 1956, was allowed and the Plaintiffs' (Appellants herein) suit was dismissed.

p.40

p.22

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2. By their Statement of Claim the Appellants, who are the executors to one Yaw Anthony (deceased), claimed a declaration that notwithstanding the provision in a deed of mortgage, dated the 11th day of November, 1927, between Yaw Anthony (deceased) and Noah Basil Basil (deceased) that on the said Yaw Anthony, the mortgagor, paying £3,500 to Noah Basil Basil, the mortgagee, the said Basil would reconvey only half of the premises on Plot No. 435 Old Town

p.3

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Section "B", the said plot having been since divided into two and described as plot No. 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 £3500 having been already paid by the said Yaw Anthony.

3. The said alleged mortgage contained the following passage:-

p.46, 1.4 to  
p.47, 1.12.

"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

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10 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 pre-  
 mises TO HOLD the same unto and to the use of  
 the Mortgagee his heirs executors administra-  
 tors and assigns PROVIDED ALWAYS that if the  
 Mortgagor shall pay to the Mortgagee the sum of  
 20 THREE THOUSAND FIVE HUNDRED POUNDS (£3,500)  
 then the Mortgagee will at any time thereafter  
 upon the request and at the cost of the Mort-  
 gagor 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 admini-  
 strators 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 THOUS-  
 AND FIVE HUNDRED POUNDS (£3,500) as provided  
 for in the aforesaid Agreement"

4. By their Statement of Claim the Appellants al-  
 leged that the condition of reconveying half of the  
 said premises on payment of the sum of £3,500 was a  
 clog on the equity of redemption. They further  
 alleged that in pursuance of the said mortgage  
 agreement the Mortgagor surrendered unto the Govern-  
 30 ment the whole plot No. 435 and this was divided  
 into two separate plots known as plots Nos. 435 and  
 435A and the Mortgagee took possession of both plots  
 and erected buildings thereon. It was further al-  
 leged that in 1949 the present Respondent as succes-  
 sor and beneficiary to Noah Basil Basil assigned  
 plot No. 435 to Yaw Anthony, the sum of £3,500 hav-  
 ing been paid to the Mortgagee but retained plot  
 No. 435A. p.3, 1.25  
 p.3, 1.35  
 p.4, 1.6
5. By his Statement of Defence the Respondent ad-  
 40 mitted the agreement but stated that the late Yaw  
 Anthony did not contribute to the sum of £7,000.  
 Further he alleged that the late Yaw Anthony agreed  
 that Noah Basil Basil should build for himself on  
 half of the plot then known as plot 435 and further  
 that by mutual consent and agreement of both parties  
 the surrender to the Government of the whole plot  
 had taken place and that on division plot No. 435  
 was in the name of the late Yaw Anthony and plot No. p.5, 1.21  
 p.5, 1.25  
 p.5, 1.30

- Record  
p.6, 1.1  
p.6, 1.6  
p.6, 1.19  
p.6, 1.38  
p.10, 1.19  
p.14, 1.17
- 435A in the name of Noah Basil Basil. The Government entered into two separate leases in respect of the two separate plots with Yaw Anthony and Noah Basil Basil dated the 4th February, 1931. The Respondent further alleged that by a form of consent dated the 11th March, 1931 the Chief Commissioner of Ashanti had granted consent to the late Yaw Anthony to assign by way of mortgage to Noah Basil Basil the new plot No. 435. The Respondent asserted that it had been agreed between the late Anthony and the late 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 the late Basil collecting the rents from the properties less payments made until the amount was finally settled and that the late Yaw Anthony had the right at any time to pay off the balance for the principal remaining due and to redeem the mortgage. The Respondents denied the construction placed on the transaction by the Appellants and said that the amount of £3,500 referred to in the alleged mortgage related only to Yaw Anthony's portion of the plot No. 435 which had been re-assigned to him upon repayment of the said amount.
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6. By leave at the trial the Defence was amended to assert that there had been an agreement prior to the original mortgage for the building by Basil of his portion of the building. And that the mortgage of the 11th November, 1927 had become null and of no effect upon the execution of the said further transactions in 1931. Further the Respondents relied, if the said mortgage was deemed to have present effect, on the fact that the Respondent had been a mortgagee in possession since 1927 and that the claim was barred by the operation of the Real Property Limitation Act, 1833.
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7. Evidence was given by the first Appellant establishing the facts set out in the Statement of Claim. For the Respondents, one Hakim Kharam was called who knew the late Basil and who gave evidence in chief as follows:-
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- "In 1927 Basil took 3 plots from Yaw Anthony - one of which was 435. He offered half of his plot to Basil - who said he would build to the value of £3,500 on half the plot for Yaw Anthony and he would have mortgage - Exhibit A."
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In cross-examination

Record

"How much did Basil pay for plot 435A?  
£3500. 0. 0. The consideration for the  
half plot was no interest on £3500.0.0. p.15, 1.3

Where is the Agreement for that? p.15, 1.6  
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 Basil to keep  
half.

10 How much Rent was got from building a Plot  
435A? p.15, 1.11

I don't know. Yaw Anthony had a plot -  
he and Basil agreed to divide it into two  
- he would build for Anthony on the plot  
and after its completion he Basil would  
take rent for half the building and that  
half if it reaches £3500. 0. 0. Yaw An-  
thony could take that part of building  
for himself.

20 Two separate leases for Anthony and for Basil  
in that Agreement? p.15, 1.19  
Yes. "

One J.W. Mead, a legal practitioner in Kumasi, gave  
evidence for the Respondent that he had managed  
plots 435, 435A from 1938 until 1948/9. He pre-  
pared Exhibit "C" which was the reconveyance of  
plot 435 to Yaw Anthony and had no complaint from  
1949 onwards. p.15, 1.28

30 8. The learned trial Judge in his Judgment held  
that the witnesses knew nothing about the original  
transaction; that the 1927 document was "beyond  
cavil" a mortgage and after setting out the proviso  
for reconveyance on half the said premises on pay-  
ment of £3,500 continued as follows:- p.22, 1.38

40 "This provision was a clog on the equity of re-  
demption. 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 p.23, 1.13 to  
p.24, 1.25.

Record

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.

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p.50, 1.41

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."

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p.50, 1.5

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 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.

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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."

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9. The Respondent appealed to the West African Court of Appeal on the following grounds:-

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

p.25, 1.29 to  
p.26, 1.15

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(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 persisted after the transactions and equitable mortgage of 1931.

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(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.

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(g) That the Learned Trial Judge was wrong in not considering the effect of the Real Property Limitation Act 1833."

10. On appeal Korsah C.J. gave the Judgment of the Court and after setting out the facts said as follows:-

Record  
p.42, 1.11 to  
p.44, 1.8.

"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 of 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.

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

The defendant contends that the parties made a subsequent agreement to divide the property, that it has been lost, but its terms can

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10 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 re-convey 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.

30 After recouping himself the mortgagee re-conveyed 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.

40 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 view of the conclusion we have reached it is unnecessary to deal with the contention

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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."

Coussey P. and Verity, Ag.J.A. concurred.

11. Final Leave to Appeal to Her Majesty in Council was granted by the West African Court of Appeal on the 24th day of June, 1957.

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12. The Respondent humbly submits that this Appeal should be dismissed with costs for the following among other

R E A S O N S

- (1) The original transaction between the late Yaw Anthony and the late Noah Basil Basil was for the conveyance of one half of the plot 435 and for the mortgage of the other half of the plot. There was no clog on the equity of redemption of the half of the plot that was mortgaged.
- (2) Any clog on the equity of redemption was removed by the further agreement in 1931 whereby the whole plot was surrendered to the Government and new leases given to both parties.
- (3) If the mortgage is deemed to have continued in existence the Respondent is protected as a mortgagee in possession since 1927 and the Appellants are barred from their remedy by the operation of the Real Property Limitation Act, 1833.
- (d) Because the Judgment of the West African Court of Appeal was right.

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THOMAS O. KELLOCK.

IN THE PRIVY COUNCIL

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

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CASE FOR THE RESPONDENT

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