Judgment 24 1954

No. 3 of 1953.

In the Privy Council

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL AT LAGOS.

BETWEEN

ANTONIO ASSAF . . . . . (*Plaintiff/Respondent*) *Appellant*

AND

DANIEL OLATUNJI FUWA, MICHAEL OREDOLAPO ONAYEMI and ABIGAIL PELEWURA OSIFESO the Executors and Executrix of MUSURU OKUNUBI, deceased (*Defendant/Appellant*) *Respondents.*

RECORD OF PROCEEDINGS

LEWIS & LEWIS AND GISBORNE & CO.,
10, 11 & 12 ELY PLACE,
HOLBORN, E.C.1,
Solicitors for the Appellant.

HATCHETT JONES & CO.,
66A FENCHURCH STREET,
LONDON, E.C.3,
Solicitors for the Respondents.

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BL2225-59404

No. 3 of 1953.

In the Privy Council.

38093

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL AT LAGOS.

BETWEEN

ANTONIO ASSAF (Plaintiff/Respondent) . . *Appellant*

AND

DANIEL OLATUNJI FUWA, MICHAEL OREDOLAPO ONAYEMI and ABIGAIL PELEWURA OSIFESO the Executors and Executrix of MUSURU OKUNUBI, deceased (Defendant/Appellant) *Respondents.*

RECORD OF PROCEEDINGS.

INDEX OF REFERENCE

PART II
EXHIBITS

DOCUMENTS SUBMITTED WITH THE RECORD BUT NOT PRINTED

NO.	DESCRIPTION OF DOCUMENT	DATE
	IN THE SUPREME COURT OF NIGERIA, LAGOS JUDICIAL DIVISION	
1	Case adjourned to 21st June 1950 for hearing	22nd May 1950
2	Case adjourned to 14th July 1950 for mention	3rd July 1950
3	Case adjourned to 11th September 1950 for mention ..	14th July 1950
4	Case fixed for 20th September 1950	11th September 1950
5	Case adjourned to 22nd September 1950	20th September 1950
6	Bond for Costs on Appeal	14th November 1950
7	Affidavit of Means of M. O. Onayemi	14th November 1950
8	Affidavit of Means of E. B. Okunsanya	14th November 1950
9	Motion heard and Final Leave to Appeal granted	20th November 1950
	IN THE WEST AFRICAN COURT OF APPEAL. HOLDEN AT LAGOS, NIGERIA	
10	Certificate of Service of Notice of Appeal	20th March 1950
11	Certificate of Registrar that Conditions of Appeal have been fulfilled	20th March 1950
12	Notice to settle Record of Appeal	17th October 1952
13	Settling Record of Appeal	25th October 1952

No. 3 of 1953.

In the Privy Council.

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL AT LAGOS.

BETWEEN

ANTONIO ASSAF . . . . (*Plaintiff/Respondent*) *Appellant*

AND

DANIEL OLATUNJI FUWA, MICHAEL OREDOLAPO ONAYEMI and ABIGAIL PELEWURA OSIFESO the Executors and Executrix of MUSURU OKUNUBI, deceased (*Defendant/Appellant*) *Respondents.*

RECORD OF PROCEEDINGS

In the Supreme Court of Nigeria, Lagos Judicial Division.

No. 1. Application for Summons, 7th March 1950.

No. 1.

APPLICATION FOR SUMMONS.

IN THE SUPREME COURT OF NIGERIA.
Lagos Judicial Division.

Suit No. 91 of 1950.

ANTONIO ASSAF . . Plaintiff

vs.

MUSURU OKUNUBI . . . . . Defendant.

The Plaintiff seeks against the Defendant

(1) the Recovery of possession of the premises situate and lying at Denton Street, Ebute Metta.

(2) £400 (Four hundred pounds) being mesne profits accruing to the Defendant and covering the period October, 1948 to February, 1950.

Annual rental value — £250.

Dated at Lagos this 7th day of March, 1950.

(Sgd.) OLADIPO MOORE,
Solicitor for the Plaintiff.

In the Supreme Court of Nigeria, Lagos Judicial Division.

No. 1. Application for Summons, 7th March 1950, *continued.*

Plaintiff's Address :—c/o 18, Tinubu Street, Lagos.
Defendant's Address :—Oko-Awo, Lagos.

Summons	£31 : – : –	+ further fee when the amount of profit is known.
Ser., etc.	– : 3 : 8	
	£31 : 3 : 8	Pd. on CR. No. 445826/97/7.3.50.

(Initld.) A. R. K.

No. 2.
WRIT OF SUMMONS.

No. 2. Writ of Summons, 11th March 1950.

IN THE SUPREME COURT OF NIGERIA. 10

CIVIL SUMMONS. U 4045.

Suit No. 91 of 1950.

Between ANTONIO ASSAF . . . . . Plaintiff

and

MUSURU OKUNUBI . Defendant.

To Musuru Okunubi

of Oko-Awo, Lagos.

You are hereby commanded in His Majesty's name to attend this Court at Tinubu Square, Lagos, on Monday the 3rd day of April, 1950, at 9 o'clock in the forenoon to answer a suit by Antonio Assaf of c/o His 20 Solicitor, 18, Tinubu Street, Lagos, against you.

The Plaintiff seeks against the Defendant

(1) the Recovery of possession of the premises situate and lying at Denton Street, Ebute Metta.

(2) £400 (Four hundred pounds) being mesne profits accruing to the Defendant and covering the period October, 1948, to February, 1950.

Annual rental value — £250.

Issued at Lagos the 11th day of March, 1950.

	£ s. d.		30
Summons	31 : 0 : 0	(Sgd.) C. W. REECE,	
Service	0 : 3 : 8	Puisne Judge.	
Mileage			
	£31 : 3 : 8	+ Plus further fee when the amount of mesne profit is known.	

C.R. No. 445826/97/7.3.50.

TAKE NOTICE :—That if you fail to attend at the hearing of the suit or at any continuation or adjournment thereof, the Court may allow the Plaintiff to proceed to judgment and execution.

In the Supreme Court of Nigeria, Lagos Judicial Division.

No. 3.
ORDER FOR PLEADINGS.

No. 3. Order for Pleadings, 3rd April 1950.

IN THE SUPREME COURT OF NIGERIA.

Monday the 3rd day of April, 1950.

Before—

HIS HONOUR COURTENAY WALTON REECE, ESQ., Puisne Judge.

Suit No. 91/50.

ANTONIO ASSAF

vs.

MUSURU OKUNUBI.

Awoyele holding Moore's brief for Plaintiff.
Kayode and David for Defendant.
Pleadings ordered—14 days each side.

(Sgd.) C. W. REECE,
Puisne Judge.

No. 4.
STATEMENT OF CLAIM.

No. 4. Statement of Claim, 15th April 1950.

Filed at 10.5 a.m. on 18.4.50. (Initld.) A. R. K.
2/6d. Pd. on C.R. No. 446195/200/18.4.50. (Initld.) A. R. K.

IN THE SUPREME COURT OF NIGERIA.
Lagos Judicial Division.

Suit No. 91 of 1950.

ANTONIO ASSAF . . . . . Plaintiff

vs.

MUSURU OKUNUBI . . . . . Defendant.

STATEMENT OF CLAIM.

1. The Plaintiff is a Lebanese Contractor and lives at 5, Egerton Road, Lagos.

2. The Defendant is a trader living in Lagos.

3. The Property in dispute is situate at Denton Street, Ebute Metta in the Mainland of Lagos.

4. The property in dispute belonged to one Sarminu Ajose.

5. The said Sarminu Ajose mortgaged the property to Oshodi and Apena.

6. The said Sarminu Ajose approached the Plaintiff sometime in October, 1948, and offered to sell to him the freehold interest on the property, he (the said Sarminu Ajose) disclosing the said mortgage to the Plaintiff.

In the Supreme Court of Nigeria, Lagos Judicial Division.

No. 4. Statement of Claim, 15th April 1950, *continued.*

7. The said Sarminu Ajose introduced the Plaintiff to Messrs. Irving and Bonnar a firm of Solicitors in Lagos as his (Solicitors) and asked Plaintiff to make payment to the firm, with further instructions to the solicitors to pay off the mortgage debt out of the agreed purchase price.

8. The Plaintiff there and then instructed the said firm of Solicitors to act for him in getting the freehold interest in and preparing the deed of Conveyance.

9. The said firm of Solicitors Messrs. Irving and Bonnar wrote sometime in October, 1948, a letter to Mr. Latunde Johnson a Solicitor acting for Oshodi and Apena (the Mortgagees) demanding the title deeds deposited by the said Sarminu Ajose with a view to investigating the title of Sarminu Ajose and preparing the deed of conveyance and paying off the mortgage debt.

10. The said Latunde Johnson sent the title deeds to the said firm of Solicitors Messrs. Irving and Bonnar.

11. The Plaintiff paid the full purchase price to the said firm of Solicitors, Messrs. Irving and Bonnar as per instructions given him by Sarminu Ajose.

12. The Deed of Conveyance was duly prepared, but the said Sarminu Ajose refused to sign.

13. In an action instituted in this Honourable Court in November, 1948, suit No. 317 of 1948 the Plaintiff sued the said Sarminu Ajose for the specific performance of the said contract of sale between the Plaintiff and the said Sarminu Ajose.

14. By the judgment of this honourable Court dated 28th day of June, 1949, it was ordered by Justice Gregg that the Defendant (Sarminu Ajose) do execute the deed of conveyance of the property in dispute to the Plaintiff within 30 days.

15. The said deed of Conveyance has since been executed.

16. During the said action viz. 317 of 1948 it transpired that the said Sarminu Ajose, subsequent to the sale to the Plaintiff had received payment from the Defendant on an alleged sale of the property in dispute.

17. The Deed of Conveyance was prepared by the said Latunde Johnson in favour of the Defendant.

18. The Plaintiff will contend at the trial that by the said Latunde Johnson acting for the Defendant there was an imputed notice on the Defendant of the Plaintiff's prior purchase.

19. The Defendant has since November, 1948, been in possession of the property, collecting rent and enjoying all profit issuing out of the said property in dispute.

Whereupon the Plaintiff claims as per writ of Summons.

Dated at Lagos this 15th day of April, 1950.

(Sgd.) OLADIPO MOORE,
Solicitor for the Plaintiff.

In the Supreme Court of Nigeria, Lagos Judicial Division.

No. 5. Statement of Defence, 13th May 1950.

No. 5.
STATEMENT OF DEFENCE.

IN THE SUPREME COURT OF NIGERIA.
In the Lagos Judicial Division.

Suit No. 91 of 1950.

Between ANTONIO ASSAF . . . . Plaintiff
and
MUSURU OKUNUBI . . . . . Defendant.

STATEMENT OF DEFENCE.

1. Save and except as are hereinafter specifically admitted the Defendant denies each and every allegation of fact contained in the Plaintiff's Statement of Claim as if each were set out seriatim and separately denied.

2. The Defendant admits paragraphs 1, 2, 3, 4, 5 and 9 of the Statement of Claim.

3. The Defendant is not in a position to admit or deny paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 of the Statement of Claim.

4. With reference to paragraph 16 of the Statement of Claim the Defendant admits that he bought the property in dispute from Sarminu Ajose in October, 1948, but he has no notice of any prior sale to the Plaintiff.

5. By a deed of conveyance dated 29th October, 1950, and registered as No. 77 at page 77 in Volume 810 of the Register of Deeds kept in the Lands Registry at Lagos, the said Sarminu Ajose conveyed to the Defendant all the rights and interests which he has left in the property in dispute.

6. The Defendant denies paragraph 18 of the Statement of Claim.

7. The Defendant admits paragraph 19 of the Statement of Claim.

8. The Defendant avers that he is a bona fide purchaser for value without notice of any interest in the said property claimed by the Plaintiff.

9. The Defendant avers that the mortgage to Oshodi and Apena is a legal mortgage subject to the usual equity of redemption.

10. With further reference to paragraph 15 of the Statement of Claim the Defendant avers that the Conveyance to the Plaintiff is of no effect whatsoever as Sarminu Ajose has nothing that he could convey.

11. The Defendant will contend at the trial of this action that the Plaintiff's claim is totally devoid of substance and that there is no cause of action disclosed.

Dated at Lagos this 13th day of May, 1950.

(Sgd.) THOMAS, WILLIAMS & KAYODE,
(Sgd.) JAMES E. DAVID,
Solicitors for the Defendant.

In the Supreme Court of Nigeria, Lagos Judicial Division.

No. 6. Notes of Trial.

No. 6.

NOTES OF TRIAL.

IN THE SUPREME COURT OF NIGERIA.

Lagos Judicial Division.

Friday the 22nd day of September, 1950.

Before—

HIS HONOUR ADETOKUNBO ADEGBOYEGA ADEMOLA, ESQ.,

Puisne Judge.

Suit No. 91/50.

ANTONIO ASSAF

v.

MUSURU OKUNUBI.

6 (i). Counsel's Opening Statement.

Sir Adeyemo Alakija (*Moore* with him) for Plaintiff.

David (*F. R. A. Williams* with him) for Defendant.

Plaintiff's Evidence.

Moore opens Plaintiff's case and calls

6 (ii). Antonio Assaf.

ANTHONY ASSAF (m) Sworn. States in English :—

Examination-in-chief.

A Lebanese trader living at 5 Egerton Road, Lagos, I know the property at 130 Denton Street, Ebute Metta. I own the property. I bought it from one Sarminu Ajose in October, 1948, for £1,600. I paid the purchase price to Messrs. Irving & Bonnar on the Vendor's instructions. These are the two receipts of payment. Both tendered, no objection, admitted in evidence and marked Exhibits " A " and " A1."

Sarminu Ajose did not execute a deed of conveyance in 1948. One was prepared but he refused to sign it. He was put in Court. He subsequently executed it. This is the certified copy of judgment in the action I brought against Ajose.—Tendered in evidence.

Williams objects. Judgment in that case is " Res inter alios." Ajose not a party to the proceedings : nor was the present Defendant a party to the proceedings sought to be tendered.

Court : Document admissible in evidence. Tendered, admitted and marked Exhibit " B." This is the deed of conveyance executed by Ajose.—Tendered, no objection, admitted and marked Exhibit " C." Since I bought the property I have never gone into possession. The Defendant is in possession. I found out that the Defendant is in possession when the case, Exhibit " B," was heard in Court. This Defendant gave evidence then for Ajose. I have drawn no rent on the property. I estimate the rent to be about £300 a year. I now claim possession and rent from October, 1948, till February, 1950, when I brought this action.

XXd. by David: I knew the property was mortgaged. I am not concerned whether or not the mortgage has been discharged. I am aware that Ajose has collected the whole of the money paid to Messrs. Irving and Bonnar. The tenants told me what rents they pay. I am not aware that the Defendant purchased this property before I did. I am not aware that at the time I brought action for specific performance (Exhibit " B ") against Ajose, that the Defendant had already bought the property. I am not in the least concerned.

Plaintiff's 1st Witness. I am FAULKNER CAMERON (m). Sworn. States in English :—

A legal practitioner and Solicitor of the Supreme Court of Nigeria. I know the Plaintiff. I know Sarminu Ajose. In October, 1948, the Plaintiff and Sarminu Ajose came to my office. The latter told me he had agreed to sell the property at 130 Denton Street to the present Plaintiff for £1,600. He said there was a mortgage on the property in favour of one Latunde Johnson for £1,300. The Plaintiff asked me to investigate the title. He paid £300 in notes to Ajose who asked me to retain the money until the balance is paid. I caused my firm to issue a receipt for the amount to the Plaintiff. Exhibit " A " is the receipt. Ajose instructed me to prepare a reconveyance from Latunde Johnson. The present Plaintiff also instructed me to prepare a Conveyance to him from Ajose if I was satisfied with the title. I asked Latunde Johnson to let me have the title deeds and the mortgage deed with a note showing principal and interest due. In reply I got this letter from Latunde Johnson—Letter dated 12.10.48 tendered; no objection, admitted and marked Exhibit " D." Attached to Exhibit " D " was a certified true copy of a deed of Conveyance: also tendered no objection: admitted and marked Exhibit " D1." I prepared both the reconveyance and the conveyance and informed both parties they were ready. The Plaintiff came to me and paid the balance of £1,300—which I credited to Ajose's account. This is the receipt issued by my firm—Exhibit " A1," identified. I got no response from Ajose. I later got a letter from Mr. G. B. A. Coker (Solicitor) on behalf of Ajose. This is the letter—letter dated 25.10.48 tendered, no objection: admitted and marked Exhibit " E." I sent a reply. This is my office copy: letter dated 25.10.48 tendered :—

Moore explains original not in existence: Mr. G. B. A. Coker said so in case (Exhibit " B ")—copy admitted and marked Exhibit " F."

On 26.10.48 I received this letter from Mr. Latunde Johnson—Tendered, no objection, admitted and marked Exhibit " G." I do not think I returned the title deeds referred to in Exhibit " G " to Mr. Latunde Johnson. Out of the £1,600 in my hands, sum of £61 odd was paid to the present Plaintiff by Order of Court on a garnishee Summons. 5 guineas costs awarded to Irving & Bonnar was paid out of that sum; £50 was withdrawn by Ajose on 31st October, 1949. The balance of £1,482 and a few shillings was withdrawn by Ajose on 14.12.49.

XXd. by David for Defendant: As far as I am concerned I did not pay off any mortgage. When I gave evidence in the previous action for specific performance (Exhibit " B ") the transaction had not been completed. I think this was during the first half of 1949: the man Ajose had not executed the Conveyance I prepared.

Cross-examination.

In the Supreme Court of Nigeria, Lagos Judicial Division.

No. 6. Notes of Trial, *continued.*

Defendant's Evidence.

6 (iv). Musuru Okunubi.

Examination-in-chief.

Cross-examination.

Defence opens.

EMANUEL MUSURU OKUNUBI. Sworn. States in English :—

I know the property at 130 Denton Street, Ebute Metta, I am the owner at present. I bought it from Sarminu Ajose. As the property was mortgaged to Oshodi & Apena, I went with Ajose to Mr. Latunde Johnson the director of the firm. Mr. Johnson told me £1,200 was owing on the property. I paid the amount to Mr. Latunde Johnson. I paid the balance of £1,500 to Sarminu Ajose by cheque. I bought the premises for £2,700. I instructed Mr. Johnson to prepare the deed of conveyance in my favour. He did. This is it—Deed tendered : no objection, admitted and marked Exhibit " H." Sarminu Ajose executed Exhibit " H." I have the deed of mortgage here with me which I discharged—Deed tendered : no objection, admitted and marked Exhibit " J." I paid £1,200 to Mr. Johnson by cheque in October, 1948. He gave me a receipt. I gave cheques and receipts to my Solicitor in this case.

XXd. by Sir Adeyemo Alakija : I am sure I bought for £2,700. I engaged Mr. Latunde Johnson to deal with the matter of investigating the title. I am a trader, an Ijebu man. I know my tribe are astute and good business men. Mr. Latunde Johnson assured me everything was in order and I could safely buy. I was not aware that at the time the title deeds were with Irving & Bonnar. I heard about the case between the Plaintiff and Ajose. I was subpœned. I gave evidence. The Court ordered specific performance.

Defendant's 1st Witness :

6 (v). Aaron Adeyeye.

Examination-in-chief.

AARON OLAJIDE ADEYEYE (m). Sworn. States in English :—

I am a clerk in the Chambers of Messrs. Thomas, Williams & Kayode, Solicitors. The firm is acting for the Defendant in this case. I received from the Defendant documents connected with this case which he handed over. Among the documents I received cheques from him ; I received a receipt. I have searched for the receipts now but this appears to have been misplaced. I noted the particulars of the Cheques down. The first cheque is a B.B.W.A. cheque No. B/60/309791 dated 27.10.48. The other cheque is B/30/439692 dated 25.10.50. The receipt is dated 25.10.48 for £2,700, in respect of property at 130 Denton Street, Ebute Metta. I cannot remember who signed the receipt. One of the cheques was drawn in favour of one Ajose and the other in the name of Messrs. Oshodi and Apena Ltd.

XXd. by Moore : Nil.

CASE FOR DEFENDANT.

David addresses the Court.

6 (vi). Counsel for Defence.

In the Writ of Summons Plaintiff did not state what is the number of property in dispute. The number is not even stated in the Statement of Claim.

Plaintiff's claim rests upon a Conveyance Exhibit " C." No dispute about the history of the property. Both parties claim from Sarminu Ajose the owner : he mortgaged it to Oshodi & Apena—a legal mortgagee (see Exhibit " J "). Vendor Ajose only had equitable interest in his hands. This he purported to sell to (1) Plaintiff and (2) Defendant. No memo. of agreement of this purported sale : none tendered.

Exhibit " D " does not mean anything because it is a reply to a letter not tendered in this Court. Exhibit " E " countermanded any instructions given to Messrs. Irving & Bonnar in respect of the Sale.

Messrs. Irving & Bonnar were acting for both the Plaintiff in this case and for Ajose—Vendor and the proposed vendee. At no time did Mr. Latunde Johnson act for the Plaintiff or for Ajose. He was doing his duty as Mortgagee all the time. He signed the Mortgage as director of the firm of Mortgagees.

What was the Plaintiff trying to buy ? and what was Defendant trying to buy ? Ajose could only convey what he had—equitable Estate.

Refers to Snell on Equity, 23rd Edition, p. 314, 2nd paragraph. Ajose sold equitable Estate to Defendant and conveyed on 29.10.48 by deed (Exhibit " H ").

The Plaintiff's conveyance made a year after (Exhibit " C ") on 13.9.49. Exhibit " C " is worth nothing at all. Ajose had nothing left when he executed Exhibit " C " ; he had conveyed all he had to the Defendant by Exhibit " H."

Plaintiff must recover possession on the strength of his title and not on any apparent weakness of the title of the Defendant.

Fahm v. *Ogbojulogun & Ano.*, 12 N.L.R. 47, from p. 48, last paragraph but one. In the present case the Defendant not only bought the equitable estate from Ajose, he paid off the mortgage and stepped into the shoes of the mortgagee as well.

1949 White Book, p. 407, last paragraph. The words " When Plaintiff had title to possession " is very material.

Refers to *General Finance Mortgage and Development Co.* versus *Liberator Permanent Building Society*, 10 Ch.D. 15, at page 24, last paragraph. Plaintiff cannot even speak of any equitable interest. No document, no agreement for sale. The Order for specific performance does not bind the Plaintiff. Refers to *Lyel* v. *Kennedy*, 51 L.J.R. 409, at page 413 : Brett, L.J. At the time of the Order Exhibit " B " ; Ajose had no more interest in the property.

No valid agreement for sale ; there could be no Specific performance. Refers to Halsbury, 2nd Edition, Vol. 13, page 123, paragraph 108.

Adjourned till 26.9.50.

(Sgd.) A. ADE ADEMOLA,
Puisne Judge.

22.9.50.

In the Supreme Court of Nigeria, Lagos Judicial Division.

IN THE SUPREME COURT OF NIGERIA.

Lagos Judicial Division.

Tuesday the 26th day of September, 1950.

No. 6. Notes of Trial, *continued.*

Before—

6 (vii).

HIS HONOUR ADETOKUNBO ADEGBOYEGA ADEMOLA, ESQUIRE, Puisne Judge.

Counsel for Plaintiff.

Suit No. 91/50.

ANTONIO ASSAF

v.

MUSURU OKUNUBI.

Same Counsel.

Moore for Plaintiff addresses the Court.

It is immaterial whether or not the number of the property is stated on the Writ or on the Statement of Claim. Parties are agreed on the number. The Conveyances Exhibits " H " and " C " made it clear what is in dispute. Also paragraph 2 of Statement of Defence admits para. 3 of Statement of Claim.

Plaintiff's case is that he purchased the property on 15th October, 1948. Purchaser was later compelled to execute Conveyance by this Court—See Exhibit " B." The Plaintiff relies on that judgment. It rules there was an enforceable contract; it has not been upset; it is binding on this Court whether or not the Defendant were parties or not to the action. The action was for specific performance. Plaintiff would not be allowed to join a third party where he sues for specific performance.

Refers to Fry on Specific Performance, 5th Ed., p. 81, section 170: under " Parties to Action."

Defendant was well aware that action (Exhibit " B ") was pending in this Court: he was a witness in the case. It was his duty to have applied to be joined. He is bound by the judgment (Exhibit " B "). The Defendant is claiming through Ajose who had sold to Plaintiff.

Refers to *Spencer* v. *Williams*: 2 P. & D. 230.

Defendant claiming through Ajose is bound by the judgment (Exhibit " B ") which is against Ajose.

Doctrine of Estoppel, Halsbury, 1st Edition, p. 343, section 478. Privies to contracts are found by the contract. Vendor and purchaser are privies.

Refers to *Board* v. *Board*: 9 Q.B.D. 48. The point about mortgage is irrelevant in this matter.

Exhibit " G " shows that Ajose himself paid off the mortgage debt before he sold. Assuming it is correct that Ajose had only equitable interest that he sold, first in time gets priority.

When Ajose got his legal estate back, the position in law is that he became a trustee of that Legal Estate for the Plaintiff. But that question immaterial.

Priority of Registration : Defendant's conveyance registered prior to Plaintiff's. It is submitted, however, that Plaintiff's conveyance is in law prior to that of Defendant's. When the Court ordered specific performance it means Court held there is a specific contract of sale as from 15.10.48 and expect any subsequent sale of the property to another is ineffective.

NOTICE : Portion of Exhibit " D " was read out by the Defendant's Counsel. The whole letter is to be read. What about the last paragraph of the letter ? The Defendant stated that he left everything to Mr. Latunde Johnson the writer of that letter—to investigate title, etc. Mr. Latunde Johnson when he prepared Conveyance for the Defendant knew that the title deeds were with Irving & Bonnar. He refrained from asking why they were so kept. That in law is constructive notice binding the Defendant.

Refers to Snell's Equity ; 22nd Ed. p. 44. Court has to consider that if another Solicitor was acting for the Defendant and not Mr. Latunde Johnson, he would have had to be referred to Messrs. Irving & Bonnar for the deed of Conveyance.

Letter Exhibit " E " by Mr. G. B. A. Coker to which Exhibit " F " is a reply : both bear the same date—25.10.48. In spite of the letter Exhibit " F," the Defendant bought the property on 27.10.48. On 25th October, 1948, Ajose knew he had nothing to sell. Mr. Latunde Johnson knew from Exhibit " F " on 25.10.48 and before then that Ajose had nothing to sell. It was on that 25.10.48 that Ajose paid off the mortgage debt according to Exhibit " G." On 25th October, 1948, Ajose got back his legal Estate : the Defendant in this case has not bought then. The Plaintiff has bought ; all that was left was for the deed of conveyance to be executed. On 27th October, Ajose proceeded to take money from the Defendant. Ajose has had part of £1,600 paid to him by the Plaintiff at Messrs. Irving & Bonnar's as from 9.10.48 and the balance of £1,300 on 15.10.48. If anything Ajose had been fraudulent. If Defendant suffered anything at all, he suffered through the negligence of his agent (Mr. Latunde Johnson). His remedy is against his Solicitor—Latunde Johnson.

Mesne Profit : Paragraph 19 of the Statement of Claim. From November, 1949, been in possession and collecting Rents. This is admitted in paragraph 7 of the Defence. Plaintiff gave evidence that Defendant collects rents of £25 a month.

Judgment reserved.

(Sgd.) A. ADE. ADEMOLA,

Puisne Judge.

In the Supreme Court of Nigeria, Lagos Judicial Division.

No. 7.
Judgment, 28th October 1950.

No. 7.

JUDGMENT.

IN THE SUPREME COURT OF NIGERIA.

In the Lagos Judicial Division.

Saturday the 28th day of October, 1950.

Before :

HIS HONOUR ADETOKUNBO ADEGBOYEGA ADEMOLA, ESQ.,

Puisne Judge.

Suit No. 91/50.

Between ANTONIO ASSAF . . . . . Plaintiff

and

MUSURU OKUNUBI . . . . . Defendant.

JUDGMENT.

In this case the Plaintiff claims the recovery of possession of the premises No. 130 Denton Street, Ebute-Metta, and also the sum of £400 being mesne profit accruing to the Defendant and covering the period October, 1948, to February, 1950.

It is not disputed that the original owner of the premises Sarminu Ajose, sold or purported to sell the property first to the Plaintiff and later to the Defendant.

The facts are as follows :—

The said Ajose mortgaged the property with another landed property to a firm of Moneylenders known as Oshodi and Apena for £1,300. Mr. Latunde Johnson, since deceased, a practitioner of this Court was a director of the firm. Whilst the mortgage debt remained unpaid, Ajose took the Plaintiff to Messrs. Irving & Bonnar a firm of Solicitors. To Mr. Cameron of that firm, Ajose said he had agreed to sell this property in dispute for £1,600 but there is a mortgage on it. The Plaintiff asked Mr. Cameron to investigate the title and paid the sum of £300 in currency notes to Ajose. The latter received it and asked Mr. Cameron to keep it until the balance is paid. He further asked him to prepare a reconveyance from Mr. Latunde Johnson. The Plaintiff instructed Mr. Cameron to prepare a conveyance to him to be executed by Ajose if he was satisfied with the title. Mr. Cameron thereupon set upon the work by asking for the title deeds and the mortgage deed from Mr. Latunde Johnson and a Statement showing principal and interest due. In reply a letter (Exhibit " D ") and certified copy of the deed of Conveyance (Exhibit " D1 ") came from Mr. Latunde Johnson. Both the reconveyance

and the conveyance were prepared and Ajose and the Plaintiff were notified. The Plaintiff at once paid the balance of £1,300 but Ajose did not turn up again. Instead a letter dated 25th October, 1948 (Exhibit " E ") from Mr. G. B. A. Coker (Solicitor) reached Messrs. Irving & Bonnar. It reads :—

" G. B. A. Coker, LL.M. (Lond.).
Barrister-at-Law.

13, Idumagbo Avenue,
Lagos, Nigeria.

25th October, 1948.

Messrs. Irving & Bonnar,
Solicitors etc.
Lagos.

Dear Sir,

re Sarminu Ajose : Property at No. 130 Denton Street, E.B.

I have been instructed by Mr. Sarminu Ajose to countermand the instructions already given with regards to the sale of the above-named property. Mr. Ajose informs me that the contract of sale in respect of the property has not been completed by you with anyone at all and as he has now got another more reasonable offer than that proposed by you, I think you would agree that he should stick to the higher offer the more so as the property is at present under a mortgage.

2. In the circumstances, I shall be much obliged if you would be good enough to stay any further steps with regards to the sale of the property until further instructions : The mortgagee— Mr. Latunde Johnson has also been informed of this.

With many thanks,

Yours faithfully,

(Sgd.) G. B. A. COKER."

In reply, Mr. Cameron of Irving & Bonnar wrote the same day, as follows :—

25th October, 1948.

" G. B. A. Coker Esq.,
Solicitor,
13, Idumagbo Avenue,
Lagos.

Dear Sir,

Mr. Sarminu Ajose.

130, Denton Street, Ebute Metta.

We are in receipt of your letter of today's date with regard to the above.

In the Supreme Court of Nigeria, Lagos Judicial Division.

No. 7.
Judgment, 28th October 1950, *continued.*

We were also acting for the purchaser Mr. A. E. Assaf and we presume his agreement to the cancellation of the sale to him has been obtained.

We hold the purchase price paid by Mr. Assaf to Mr. Ajose's credit in our clients' account.

Yours faithfully, "

IFC/EKM.

Next day, 26th October, 1948, Mr. Latunde Johnson, addressed a letter (Exhibit "G") to Messrs. Irving & Bonnar, as follows :—

" A. Latunde Johnson, LL.B. (Lond.), 10
Barrister-at-law.

5 Onikepo Street,
Lagos, Nigeria.

26th October, 1948.

Messrs. Irving & Bonnar,
Broad Street,
Lagos.

re Sarminu Ajose.

Mortgage of 130, Denton Street, E.B.

I have to inform you that Sarminu Ajose has paid off the whole 20
mortgage debt with interests thereon since 25th October, 1948.

Will you kindly return the certified true copies of the conveyances I sent you on the 12th of this month as to enable me to return same to him.

Yours faithfully,

(Sgd.) A. L. JOHNSON."

Meanwhile, it would appear that the present Defendant had been negotiating with Ajose for the purchase of the property. With Ajose he went to Mr. Latunde Johnson. According to him, he paid off the mortgage debt of £1,200 to Mr. Latunde and instructed him, if he was satisfied with 30
the title, to prepare a deed of conveyance. He also stated that he paid £1,500 to Ajose by cheque, making a total of £2,700 for the property.

The two cheques and the receipts were not put in evidence. They were alleged lost in the hands of the Clerk to the Defendant's Solicitor. A Deed of Conveyance (Exhibit "H") was executed by Ajose.

Now, as Ajose would not turn up at Messrs. Irving & Bonnar to execute the Deed of Conveyance in favour of the Plaintiff, the Plaintiff brought an action for recovery of possession and for specific performance against him. After hearing evidence on both sides on the facts as now put before me—the present Defendant also giving evidence—Gregg, J., 40
entered judgment in favour of the Plaintiff for recovery of possession of

the premises and ordered specific performance. Ajose then signed the Deed of Conveyance and proceeded to withdraw the moneys with Messrs. Irving & Bonnar.

The Defendant who had gone into possession refused to give up possession. The contention is that he is not bound by the Order against Ajose for recovery of possession and for specific performance.

Now, the sale to the Defendant was not a case of sale by the mortgagee under a power of sale. The evidence is that the Defendant bought from Ajose and then paid off the mortgage debt to the mortgagee.

The Deed of Conveyance executed in favour of the Defendant was registered on 29th November, 1948, and therefore by section 16 of the Land Registration Ordinance Cap. 108 takes priority to the Deed of Conveyance executed in favour of the Plaintiff which was registered on 13th September, 1949. But, section 19 of the Ordinance makes it clear that registration shall not cure any defect in any would not otherwise have had.

In his judgment (Exhibit " E "), Gregg, J., held that there is a definite contract between the Plaintiff and Ajose with regard to the sale of the property and that the Plaintiff had in fact purchased the house and landed property. It appears the transaction between the Plaintiff and Ajose took place on the 9th October, 1948.

For the Defendant it was argued that having mortgaged the premises to Oshodi and Apena by a Legal Mortgage (Exhibit " J "), Ajose only had equitable interest in his hands and this is what he sold to the Plaintiff as well as to the Defendant in this case. That later, when the Defendant paid off the mortgage debt to Oshodi and Apena he stepped into the shoes of the latter and thus got the legal estate.

On this point, although the Defendant asserts that he paid off the mortgage debt to Mr. Latunde Johnson, the letter (Exhibit " G ") from Mr. Latunde Johnson is to the effect that Ajose paid off the whole of the mortgage debt on 25th October, 1948.

Further the evidence discloses that the Defendant paid £1,500 to Ajose on the 27th October, 1948, and that he bought on that day.

To my mind, it is difficult to say that the Defendant paid off the mortgage debt (whatever the arrangements are between him and Ajose) on the face of the letter Exhibit " G." It was stated that he paid by cheques but the evidence is that the cheques and receipts are now lost. I can attach no importance to this. What I can reasonably find is that the mortgage debt was paid off before the 27th October, 1948, and that the Defendant bought on that date.

The Plaintiff as I had pointed out bought on 9th October, 1948, and it was so found by Gregg, J., in his judgment Exhibit " B."

The question arises : When the Defendant bought on the 27th October, 1948, has he notice of the previous sale to the Plaintiff ? The Defendant has told the Court that he engaged the services of Mr. Latunde Johnson (Solicitor) to investigate the title and he assured him he could safely buy. Without a shadow of doubt and from his letter (Exhibit " D ") Mr. Latunde Johnson was well aware that the property had been sold by Ajose and that

In the Supreme Court of Nigeria, Lagos Judicial Division.

No. 7. Judgment, 28th October 1950, *continued.*

Messrs. Irving & Bonnar was acting in the matter. It appears to me that under the circumstances, notice must be imputed. Notice to the Defendant's Solicitor is definitely notice to the Defendant.

Le Neve v. *Le Neve* (1747), Amb. 436 ; 2 W. & T. L.C. 157.

Now, in *Potter* v. *Sanders* (1846), 6 Hare 1 ; 40 Digest 194, 1630, and *Barsht* v. *Tagg* (1900), 1 Ch. 231, 235, it was held that where vendor entered into a subsequent contract of sale, the first purchaser, provided his contract is specifically enforceable, has the better title and can assert it in an action against the vendor and the second purchaser, unless the latter has obtained the legal estate without notice.

In this case, the Defendant has obtained the estate and I find that he is bound by the notice his Solicitor had of the previous transaction.

The Defendant is claiming through Ajose. On the 27th October, 1948, had Ajose any more interest in the land which he could sell ? I am of the view that he had not. The land was sold to the Plaintiff by him on 9th October, when a sum of £300 (receipt Exhibit " A ") was paid. He instructed his agent Messrs. Irving & Bonnar to keep the money for him and to get on with the necessary documents. At that state, he is a trustee of the property until the balance is paid. On 15th of October, 1948, the balance of £1,300 (see receipt Exhibit " A1 ") was paid by the Plaintiff to Ajose's agent and the deal was completed. The mortgage on the property was on 25th October, 1948, paid off by Ajose. As from that date, in my view, the legal estate, free from all incumbrances is in the Plaintiff and Ajose has nothing more he can sell.

Again, there is a judgment (Exhibit " B ") for Plaintiff against Ajose in respect of the land. In that judgment Gregg, J., made an order against Ajose for recovery of possession of the premises in question as well as for specific performance. The present Defendant knew about the case ; he was also called as witness. The whole facts as they are now put before me was put before Gregg, J. In effect, the Defendant is now re-opening what has been decided by Gregg, J.

It is clear that the Defendant was not a party to the suit but he was well aware of it. To my mind, he cannot now re-open the case as he claims through Ajose—*Spencer and Spencer* v. *Williams*, 2 P. & D. 230. That judgment (Exhibit " B ") in my view, puts the Plaintiff in possession of the premises as against Ajose and those who claim through him, as from the date of the sale to the Plaintiff. I cannot go behind that judgment.

It is not disputed that the Defendant collects rent of £25 per month on the property since he took possession. The amount collected up till the time of this action is £400.

Judgment is therefore entered for the recovery of possession of the premises as per terms of the writ and for £400 as mesne profit.

Fifty-five guineas costs to the Plaintiff.

(Sgd.) A. ADE. ADEMOLA,
Puisne Judge.

28/x/50.

No. 8.

MOTION for Conditional Leave to Appeal.

In the Supreme Court of Nigeria, Lagos Judicial Division.

No. 8. Motion for Conditional Leave to Appeal, 30th October 1950.

IN THE SUPREME COURT OF NIGERIA.

In the Supreme Court of the Lagos Judicial Division.

Suit No. 91/1950.

Motion £2
Sealing 10/- Pd. on C.R. No. 615449/48/31.x.50. Intld. A.R.K.
Filing 2/-

Between ANTONIO ASSAF . . . Plaintiff

and

MUSURU OKUNUBI . . Defendant.

MOTION ON NOTICE.

TAKE NOTICE that this Honourable Court will be moved on Monday 6th of November, 1950, or so soon thereafter as Counsel can be heard on behalf of the above-named Defendant for an Order granting Conditional Leave to Appeal to the West African Court of Appeal, Lagos, Nigeria from the judgment of this Honourable Court delivered on the 28th day of October, 1950, and in the meantime for a stay of execution of the said judgment and for such further order or other orders as this Honourable Court may deem fit to make.

Dated at Lagos this 30th day of October, 1950.

(Sgd.) THOMAS, WILLIAMS & KAYODE,
Defendant's Solicitors.

In the Supreme Court of Nigeria, Lagos Judicial Division.

No. 9. Affidavit in support of Motion, 31st October 1950.

No. 9.

AFFIDAVIT in support of Motion.

IN THE SUPREME COURT OF NIGERIA.

In the Lagos Judicial Division.

Suit No. 91 of 1950.

Between ANTONIO ASSAF . . . . . Plaintiff

and

MUSURU OKUNUBI . . . . . Defendant.

AFFIDAVIT.

I, CHARLES B. EJUONE, British Protected Person, of No. 42A, Kadara Street, Ebute-Metta, do hereby make oath and say as follows :— 10

1. That I am a clerk in the chambers of Messrs. Thomas, Williams and Kayode, the Defendant's Solicitors.

2. That I am familiar with the facts of the above-mentioned case.

3. That on Saturday the 28th day of October, 1950, this Honourable Court gave judgment in favour of the above-named Plaintiff for £400 as mesne profits and Fifty-five guineas costs.

4. That the Defendant/Appellant is dissatisfied with the said judgment and desires to appeal therefrom to the West African Court of Appeal.

Sworn to at the Supreme Court Registry, Lagos, this 31st day of October, 1950 (Sgd.) C. B. EJUONE. 20

Before Me,

(Sgd.) D. SAGIEDE ODIGIE,

Commissioner for Oaths.

No. 10.

HEARING of Motion for Conditional Leave to Appeal—Adjourned.

In the Supreme Court of Nigeria, Lagos Judicial Division

No. 10. Hearing of Motion for Conditional Leave to Appeal—6th November 1950.

IN THE SUPREME COURT OF NIGERIA.

Lagos Judicial Division.

Monday the 6th day of November, 1950.

Before :

HIS HONOUR JOSEPH HENRI MAXIME DE COMARMOND, ESQUIRE,
Senior Puisne Judge.

Suit No. 91/50.

ANTHONY ASSAF

vs.

MUSURU OKUNUBI.

For Defendant Applicant *Dosunmu.*

Mr. Moore for Plaintiff.

Dosunmu asks for adjournment to perfect notice, etc.

Adjourned to 13th November.

(Sgd.) M. de COMARMOND, S.P.J.

* * * * *

In the Supreme Court of Nigeria, Lagos, Judicial Division.

No. 11.

HEARING of Motion for Conditional Leave to Appeal.

IN THE SUPREME COURT OF NIGERIA.

No. 11. Hearing of Motion for Conditional Leave to Appeal, 13th November 1950.

Monday the 13th day of November, 1950.

Before :

HIS HONOUR JOSEPH HENRI MAXIME DE COMARMOND, ESQUIRE,
Senior Puisne Judge.

Suit No. 91/50.

ANTONIO ASSAF

versus

MUSURU OKUNUBI.

Conditional leave to appeal to W.A.C.A.

For Applicant *F. R. A. Williams.*

For Plaintiff/Respondent *Moore.*

After hearing Counsel ; conditional leave granted :

(A) Twenty-five pounds for transmission of record to be deposited in Court.

(B) Bond for 50 guineas with 2 sureties to satisfaction of Senior Registrar.

(C) Service, etc., within one month.

Williams says that Judgment debt and Costs will be paid into Court ; both counsel agree that a receiver be appointed to collect rents. Counsel agree that partnership of Thomas, Williams & Kayode be appointed receiver.

Stay of execution granted on condition that judgment debt and costs be paid into Court, and that rents be collected by receiver appointed namely, Thomas, Williams & Kayode from 1st December, 1950.

(Sgd.) M. DE COMARMOND, S.P.J.

In the Supreme Court of Nigeria, Lagos Judicial Division.

No. 12.
Order of Court granting Conditional Leave to Appeal, 13th November 1950.

No. 12.

ORDER of Court granting Conditional Leave to Appeal.

IN THE SUPREME COURT OF NIGERIA.
In the Lagos Judicial Division.

Suit No. 91/50.

Between : ANTONIO ASSAF . . Plaintiff/Respondent

AND

MUSURU OKUNUBI . . Defendant/Appellant.

AFTER READING the affidavit of Charles Ejuone, British Protected Person, residing at No. 42A Kadara Street, Ebute-Metta, Clerk in the Chambers of Messrs. Thomas, Williams and Kayode, Solicitors, sworn to and filed on the 31st day of October, 1950, and after hearing F. R. A. Williams, Esquire, Counsel for the Defendant/Appellant in the matter :

IT IS ORDERED that Conditional Leave to Appeal to the West African Court of Appeal from the judgment of this Court dated 28th October, 1950, be and is hereby granted on the following conditions :—

1. That the Defendant/Appellant do deposit in Court the sum of £25 to cover cost of making up and transmission of Record of Appeal.

2. That the Defendant/Appellant do enter into Bond in the sum of 50 guineas with 2 sureties in the same amount (Sureties to be approved by the Senior Registrar) as security for costs.

3. That the Defendant/Appellant do give Notice of Appeal to the Plaintiff/Respondent and that all conditions be perfected within one month.

4. Stay of execution granted on condition that judgment Debt and Costs are paid into Court.

IT IS ALSO ORDERED that Messrs. Thomas, Williams and Kayode, Solicitors, be and are hereby appointed Receiver to collect rents in respect of the property No. 130 Denton Street, Ebute-Metta, as from 1st December, 1950.

Dated at Lagos this 13th day of November, 1950.

(Sgd.) M. DE COMARMOND.
Senior Puisne Judge.

In the Supreme Court of Nigeria, Lagos Judicial Division.

No. 13.

NOTICE OF APPEAL.

IN THE SUPREME COURT OF NIGERIA.

In the Supreme Court of The Lagos Judicial Division.

No. 13. Notice of Appeal, 14th November 1950.

Suit No. 91/50.

Between ANTONIO ASSAF . . . . Plaintiff/Respondent

and

MUSURU OKUNUBI . . . Defendant/Appellant.

NOTICE.

TAKE NOTICE that Conditional Leave to appeal has been granted and that the Appellant has perfected the Conditions imposed. 10

Dated at Lagos this 14th day of November, 1950.

(Sgd.) THOMAS, WILLIAMS & KAYODE,
Solicitor for the Appellant.

No. 14.

MOTION for Final Leave to Appeal.

No. 14. Motion for Final Leave to Appeal, 14th November 1950.

IN THE SUPREME COURT OF NIGERIA.

In the Supreme Court of the Lagos Judicial Division.

Suit No. 91/1950.

Between ANTONIO ASSAF . . . . . Plaintiff 20

and

MUSURU OKUNUBI . . . . Defendant.

MOTION.

TAKE NOTICE that this Honourable Court will be moved on Monday the 20th day of November, 1950, at the hour of 9 o'clock or so soon thereafter as counsel can be heard on behalf of the above-named Defendant for an order for FINAL LEAVE to appeal to the West African Court of Appeal and for such further or other orders as this Honourable Court may deem fit.

Dated at Lagos this 14th day of November, 1950. 30

(Sgd.) THOMAS, WILLIAMS & KAYODE.
Solicitors to the Defendant.

In the Supreme Court of Nigeria, Lagos Judicial Division.

No. 15.
Affidavit in support of Motion, 14th November 1950.

No. 15.

AFFIDAVIT in support of Motion.

IN THE SUPREME COURT OF NIGERIA.

In the Lagos Judicial Division.

Suit No. 91/1950.

Between ANTONIO ASSAF . . . . . Plaintiff

and

MUSURU OKUNUBI . . . . . Defendant.

AFFIDAVIT.

I, CHARLES EJUONE, Urhobo, British Protected Person and of No. 42A, Kadara Street, Ebute Metta do hereby make oath and say as follows :—

1. That I am a clerk engaged in the Chambers of Messrs. Thomas, Williams & Kayode, Solicitors to the Defendant-Appellant in the above-mentioned matter.

2. That I am conversant with the facts of the above-mentioned matter.

3. That Conditional Leave to Appeal in the above matter was given on the 13th day of November, 1950.

4. That all the Conditions imposed have been fulfilled.

(Sgd.) C. EJUONE.

Sworn to at the Supreme Court Registry,
Lagos, this 14th day of November, 1950.
Before Me,

(Sgd.) M. E. OJOMO.

Commissioner for Oaths.

In the Supreme Court of Nigeria, Lagos Judicial Division.

No. 16. Order granting Final Leave to Appeal, 20th November 1950.

No. 16.

ORDER granting Final Leave to Appeal.

IN THE SUPREME COURT OF NIGERIA.

In the Lagos Judicial Division.

Suit No. 91/1950.

Between ANTONIO ASSAF . . . . Plaintiff/Respondent

and

MUSURU OKUNUBI . . . Defendant/Appellant.

AFTER READING the Affidavit of Charles Ejuone, Urhobo, British Protected Person and of No. 42A, Kadara Street, Ebute-Metta, sworn to and filed on the 14th day of November, 1950, and after hearing Counsel in the matter : 10

IT IS ORDERED that Final Leave to appeal to the West African Court of Appeal from the judgment of this Honourable Court dated 28th day of October, 1950, be and is hereby granted to the above named Defendant/Appellant.

Dated at Lagos this 20th day of November, 1950.

(Sgd.) S. B. RHODES,

Puisne Judge.

No. 17.

GROUNDS OF APPEAL.

In the West African Court of Appeal, Lagos.

No. 17. Grounds of Appeal, 27th November 1950.

IN THE WEST AFRICAN COURT OF APPEAL.

(Holden at Lagos).

Suit No. 91/1950.

Between MUSURU OKUNUBI . . . Appellant

and

ANTONIO ASSAF . . . . . Respondent.

The Appellant, being dissatisfied with the judgment of the Supreme Court delivered on the 28th day of October, 1950, and having obtained final leave to appeal therefrom dated the 20th day of November, 1950, hereby applies to the West African Court of Appeal on the grounds hereinafter set forth :—

GROUNDS OF APPEAL

1. The learned trial judge was wrong in law in giving judgment to the Plaintiff when it is clear on the evidence that the conveyance executed by Sarminu Ajose to the Plaintiff conveyed no right title or interest in the property in dispute to the said Plaintiff.

2. The learned trial judge was wrong in law in giving judgment to the Plaintiff when it is clear on the evidence (A) that the Plaintiff has not the legal estate to the property and (B) that the equity of redemption has been conveyed to the Defendant.

3. The learned trial judge erred in law in holding that he was bound by the finding of fact by Gregg, J.

4. The judgment is against the weight of evidence.

Dated at Lagos this 27th day of November, 1950.

(Sgd.) THOMAS, WILLIAMS & KAYODE,
Solicitors to the Appellant.

In the West African Court of Appeal, Lagos.

No. 18. Motion for an Order to adduce Additional Evidence, 10th May 1951.

No. 18.

MOTION for an Order to adduce Additional Evidence.

IN THE WEST AFRICAN COURT OF APPEAL.

Holden at Lagos, Nigeria.

Suit No. 91/1950.

Between ANTONIO ASSAF . . . Plaintiff/Respondent

AND

MUSURU OKUNUBI . . . Defendant/Appellant.

MOTION.

TAKE NOTICE that this Honourable Court will be moved on Monday the 14th day of May 1951, or so soon thereafter as counsel can be heard on behalf of the above-named Defendant/Appellant for an order that the Defendant/Appellant be at liberty upon the hearing of the appeal herein to adduce in addition to the evidence before the Court below the evidence of Emanuel Musuru Okunubi and for such further or other orders as this Honourable Court may deem fit to make. 10

Dated at Lagos this 10th day of May, 1951.

(Sgd.) THOMAS, WILLIAMS & KAYODE,
Solicitors to the Defendant/Appellant.

In the West African Court of Appeal, Lagos.

No. 19. Affidavit in support of Motion, 10th May 1951.

No. 19.

AFFIDAVIT in support of Motion.

IN THE WEST AFRICAN COURT OF APPEAL.
Holden at Lagos.

Suit No. 91/1950.

Between ANTONIO ASSAF . . Plaintiff/Respondent

AND

MUSURU OKUNUBI . . Defendant/Appellant.

AFFIDAVIT.

I, AARON OLAJIDE ADEYEYE, Yoruba, British Protected Person, Clerk, and of No. 47 Tokunboh Street, Lagos, do hereby make oath and say as follows :—

1. That I am a Clerk employed in the Chambers of Messrs. Thomas, Williams and Kayode Solicitors to the Defendant-Appellant.

2. That in the Court below I gave evidence in this Case as recorded on page 14 of the Record of Appeal. (See p. 8.)

3. That the cheques and receipt referred to in my evidence at Page 14 of the Record were misplaced in the office during the hearing in the Court below.

4. That I made a diligent search of the said receipt and cheques in the office before the hearing of the said case but I could not find any of them.

5. That on Tuesday the 8th day of May, 1951 I discovered the receipt and the cheques in the file of another case.

6. That in September, 1950 there were over 1,000 files in the chambers of the Defendant's Solicitors.

7. That as soon as I discovered the said receipt and cheques I handed them to Mr. F. R. A. Williams who is in charge of the case.

8. That I am informed by the said Mr. F. R. A. Williams and I verily believe that the additional evidence which the defendant-appellant would give if he obtains leave is as set out in the document attached herewith and marked Exhibit " A."

(Sgd.) A. O. ADEYEYE.

Sworn to at the Supreme Court Registry,
Lagos this 10th day of May, 1951.

Before me,

(Sgd.) M. E. OJOMO,

Commissioner for Oaths.

In the West African Court of Appeal, Lagos.

No. 19. Affidavit in support of Motion, 10th May 1951, *continued.*

Emanuel Musuru Okunubi: I am the Defendant-Appellant. I tender B.B.W.A. Cheques Nos. B/60/309791 dated 27th day of October, 1948, and another cheque No. B/30/439692 dated 25th October, 1950. I also tender purchase receipt dated 25th day of October, 1948, for £2,700 in respect of property at No. 130, Denton Street, Ebute-Metta. These were the receipt and cheques which I stated that I gave to my Solicitor in the Court below.

"This is the document referred to as 'exhibit A' in the affidavit of Aaron Olajide Adeyeye sworn to on the 10th day of May, 1951." 10

Before Me,

(Sgd.) M. E. OJOMO.

Commissioner for Oaths.

No. 20. Hearing of Motion, 14th May 1951.

No. 20.

HEARING OF MOTION.

IN THE WEST AFRICAN COURT OF APPEAL.

Holden at Lagos, Nigeria.

Monday the 14th day of May, 1951.

Before: THEIR HONOURS,

SIR JOHN VERITY, Chief Justice, Nigeria—AG: President. 20
ARTHUR WERNER LEWEY, K.C.—Justice of Appeal, Gold Coast.
JOSEPH HENRI MAXIME DE COMARMOND, Senior Puisne Judge, Nigeria.

W.A.C.A. 3446.

ANTONIO ASSAF . . . . Plaintiff/Respondent

versus

MUSURU OKUNUBI . Defendant/Appellant.

MOTION.

F. R. A. Williams to move.

Moore on notice, opposes. 30

Williams: Documents referred to in Court below, pp. 13 & 14. Moves to call additional evidence to produce receipt of which secondary evidence given.

Moore: Appellant prepared to go on without documents—is it now essential? No grounds of appeal. Judgment page 24, Page 40. Payment admitted.

Williams: Judgment page L 15 reads.

Decision: Production of cheque allowed.

(Sgd.) JOHN VERITY.

Ag. President. 40

No. 21.
HEARING OF APPEAL.

In the West African Court of Appeal, Lagos.

No. 21. Hearing of Appeal.

IN THE WEST AFRICAN COURT OF APPEAL.
Holden at Lagos, Nigeria.

Tuesday the 15th day of May, 1951.

Before : THEIR HONOURS,

SIR JOHN VERITY, Chief Justice, Nigeria—AG : President.

ARTHUR WERNER LEWEY, K.C.—Justice of Appeal, Gold Coast.

JOSEPH HENRI MAXIME DE COMARMOND, Senior Puisne Judge, Nigeria.

W.A.C.A. 3446.

Between : ANTONIO ASSAF . . . . Plaintiff/Respondent

versus

MUSURU OKUNUBI . . . Defendant/Appellant.

F. R. A. Williams for Appellant.

Moore for Respondent.

Williams : Produces 2 cheques and one receipt allowed by order made yesterday—

21 (i). Counsel for Appellant.

By consent : admitted without proof.

(*Court :* Cheques do not add up to amount of receipt. £24 odd less ?)

Williams : Asks leave to put in formally by witness who can explain.

EMANUEL MUSURU OKUNUBI Sworn :

21 (ii). Musuru Okunubi. — Examination-in-chief.

I produce two cheques to which I referred in Court below. First in favour of my endorsement to Johnson for £1,290. (Tendered. Admitted. W.A.C.A.1.) Second is in favour of S. A. Ajose for £1,385 16s. 9d. (Tendered. Admitted. W.A.C.A.2.) I received this receipt from Ajose for £2,700. (Tendered. Admitted. W.A.C.A.3.) The two cheques do not add up to £2,700. I paid the difference on the mortgage account in Cash and that balance made up £2,700.

XXd. Johnson gave me no receipt. Cross-examination.

Williams : Property belonged to Ajose. Mortgaged on 5.7 48 to firm of which Johnson was Director ; On 9.10.48 Respondent arranged to buy and deposited £300 ; concluded on 16.10.48 when Respondent paid balance ; on 27.10.48 Appellant at office of Johnson bought the property by paying amount due on mortgage and balance to Ajose.

21 (iii). Counsel for Appellant.

On 29.10.48 Ajose conveyed property to Appellant. In November, 1948, Respondent took action against Ajose for specific performance and possession. On 28.6.49 Supreme Court so ordered and conveyance executed 13.9.49. Appellant no party to such proceedings and present action brought in March, 1950.

Grounds 1, 2 & 3.

(1) Legal mortgage. Exhibit " J," p. 57, dated 5.7 48.

In the West African Court of Appeal, Lagos.

No. 21. Hearing of Appeal, *continued.*

21 (iii). Counsel for Appellant, *continued.*

Snell, 23rd Edition, p. 314, Equity of redemption. Equitable estate in land. Here contractment right to redeem still existing—and equitable estate also existing.

Agreement between Respondent and Ajose agreement for sale of fee simple.

Statement of Claim, p. 3, paras. 6–15. Conveyance, p. 66. Evidence p. 6. Exhibit " B." Legal estate vested in mortgagee till reconveyance. Equitable owner may still agree to all freehold. Halsbury (2nd Edition), Vol. XXIX, p. 307, paragraph 404 ; p. 308 (n. " 1 ").

Camberwell & S.L. Building Society v. *Holloway* (1829), 13 Ch. D. p. 754, at 763 : " good equitable title and power to get legal estate."

Concedes valid agreement to sell freehold to Respondent on 9.10.48. Did *Respondent* then acquire any equitable interest by virtue of that Agreement ? Contract of sale confers equitable interest on purchaser from date of agreement. But not applicable when vendor has not legal estate (Verity, Ag. P : No equity on an equity ?).

No. Equitable interest can only arise when one party has legal estate vested in him. Holder of legal estate then holds in trust for owner of equitable interest. Halsbury (2nd Edition), Vol. XIII, p. 110, para. 97. Adopts opinion of Hanbury's " Modern Equity, p. 16. Impossible to find equitable estate with no legal estate to support it. On 9 and 16.10.48 no legal estate in Ajose and therefore no equitable estate or interest in Respondent. If Respondent had bargained to buy Ajose's equity of redemption he could have done so without formality of a deed.

Halsbury (1st Edition), Vol. X, p. 375. Note on requirement of Statute of Frauds. But here agreement was for sale of freehold—not equity of redemption. Appellant in same position as Respondent when he paid money on 27.10.48—no interest either legal or equitable. On 29.10.49 he took conveyance from Ajose to whom property was reconveyed—purports to convey fee simple. Exhibit H, p. 62, transferred to Appellant all interest vested in vendor at that date, i.e., equity of redemption. Conveyancing Act, 1881, sec. 63, s.s. (1).

Adjourned.

Action for specific performance in 1949—view of Court below : Action commenced November, 1949 (p. 4, para. 13, Statement of Claim), i.e., after Appellant's conveyance, therefore judgment not binding upon Court below. *Hodson* v. *Walker* 7 L.R. Ex. p. 55 at 61. *Mercantile Investment & Co.* v. *R. Plate Jn. & Co.* (1894) 1 Ch. p. 578. Purchaser not estopped by judgment in action against vendor commenced after purchase.

Halsbury, (2nd Edition) Vol. XIII, p. 429, para. 481. Appellant not therefore bound by Gregg, J.'s judgment in previous action. Ajose's remedy was for damages—not specific performance. Appellant in possession till appointment of receiver pending the appeal. Appellant acquired equity of redemption and had paid mortgage debt, but no reconveyance and legal estate still in mortgagee.

Judgment : p. 12, *et seq.*—Judge erred—legal estate never vested in Ajose nor vested in Respondent. As assignee of equity of redemption by virtue of Conveyance of 29.10.48 Appellant entitled to call in legal estate.

Coote's Mortgages, 8th Edition, Vol. 1, p. 718. Respondent did not seek to get legal estate conveyed to him by mortgage but sued mortgagee

for specific performance. Respondent has no interest in property. Lands Registration Ordinance, Cap. 108, sec. 16. Priorities determined by date of registration. Respondent's conveyance excluded by Appellant's Judgment p. 12, *et seq.* Cap. 108, sec. 19—

Submits does not affect question of priority.

Moore: Judgment of Gregg, J., creates estoppel binding Appellant as privy. Fry on Specific Performance, 5th Edition, p. 81, para. 170. Report of case cited not available. *Santos* v. *Ikosi Industries & Anor*, 8 W.A.C.A. p. 29, at 34–5. Case cited by Williams held not applicable in similar circumstances. See p. 595. " prior purchaser "

Spencer & Brown on *Res Judicata*, p. 126, p. 197.

21 (iv). Counsel for Respondent

Appellant knew of action before Gregg, J.—was a witness. Halsbury, 1st Edition, Vol. XIII, p. 343, para. 478, " privies in estate." *Spencer* v. *Williams* (1869–72), 2 P. & D. p. 230, at 235. *Ward* v. *Ward* (1878), 9 K.B.D. at 53.

Judgment of Gregg, J.—binding whether or not party vested with legal estate.

Mortgagor in possession—vesting of legal estate immaterial—and could convey.

Receipt " W.A.C.A.3 " shows £2,700 paid to Ajose. See also Exhibit " G." Judge erred in holding Ajose paid off mortgagor. When he had paid off equity of redemption finished and mortgagee is trustee of legal estate for mortgagor. Fisher on Law of Mortgage, p. 934, para. 1977, implied trust to surrender estate. Mortgagor the beneficiary of a trust, i.e., possessed an equitable estate. Respondent in his shoes acquired like estate by purchase. Snell, 22nd Edition, pp. 22–23. Mortgagor was in possession and he was so entitled. Respondent sued Mortgagee and succeeded. Appellant wrong to say equity of redemption still alive. Gregg, J., ordered re-conveyance for mortgagee, conveyance by mortgagor to Respondent, and possession. Re-conveyance not in fact executed. Respondent had a valid and enforceable contract; Ajose in a position to get in legal title and convey—Court therefore granted specific performance. Evidence p. 7—purchase money withdrawn on 14.12.49. Exhibit " D ": Johnson had full knowledge of both transactions. Documents admit knowledge—para. 2 Statement of Defence. Exhibit " E," p. 60; " F," p. 61; and " G," p. 61. Defendant, p. 8—if Defendant had no personal knowledge his solicitor had knowledge. As to Lands Registration Ordinance Cap. 80, Respondent relies on section 19. Appellant's conveyance of no effect and registration could give it effect.

21 (v). Counsel for Appellant.

Williams: As to priority—if shown that Appellant demands title from Ajose he is *prima facie* bound by judgment against Ajose—but there is exception. As to *Santos* v. *Ikosi Industries*, distinguished there no conveyance—defendant in earlier action was not defending " to enable him to give a good conveyance." Any equitable interest acquired by Ajose on 25.10 he could have not transferred to respondent on 16.10. Halsbury, Vol. XIII, p. 376—transfer must be in writing. Snell, 23rd Edition, p. 21—illustrations distinguished from present case.

Adjourned to 16.5.51.

(Sgd.) JOHN VERITY,
Acting President.

In the West African Court of Appeal, Lagos,

IN THE WEST AFRICAN COURT OF APPEAL.

Holden at Lagos, Nigeria.

Wednesday the 16th day of May, 1951.

No. 21. Hearing of Appeal, *continued.*

Before : THEIR HONOURS,

SIR JOHN VERITY, Chief Justice, Nigeria—AG : President.

ARTHUR WERNER LEWEY, K.C., Justice of Appeal, Gold Coast.

JOSEPH HENRI MAXIME DE COMARMOND, Senior Puisne Judge.

21 (v). Counsel for Appellant, *continued.*

W.A.C.A. 3446.

ASSAF

versus

OKUNUBI.

Appearance as before.

Williams resumes :

Johnson director and Solicitor to Mortgages—paid by Appellant amount due on mortgage (p. 8).

Knowledge by Johnson.

Exhibit " D " dated 12.10.48 (p. 59) by Johnson.

Respondent completed payment on 16.10.48.

Exhibit " E " dated 25.10.48 (p. 60) by Coker.

No action by Respondent between 16.10 and 25.10.

No contract of sale signed or in writing.

De Comarmond, J.: What about Receipts Exhibits "A" and "B"?

Receipt insufficient memo :

Bickett v. *Nurse* [1948] 1 A.E.R. 81.

Therefore Appellant did not consider himself bound.

Exhibit " F " dated 25.10.48 (p. 61) addressed to Coker—not Johnson.

Exhibit " G " dated 26.10.48 (p. 61) from Johnson.

No communication from Respondent's solicitor between 11.10 and 26.10. Coker's letter Exhibit " E " states Johnson informed of cancellation. Johnson knew nothing further and conveyance executed 29.10. If Respondent had no equitable interest—notice to Johnson immaterial.

De Comarmond, J. : At date of sale Ajose had legal right under mortgage to redeem—not equitable.

Yes, but that is not an estate—it is only a contractment right.

Coote's Mortgages, 8th Edition, Vol. II, p. 1430.

Legal estate vested in mortgagee *ab initio*—only re-vested in mortgagor by re-conveyance.

(Verity AG.P. When Court (Gregg, J.) held contract and ordered performance can you now say not ?)

Yes. Appellant not bound by Gregg, J.'s judgment. Under Lands Registration Ordinance Appellant's registration taken against prior to Respondent's.

C.A.V.

Saturday the 26th day of May, 1951.

ASSAF

vs.

OKUNUBI.

Judgment delivered by the Acting President.

Appeal allowed. Judgment in Court below set aside and judgment entered therein for the Defendant with costs £26 5s. 0d.

Appellant to have cost of this appeal. £38 11s. 0d. Costs paid to plaintiff in amount of judgment in Court below to be repaid.

(Sgd.) JOHN VERITY.
Acting President.

No. 22.

JUDGMENT.

IN THE WEST AFRICAN COURT OF APPEAL.
Holden at Lagos.

Saturday the 26th day of May, 1951.

Before :

THEIR HONOURS SIR JOHN VERITY, Chief Justice, Nigeria, Presiding Judge, ARTHUR LEWEY, K.C., Justice of Appeal, JOSEPH HENRI MAXIME DE COMARMOND, Senior Puisne Judge.

W.A.C.A. 3446.

ANTONIO ASSAF

v.

MUSURU OKUNUBI.

JUDGMENT.

Verity, C.J., this is an appeal from a judgment of Ademola, J., in an action in which the Plaintiff sought to recover possession of certain premises at Ebute Metta and also mesne profits. The learned Judge entered judgment for the Plaintiff on both claims and the Defendant has appealed.

In the West African Court of Appeal, Lagos,

No. 22. Judgment, 26th May 1951, *continued.*

Before considering the rights of the parties I think it is essential to state as briefly as may be consistent with clarity the facts, which are hardly in dispute.

The original owner of the premises was one Sarminu Ajose. He mortgaged the property to a firm of money-lenders, of which Latunde Johnson, a solicitor, now deceased, was a director and acted as solicitor for the mortgagees. On the 9th October, 1948, Ajose agreed to sell the property to the Respondent for £1,600, and the Respondent paid £300 to Messrs. Irving & Bonnar, Ajose's solicitors, on account of the purchase money. The Respondent then asked the solicitors to investigate the title and instructed them to prepare a conveyance to him from Ajose and the latter instructed them to prepare a re-conveyance to him from Johnson's firm. The solicitors asked Johnson to furnish them with the title deeds, the mortgage deed and a note of the amount due thereunder for principal and interest, and on 12th October Johnson provided certified copies of title deeds to Messrs. Irving & Bonnar, informed them that the sum of £1,314 3s. 4d. was due on the mortgage and said he would be glad to receive their cheque therefor. Messrs. Irving & Bonnar prepared the conveyance and re-conveyance and informed Ajose and the Respondent. On 16th October the Respondent attended and paid the solicitors £1,300 and obtained a receipt for that sum and the balance of the purchase money. On that day Ajose did not attend and no conveyance was, therefore, executed. Nothing more transpired until the 25th October, when a solicitor, Mr. Coker, wrote to Messrs. Irving & Bonnar informing them that Ajose had instructed him that no agreement for sale had been completed by them with anyone, and that as his client had a more reasonable offer Mr. Coker thought his client should accept it. He requested them to stay any further steps in regard to the sale of the property. A copy of the letter Mr. Coker sent to Johnson. Messrs. Irving & Bonnar replied the same day that they were also acting for the Respondent and stated that they presumed that he had agreed to cancelling the sale. They informed Mr. Coker that they held the purchase price paid by Respondent to Ajose's credit.

It appears that in the meantime the Appellant was negotiating with Ajose for the purchase of the same land, and on the same day as Mr. Coker's letter, he received from Ajose a receipt for the purchase money, £2,700. This sum he paid by means of two cheques, one endorsed in favour of Johnson and one drawn in favour of Ajose. The former was in satisfaction of the mortgage debt and the latter the balance of the purchase money. On the following day, 26th October, Johnson wrote to Messrs. Irving & Bonnar that Ajose had paid off the whole mortgage and asking for the return of the copies of conveyance sent to them earlier. There is no evidence that any reply to this letter was ever sent. On the 29th October Ajose executed a deed purporting to convey the premises to the Appellant in fee simple. The deed was registered on the 15th November, 1948. During the month of November, 1948, the Respondent commenced proceedings in the Supreme Court against Ajose for specific performance of the contract for sale which he averred had been made between Ajose and himself, and on 28th June, 1949, Mr. Justice Gregg gave judgment in his favour, making an Order that " All the parties concerned do execute the relevant conveyances within 30 days " and

also an Order for possession. The conveyances referred to in this judgment are described as "now in the hands of Messrs. Irving & Bonnar" and I presume, therefore, that they refer to the re-conveyance from Johnson to Ajose as well as the conveyance from Ajose to the Respondent. I would observe in passing that Johnson was not a party to that suit. At the date of the suit, it is also to be observed, the property was not in the possession of Ajose, but of the Appellant, who was not a party to the suit. No re-conveyance was ever executed nor did the Respondent secure possession. On 13th September, 1949, Ajose executed a second conveyance, this time in favour of the Respondent, and the deed was registered on 31st October, 1949. In March, 1950, the Respondent commenced these proceedings.

It is, I think, desirable in the first place to consider whether or not the judgment of Gregg, J., is binding upon the Appellant in the present suit. The learned Judge in the Court below expressed his view that while the Appellant was not a party to the suit tried by Gregg, J., he was well aware of it. This is certainly true for he was a witness therein. The learned Judge proceeded :—

> "He cannot now re-open the case as he claims through Ajose. "That judgment in my view puts the plaintiff (the present "respondent) in possession of the premises as against Ajose and "those who claim through him . I cannot go behind that "judgment."

Counsel for the Appellant cited the decision of Romer, J., in *Mercantile Investment & General Trust Co.* v. *River Plate Trust, Loan and Agency Co.* [1894] 1 Ch. p. 587, when his Lordship said :—

> "A prior purchaser of land cannot be estopped as being a "privy in estate by a judgment obtained in an action against the "vendor commenced after the purchase."

If I may say so with great respect, there are obviously sound reasons for this view. A purchaser who enters into negotiations with a vendor after proceedings have been commenced to determine the vendor's rights and especially if he has notice and knowledge of such proceedings, does so with his eyes open and may well be bound by the result thereof. But a purchaser who buys and completes his purchase before any such proceedings cannot be affected by such proceedings unless he is made a party thereto, for the contractual relationship between the vendor and himself has come to an end by performance of the contract. A third party who wishes to bind the purchaser should join him in the proceedings and if he does not do so, then he must take fresh proceedings against him, as in fact the Respondent has done in the present case, and in those proceedings he cannot rely on the previous proceedings against the vendor in which he failed to join the purchaser as he should have done. In such a case as the present and in that which preceded the vendor had very little real interest. He had received purchase money from both parties and although he might actually be inclined to support the second rather than the first of these transactions, for it is the more profitable, whether or not he executed a second conveyance was more or less immaterial to him. In any event he was left in possession of the purchase money in relation to both transactions, at least while the rival purchasers fight it

In the West African Court of Appeal, Lagos,

No. 22. Judgment, 26th May 1951, *continued.*

out. For the Appellant to be bound by a decision obtained in such circumstances would certainly be inequitable, even though, as in the case cited, he knew of the action and assisted therein.

It was submitted on behalf of the Respondent that in *Santos* v. *Ikosi Industries, Ltd., and Another*, 8 W.A.C.A. 29, this Court held that the judgment of Romer, J., in the case cited was not applicable in the present or similar circumstances. All that was held then by this Court was, however, that in a case when a vendor executes a conveyance subsequent to proceedings in pursuance of an agreement entered into before the proceedings, the vendor and purchaser are clearly privies. Such a decision is not, in my view, applicable in the present case, in which the transaction was completed and the conveyance executed and registered before the proceedings against the vendor were commenced. I consider, therefore, that the judgment of Mr. Justice Gregg in the suit against Ajose is not binding upon the Appellant in the present proceedings and that the learned Judge in the Court below erred in holding that as between the present parties he could not go behind it.

Assuming that I am right in my conclusion that the Appellant is not bound by the judgment in the suit between the Respondent and Ajose, I will proceed to consideration of the position as between the parties to the present suit. The first point to be decided is, I think, the nature and effect of the transaction between Ajose and the Respondent on the 9th and 16th October. In the suit between those parties it was held that his transaction was a contract for sale, capable of enforcement by a Court of equity. But if the Appellant is not bound by that judgment it is open to him to attack the validity of that contract which is the very root of the Respondent's claims against him. Counsel submitted that the contract, being one for the sale of land, it is required to be in writing and unless it is so it cannot be enforced unless the facts in relation to the transaction bring it within the doctrine of part performance. It is well established that the mere payment of part or even the whole of the purchase money is not sufficient part performance of such a contract to bring it within this rule, for as was said by Lord Selborne in *Maddison* v. *Alderson* (1883), 8 App. Cas. 441, " the payment of money is not in itself, until the connection is established by parol evidence, indicative of a contract concerning land." In the present case, however, the Appellant is in a somewhat stronger position for he has not to depend upon parol evidence alone, there are the two receipts of the 9th and 16th October, 1948 (Exhibits "A" and "B"). It might appear, therefore, that when the payment of money is linked with a writing " indicative of a contract concerning land " the transaction would come within the rule. Counsel for the Appellant referred us, however, to the case of *Beckett* v. *Nurse* [1948] 1 All E.R. 81, in which it was held that a mere receipt for purchase money even though accompanied by a plan, is not a written contract. From this Counsel argued that it is not an enforceable contract by reason of the Statute of Frauds. It is to be observed, however, that the Statute does not require a contract for the sale of land to be a written contract but that—

> " no action shall be brought . . upon any contract of sale
> " of lands . . unless the agreement . . . or some memorandum
> " or note thereof shall be in writing and signed by the party to be
> " charged therewith."

The whole point of the decision in *Beckett* v. *Nurse* was that the County Court Judge had erred in treating the purchase receipt as a written contract and for that reason excluding parol evidence of the agreement between the parties, but that the receipt was admissible as evidence of a note or memorandum sufficient to satisfy the Statute and that the opposing party should have been allowed to give parol evidence to show, if he could, that it was not in fact a note of the real terms of the oral agreement of which it purported to be a note. That is exactly the position in the present case. The receipts were admitted in evidence as a note or memorandum of an oral agreement. The vendor in the previous action had sought to show that it did not contain the real terms of the agreement. He was disbelieved and no attempt was made by the Appellant in the present action to attack the note on this ground. I think, therefore, that it is a sufficient note of the oral agreement to satisfy the Statute and that the Respondent thereby established his contract of sale.

The next question for consideration is what is the legal position created by these circumstances. In the first place what was the nature of the contract entered into by Ajose and the Respondent ? In order to determine this it is necessary to examine the oral testimony. It is, I think, clear from the evidence of the Respondent himself, that what he agreed to purchase was the legal estate in the property and not merely the equity of redemption which was all that the vendor was in a position to sell, for he says " I knew the property was mortgaged. I am not concerned whether or not the mortgage has been discharged." This was a perfectly valid contract from the point of view both of the vendor and the purchaser, but unless and until the mortgage was reduced and the legal estate re-conveyed to the vendor, it was a contract which was incapable of being carried out. This was recognised by the parties, for Messrs. Irving & Bonnar were instructed to prepare a re-conveyance at the same time as they prepared the conveyance. The position, on the 16th October, was that the Respondent had contracted to purchase the legal estate and had deposited with his solicitors the full amount of the purchase money. The legal estate was not at that time vested in the vendor and he could only get it in by paying off the mortgage. Messrs. Irving & Bonnar, who had prepared the documents, informed both parties it was necessary also for the mortgagee to be present in order that he might, if paid, execute the re-conveyance. The purchaser, however, was under no obligation to pay the purchase money until the re-conveyance was executed for until that was done a conveyance by the vendor would have conferred upon him no more than the equity of redemption, which was not what he had agreed to purchase. With the redemption of the mortgage he expressly states he was not concerned. It is true that, had all the parties met he might, indeed, he probably would have consented to the payment of some of the purchase price, the payment to the mortgagee of the amount due on the mortgage, followed by the execution of the re-conveyance and finally of the conveyance to himself. In point of fact, however, none of these things happened. No re-conveyance has, up to the present moment, been executed. The vendor has at no time, therefore, been in a position to convey to the Respondent what he had contracted to sell. There was no doubt an obligation upon the vendor to get in the legal estate in order that he might carry out his contract.

In the West African Court of Appeal. Lagos,

No. 22. Judgment, 26th May 1951, *continued.*

If he failed to do so, however, the remedy of the purchaser was an action in damages for breach of contract and not for specific performance of a contract to sell that which was not vested in him, although no doubt the Court in his action for specific performance might have awarded damages in lieu of the relief sought.

In my view, therefore, the Respondent had, at the date of the subsequent purchase by the Appellant, neither a legal nor any equitable estate or interest in the land, his sole right being to damages for breach of contract. But if, for the sake of argument, it be admitted that he had an equitable interest, and he certainly can have had no more than that, what would have been the effect of the subsequent purchase by the Appellant?

The rule as to equitable priorities is clearly expressed in Snell's Principles of Equity (23rd Edition, pp. 29 *et seq.*). The rule which it is important to bear in mind in this case is that—

> " A purchaser for valuable consideration who obtains a legal " estate at the time of his purchase without notice of a prior " equitable right is entitled to priority in equity as well as in law."

It is to be observed that this principle involves three factors: that the purchase must be for valuable consideration (which is beyond doubt in the present case); that he must have obtained the legal estate or it must be vested in some person on his behalf; and that he must have had no notice of the equitable interest at the time he gave his consideration for the conveyance.

It is these two latter considerations that are here in question. In the first place, did the Appellant obtain the legal estate or was it vested in some person on his behalf? It is clear from the evidence in the Court below and from the additional evidence adduced by leave at the hearing of the appeal, that prior to the execution of the Conveyances from Ajose to him, the Appellant had paid off the mortgage. It is equally clear that he did not secure, by means of Ajose's Conveyance, the legal estate, for this had not been and still has not been re-conveyed although the mortgage is satisfied. The mortgage debt having been paid off, however, the mortgagee held the legal estate as trustee for the mortgagor on whose behalf property is vested in him. By the Conveyance to the Appellant Ajose assigned to the Appellant his beneficial interest in the property and from that date the legal interest remained vested in the mortgagor but was so vested on behalf of the Appellant. The second condition is therefore, in my view, fulfilled and it remains only to be considered whether the Appellant purchased without notice.

It is submitted on behalf of the Respondent that Johnson, who was not only solicitor and director of the mortgagee firm, but also solicitor for the Appellant, had notice of the prior transaction between Ajose and the Respondent, as indeed he had, and it is further submitted that notice to Johnson was therefore notice to the Appellant. The learned author of Snell's Principles of Equity (p. 39) expresses the rule in the following terms, save as to certain exceptions :—

> " When the same solicitor acts for both parties to a transaction " any notice he acquires is imputed to both parties."

In the present case, however, it is clear that Johnson was not acting on behalf of both parties to the transaction, that is to say, for both Respondent and Appellant, nor did he acquire notice of the transaction between the Respondent and Ajose by virtue of his position as solicitor to either. Notice was given him of the proposed sale by Ajose to the Respondent in his capacity as solicitor to the mortgagee and it cannot be said, I think, that he owed any duty to communicate his knowledge to the Appellant when the latter subsequently became his client. More particularly is this so when it is remembered that by reason of Mr. Coker's letter and of the fact that he received no further communication from Messrs. Irving & Bonnar, he had good reason to believe that the earlier transaction had been abandoned. In my opinion, therefore, the Appellant was a purchaser for value without notice and his conscience was in no way affected by the prior equitable right of the Respondent.

I think, therefore, that the learned Judge erred in finding for the Respondent, whose claim should have been dismissed and I would allow the appeal with costs setting aside the judgment in the Court below and entering judgment therein for the Defendant with costs.

I would observe, although it is not a point necessarily to be determined in view of the conclusion at which I have arrived on other aspects of the case, that I do not think that the submission of Mr. F. R. A. Williams for the Appellant based upon the terms of section 16 of the Land Registration Ordinance is well founded. He contended that by virtue of this section the prior registration of the Appellant's conveyance barred the Respondent from setting up any claim under his own subsequent conveyance. Having in mind the provisions of section 19 of that Ordinance as well as applying thereto a reasonable method of interpretation, I think that this proposition cannot be supported. Whatever may be the intention of section 16, I think it is plain that it does not mean that if *A* sells *C's* property to *B*, and *C* subsequently sells to *D*, *C* is precluded by *B's* prior registration from showing that *A* had no interest to convey to *B*. At the same time I wish to express my appreciation of the very interesting and helpful arguments presented by Mr. Williams in his conduct of this appeal.

(Sgd.) JOHN VERITY,
Acting President.

(Sgd.) ARTHUR LEWEY,
Justice of Appeal.

(Sgd.) M. DE COMARMOND,
Senior Puisne Judge.

In the West African Court of Appeal, Lagos

No. 23. Order on Judgment, 26th May 1951.

No. 23.

ORDER ON JUDGMENT.

IN THE WEST AFRICAN COURT OF APPEAL.

Holden at Lagos, Nigeria.

Suit No. 91/1950.

(L.S.) W.A.C.A. 3446.

On appeal from the Judgment of the Supreme Court in the Lagos Judicial Division.

(Sgd.) JOHN VERITY.

Ag. President.

Between ANTONIO ASSAF . . . . Plaintiff/Respondent

and

MUSURU OKUNUBI . . . Defendant/Appellant.

Saturday the 26th day of May, 1951.

UPON READING the record of appeal herein and after hearing Mr. F. R. A. Williams of counsel for the Appellant and Mr. Moore of counsel for the Respondent :

IT IS ORDERED that this appeal be allowed, that the judgment of the Court below be set aside and judgment entered therein for the Defendant/Appellant with costs fixed at £26 5s.

AND IT IS FURTHER ORDERED that the Appellant do have costs of this appeal assessed at £38 11s., and any costs paid to Plaintiff in respect of judgment in the court below shall be repaid to the Appellant.

(Sgd.) W. H. HURLEY,

Deputy Registrar.

In the West African Court of Appeal, Lagos.

No. 24.
Motion for Conditional Leave to Appeal to Privy Council, 9th June 1951.

No. 24.

MOTION for Conditional Leave to Appeal to Privy Council.

IN THE WEST AFRICAN COURT OF APPEAL.

Holden at Lagos, Nigeria.

Suit No. 91 of 1950.

Between : ANTONIO ASSAF . . . . Plaintiff/Respondent

and

MUSURU OKUNUBI . . . Defendant/Appellant.

MOTION ON NOTICE.

Under Order 5 of the West African Appeal to Privy Council Order in Council, 1950.

TAKE NOTICE that this Honourable Court will be moved on Wednesday the 27th day of June, 1951, at the hour of nine o'clock in the forenoon or so soon thereafter as Counsel on behalf of the Plaintiff/Respondent can be heard for an order for Conditional Leave to appeal to His Majesty in Council.

Dated at Lagos this 9th day of June, 1951.

(Sgd.) OLADIPO MOORE,
Solicitor for the Plaintiff/Respondent.

In the West African Court of Appeal, Lagos.

No 25. Affidavit in support of motion, 9th June 1951.

No. 25.

AFFIDAVIT in support of Motion.

IN THE WEST AFRICAN COURT OF APPEAL.

Holden at Lagos, Nigeria.

Suit No. 91 of 1950.

Between ANTONIO ASSAF . . . . Plaintiff/Respondent

and

MUSURU OKUNUBI . . . Defendant/Appellant.

AFFIDAVIT.

I, ANTHONY ASSAF, Lebanese Trader, of 5, Egerton Road, Lagos, make oath and say as follows :—

1. That I was the Respondent in the above-mentioned matter before the West African Court of Appeal.

2. That on the 26th day of May, 1951, the court allowed the appeal of the above-mentioned Defendant/Appellant.

3. That I am dissatisfied with the said judgment of the said West African Court of Appeal and desire to appeal against the said judgment.

4. That the property in dispute is worth over £1,500 (One thousand five hundred pounds).

(Sgd.) A. ASSAF.

Sworn at the Supreme Court Registry, Tinubu Square, Lagos, this 9th day of June, 1951.

Before me,

(Sgd.) S. O. MAFE,

Commissioner for Oaths.

No. 26.

HEARING OF MOTION.

In the West African Court of Appeal, Lagos.

No. 26. Hearing of Motion, 27th June 1951.

IN THE WEST AFRICAN COURT OF APPEAL.

Holden at Lagos, Nigeria.

Wednesday, the 27th day of June, 1951.

Before :

HIS HONOUR VAHE ROBERT BAIRAMIAN—sitting as a single Judge in Chambers.

W.A.C.A. 3446.

ASSAF

v.

OKUNUBI.

Oladipo Moore : moving for Assaf Plaintiff who lost in W.A.C.A.

Teesdale (for F. R. A. Williams) : am not opposing.

By consent it is ordered that Antonio Assaf, the Plaintiff in Suit No. 91 of 1950 and Respondent in W.A.C.A. appeal 3446, be at liberty to appeal on the said case to His Majesty's Privy Council upon the fulfilment within three months from today of the following conditions :—

(A) That the Plaintiff do deposit in Court the sum of £50 for the preparation of the Record of Appeal and for the despatch thereof to H.M.'s Privy Council ;

(B) That the Plaintiff do enter into good and sufficient security, to the satisfaction of the Court, in the sum of £500 for the due prosecution of the appeal, and the payment of all such costs as may become payable to the Defendant in the event of the Plaintiff not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the Plaintiff to pay the Defendant's costs of the appeal ;

(C) That the Plaintiff do give notice of the appeal to the Defendant.

The Plaintiff who is obtaining this conditional leave shall when applying for final leave give notice to the Defendant or his solicitor, Mr. F. R. A. Williams.

(Sgd.) V. R. BAIRAMIAN, J.

In the West African Court of Appeal, Lagos.

No. 27.
Order granting Conditional Leave to Appeal, 27th June 1951.

No. 27.

ORDER granting Conditional Leave to Appeal.

IN THE WEST AFRICAN COURT OF APPEAL.
Holden at Lagos, Nigeria.

Suit No. 91/1950.

W.A.C.A. 3446.

Sgd. V R. BAIRAMIAN, Presiding Judge.

(L.S.)

Between : ANTONIO ASSAF . . Plaintiff/Appellant

AND

MUSURU OKUNUBI . . Defendant/Respondent.

Wednesday the 27th day of June, 1951.

UPON READING the motion and affidavit filed on behalf of Antonio Assaf, the Plaintiff/Appellant, on the 9th day of June, 1951, in the above matter and after hearing Mr. O. Moore of counsel for Plaintiff/Appellant and Mr. Teesdale (holding Mr. F. R. A. Williams' brief) of counsel for the Defendant/Respondent :

IT IS ORDERED that Conditional Leave to appeal in the above matter to His Majesty's Privy Council be granted to Antonio Assaf, the Plaintiff/Appellant upon fulfilment within 3 months from the date hereof of the following conditions :

(A) That the Plaintiff/Appellant, Antonio Assaf, do deposit in Court the sum of £50 for the preparation of the Record of Appeal and for the despatch thereof to His Majesty's Privy Council :

(B) That the Plaintiff/Appellant, Antonio Assaf, do enter into good and sufficient security, to the satisfaction of the Court, in the sum of £500 for the due prosecution of the appeal and the payment of all such costs as may become payable to Musuru Okunubi, the Defendant/Respondent, in the event of the Plaintiff/Appellant, A. Assaf, not obtaining an Order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution, or of His Majesty-in-Council ordering the Plaintiff/Appellant, Antonio Assaf, to pay the Defendant/Respondent, Musuru Okunubi, costs of the Appeal :

(C) That the Plaintiff/Appellant, Antonio Assaf, do give Notice of the Appeal to the Defendant/Respondent, Musuru Okunubi.

(Sgd.) W. H. HURLEY,
Deputy Registrar.

* * * * *

In the West African Court of Appeal, Lagos.

No. 28.
Notice of Appeal, 28th August 1951.

No. 28.

NOTICE OF APPEAL.

IN THE WEST AFRICAN COURT OF APPEAL.

Holden at Lagos, Nigeria.

W.A.C.A. 3446/18.

Between : ANTONIO ASSAF . Plaintiff/Respondent/Appellant

AND

MUSURU OKUNUBI . Defendant/Appellant/Respondent.

In re ANTONIO ASSAF . . Applicant.

NOTICE OF APPEAL.

TAKE NOTICE that the above-named Antonio Assaf, Plaintiff/Respondent/Appellant in W.A.C.A./3446/18 did on the 27th day of June, 1951, obtain conditional leave to appeal to His Majesty in Council against the Order of this Honourable Court given on 26th May, 1951, and has since fulfilled all the conditions imposed on him by paying £500 (Five hundred pounds) to the Court and depositing £50 (Fifty pounds) for despatch of record.

Dated this 28th day of August, 1951.

(Sgd.) ALAKIJA & ALAKIJA,
Solicitors to Antonio Assaf.

(1) The Registrar of the West African Court of Appeal.

(2) The Defendant/Appellant/Respondent.

In the West African Court of Appeal, Lagos,

No. 29. Motion for Final Leave to Appeal, 20th September 1951.

No. 29.

MOTION for Final Leave to Appeal.

IN THE WEST AFRICAN COURT OF APPEAL.

Holden at Lagos, Nigeria.

W.A.C.A. No. 3446/18.

Between ANTONIO ASSAF . Plaintiff/Respondent/Appellant

and

MUSURU OKUNUBI . Defendant/Appellant/Respondent.

In re ANTONIO ASSAF, Applicant.

MOTION ON NOTICE.

TAKE NOTICE that this Honourable Court will be moved on 1st October, 1951 at the hour of Nine O'Clock in the forenoon or so soon thereafter as Counsel can be heard on behalf of the above-named Applicant for an Order that having paid £500 (five hundred pounds) to the Court and deposited £50 (fifty pounds) for despatch of record, the said Applicant be given final leave to appeal to the Judicial Committee of His Majesty's Privy Council in above suit, and for such further or other Orders as this Honourable Court may deem fit.

Dated at Lagos this 20th day of September, 1951.

(Sgd.) ALAKIJA & ALAKIJA,
Solicitors to the Applicant.

No. 30.

AFFIDAVIT in support of Motion.

In the West African Court of Appeal, Lagos.

No. 30. Affidavit in support of Motion, 20th September 1951.

IN THE WEST AFRICAN COURT OF APPEAL.
Holden at Lagos, Nigeria.

W.A.C.A. No. 3446/18.

Between ANTONIO ASSAF . Plaintiff/Respondent/Appellant
and
MUSURU OKUNUBI . Defendant/Appellant/Respondent.

In re : ANTONIO ASSAF . Applicant.

AFFIDAVIT.

I, ANTONIO ASSAF, Contractor of No. 5, Egerton Road, Lagos, make oath and say as follows :—

1. That I am the Applicant in this motion and the Plaintiff/Respondent/Appellant in the above-named suit.

2. That on 27th day of June, 1951, I obtained from this Honourable Court conditional leave to appeal to the Judicial Committee of His Majesty's Privy Council.

3. That the conditions were that (i) I should deposit £500 (five hundred pounds) to the Court or that I should enter into a bond for the same amount with two sureties within three months (ii) I should pay for the records of the proceedings.

4. That on 22nd August, 1951, I made the deposit of five hundred pounds (£500) to the Court and also paid fifty pounds (£50) for the cost of records and obtained receipt No. A.307918/29/21.8.51.

5. That the Defendant/Appellant/Respondent is well known to me.

6. That I have served notice of my intention to apply for final leave to appeal to the Defendant/Appellant/Respondent.

7. That having fulfilled all the conditions I pray this Honourable Court to grant me final leave to appeal to the Judicial Committee of His Majesty's Privy Council or for such further or other Orders as this Honourable Court may deem fit.

Sworn to at the Supreme Court Registry, Lagos, this 20th day of September, 1951
Before me,
(Sgd.) S. O. MAFE,
Com. for Oaths.

(Sgd.) A. ASSAF
Applicant.

In the West African Court of Appeal, Lagos.

No. 31. Hearing of Motion, 29th October 1951.

No. 31.
HEARING OF MOTION.

IN THE WEST AFRICAN COURT OF APPEAL.
Holden at Lagos, Nigeria.

Monday the 29th day of October, 1951.

Before :
THEIR LORDSHIPS,
SIR JOHN VERITY—Chief Justice Nigeria—AG : President.
ARTHUR LEWEY—Justice of Appeal.
OLUMUYIWA JIBOWU—Acting Senior Puisne Judge, Nigeria.

W.A.C.A. No. 3446.

Between : ANTONIO ASSAF . Plaintiff/Respondent/Appellant
and
MUSURU OKUNUBI . Defendant/Appellant/Respondent.

MOTION.

Omololu for Appellant.

F. R. A. Williams on notice.

Omololu : Order for conditional leave to appeal to His Majesty in Council.

Conditions—deposit or bond.

Appellant made deposit and all conditions fulfilled.

Williams : Paragraph 3 of affidavit is not accurate. Order of 27.6.51 does not provide for deposit or bond.

Bentwich P.C. Practice.

Within the Court's discretion—Respondent will not object. If not a matter of discretion then Appellant is out of Court.

Omololu : regrets error in affidavit.

C.A.V.

Monday the 19th day of November, 1951.

W.A.C.A. No. 3446.

ASSAF
versus
OKUNUBI.

Decision delivered by Jibowu, S.P.J.

F. R. A. Williams asks for costs.

Respondent to have costs of application fixed at £3 3s.

(Sgd.) JOHN VERITY,
Acting President.

No. 32.

JUDGMENT refusing Leave to Appeal to Privy Council.

In the West African Court of Appeal, Lagos.

No. 32. Judgment, 19th November 1951.

IN THE WEST AFRICAN COURT OF APPEAL.
Holden at Lagos, Nigeria.

Monday the 19th day of November, 1951.

Before :

THEIR LORDSHIPS,

SIR JOHN VERITY, Chief Justice, Nigeria, Acting President.
ARTHUR WERNER LEWEY, K.C. Justice of Appeal, Gold Coast.
OLUMUYIWA JIBOWU, Acting Senior Puisne Judge, Nigeria.

W.A.C.A. 3446.

ANTONIO ASSAF . Plaintiff/Respondent/Appellant

versus

MUSURU OKUNUBI Defendant/Appellant/Respondent.

JUDGMENT.

(Delivered by Jibowu AG : S.P.J.)

This is an application by the Applicant, Antonio Assaf, for final leave to appeal to His Majesty in Council. In paragraph 3 of the affidavit filed by the applicant in support of this application, he alleged that this Honourable Court, on the 27th day of June, 1951, granted him leave to appeal on the conditions (1) that he should deposit £500 in Court or enter into a bond for the same amount with two sureties within three months, and (2) that he should pay for the records of the proceedings.

In the affidavit he further alleged that he had deposited £500 in Court, paid £50 for records and given notice of his intention to apply for final leave to appeal to the Defendant/Respondent. Before granting the final leave sought for, this Court has to be satisfied that the conditions of appeal imposed have been fulfilled. It has been discovered that leave to appeal in this matter was granted on three conditions, the second of which was " that the Plaintiff/Appellant, Antonio Assaf, do enter into good and sufficient security, to the satisfaction of the Court, in the sum of £500 for the due prosecution of the appeal and the payment of all such costs as may become payable to Musuru Okunubi, the Defendant/ Respondent in the event of the Plaintiff/Appellant, Antonio Assaf, not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution, or of His Majesty-in-Council ordering the Plaintiff/Appellant, Antonio Assaf, to pay the Defendant/Respondent, Musuru Okunubi, costs of the appeal."

It is, therefore, clear from the terms of the order that the 3rd paragraph of the applicant's Affidavit is incorrect and that no such order as was alleged was made by the Court.

In the West African Court of Appeal, Lagos.

No. 32. Judgment, 19th November 1951, *continued.*

In this connexion, the Court cannot too strongly condemn the gross carelessness displayed in getting up the applicant's Affidavit without first finding out the terms of the Order of Court and in making the Applicant swear to incorrect facts which might seriously have misled the Court.

It is clear from the Order of Court that the Court ordered the Applicant to " enter into good and sufficient security " and the question now to be decided is whether he complied with that Order by making a cash deposit. It is conceded, generally speaking, that a good and sufficient security may be by bond or by cash deposit, but the wording of the Court Order, which is identically the same as that of section 6 (A) of the West African (Appeal to Privy Council) Order-in-Council of 1949, has to be construed in order to determine the kind of security indicated.

The words used in both the Order of Court and section 6 (A) of the Order-in-Council are " enter into." One enters into bond but not into a cash deposit. One can make or give a cash deposit. By the use of the words " enter into " a bond, and not a cash deposit, is the security indicated.

By making a cash deposit of £500, the Applicant has not complied with the Order of Court. He has therefore not fulfilled all the conditions of appeal imposed. It is to be observed that section 6 (A) of the Order-in-Council leaves the Court no discretion to order a cash deposit instead of a bond.

A cash deposit might appear to be a higher and better form of security than a bond, provided that the conditions upon which the deposit is made were sufficient to bind the Appellant within the security required, but we have to administer the law as we find it.

This Court takes judicial notice of the fact that some Appellants prefer, owing to the difficulty of finding sureties, to make cash deposits for security for costs of their appeals to His Majesty-in-Council, and we consider it desirable, in the interest of justice, that security for costs of such appeals may be by cash deposit or by bond. We express the hope that steps will be taken by the authorities to make necessary representation to the proper quarters with a view to getting section 6 (A) of the West African (Appeal to Privy Council) Order-in-Council, 1949, amended to include cash deposit.

As the Applicant has not fulfilled the conditions of appeal imposed, his application for final leave is, therefore, refused.

(Sgd.) JOHN VERITY,
Acting President.

(Sgd.) ARTHUR LEWEY,
Justice of Appeal.

(Sgd.) OLUMUYI JIBOWU,
Acting Senior Puisne Judge.

In the West African Court of Appeal Lagos.

No. 33.
Notice of Appeal, 6th March 1952.

No. 33.

NOTICE OF APPEAL.

IN THE WEST AFRICAN COURT OF APPEAL.

Between ANTONIO ASSAF . . Petitioner

and

MUSURU OKUNUBI . . Respondent.

NOTICE OF APPEAL.

TAKE NOTICE that the Appellant-Petitioner herein intends to appeal, and is appealing, by Petition for Special Leave to Appeal to Her Majesty The Queen in Council from the judgments of the West African Court of Appeal, Holden at Lagos, Nigeria, dated respectively the 26th May, 1951, and the 19th November, 1951.

Dated at Lagos, Nigeria, this 6th day of March, 1952.

To the Registrar,
West African Court of Appeal,
Lagos, Nigeria, and

To Musuru Okunubi, Respondent.

(Sgd.) OLADIPO MOORE.

Solicitor for the Petitioner-Appellant,
Ijemo Chambers,
Lagos, Nigeria.

In the Privy Council.

No. 34.

ORDER IN COUNCIL granting Special Leave to Appeal.

No. 34. Order in Council granting Special Leave to Appeal, 24th June 1952.

AT THE COURT AT BUCKINGHAM PALACE

The 24th day of June, 1952

(L.S.)

Present

THE QUEEN'S MOST EXCELLENT MAJESTY

LORD PRESIDENT
EARL DE LA WARR
EARL FORTESCUE
Mr. THORNEYCROFT
Mr. MACLEOD
Mr. MACLAY
Sir CHARLES MACANDREW

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 27th day of May 1952 in the words following, viz. :—

" WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Antonio Assaf in the matter of an Appeal from the West African Court of Appeal holden at Lagos Nigeria between the Petitioner Appellant and Musuru Okunubi Respondent setting forth (amongst other matters) : that this is a Petition for special leave to appeal (*a*) from a Judgment of the West African Court of Appeal dated the 26th May 1951 and (*b*) from a Judgment of the said Court dated the 19th November 1951 : that by the last mentioned Judgment the Court refused to give the Petitioner leave to appeal inasmuch as he had not complied with the conditions laid down by the Court on the 27th June 1951 which conditions are substantially the same as those laid down in The West African (Appeal to Privy Council) Order in Council 1949 section 6 (*a*) : that the Order of the Court was to ' enter into good and sufficient security ' : that the Court held that by making a cash deposit of £500 the applicant had not complied with the Order of the Court and therefore had not fulfilled all the conditions of Appeal imposed : that by a Judgment dated the 28th October 1950 in a case between the Petitioner as Plaintiff and Musuru Okunubi as Defendant the Court decided in favour of the Petitioner who claimed recovery of possession of the premises 130 Denton Street Ebute Metta and the sum of £400 as mesne profits from October 1948 to February 1950 : that on the 26th May 1951 the West African Court of Appeal reversed the Judgment dated the 28th October 1950 and held that the interest of the Respondent prevails over that of the Petitioner : And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal against the Judgment of the West African

Court of Appeal dated the 26th May 1951 and the Judgment of the said Court dated the 19th November 1951 and for further or other relief :

No. 34. Order in Council granting Special Leave to Appeal, 24th June 1952, *continued.*

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel on behalf of the Respondent Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the West African Court of Appeal dated the 26th day of May 1951 and against the Judgment of the said Court of Appeal dated the 19th day of November 1951 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs ;

"AND THEIR LORDSHIPS do further report to Your Majesty that the proper officer of the said Court of Appeal ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor or Officer administering the Government of Nigeria for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

F. J. FERNAU.

No. 35.

ORDER IN COUNCIL for Revivor of Appeal.

No. 35. Order in Council for revivor of Appeal, 30th April 1953.

AT THE COURT AT WINDSOR CASTLE.

The 30th day of April, 1953.

(L.S.)

Present :

THE QUEEN'S MOST EXCELLENT MAJESTY

LORD PRESIDENT — MR. ECCLES

EARL DE LA WARR

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 22nd day of April, 1953, in the words following, viz. :—

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there

In the Privy Council.

No. 35. Order in Council for revivor of Appeal, 30th April 1953, *continued.*

was referred unto this Committee a humble Petition of the Appellant in the matter of an Appeal from the West African Court of Appeal between Antonio Assaf Appellant and Musuru Okunubi Respondent (Privy Council Appeal No. 3 of 1953) setting forth : that the above Appeal is pending before Your Majesty in Council : that the above named Respondent died on the 3rd November 1952 : that pursuant to an Order of the West African Court of Appeal dated the 13th February 1953 contained in a supplemental record which has arrived at the Privy Council Office it was certified that (1) Daniel Olatunji Fuwa (2) Michael Oredolapo Onayemi and (3) Abigail Pelewura Osifeso being the Executors and Executrix named in the last Will of the late Musuru Okunubi and to whom Probate of his last Will and Testament was granted on the 3rd January 1953 are the proper persons to be substituted and entered on the Record in place of the deceased Respondent : And humbly praying that (1) Daniel Olatunji Fuwa (2) Michael Oredolapo Onayemi and (3) Abigail Pelewura Osifeso be substituted in the above Appeal for the deceased Respondent and that the Appeal may be revived accordingly :

" THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and the Solicitors for the Respondent having signified in writing their consent to the prayer thereof Their Lordships do this day agree humbly to report to Your Majesty as their opinion that (1) Daniel Olatunji Fuwa (2) Michael Oredolapo Onayemi and (3) Abigail Pelewura Osifeso ought to be substituted in place of Musuru Okunubi deceased as Respondents and that this Appeal ought to stand revived accordingly."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor or Officer administering the Government of Nigeria for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

W. G. AGNEW.

PART II.

EXHIBITS.

D1.—CONVEYANCE—S. W. Savage to M. Ajose.

Ex. " D1 " (by Plaintiff). Suit No. 91/1950.

ANTONIO ASSAF

vs.

MUSURU OKUNUBI. (Intld.) J.E.G.

Registrar, 22.9.50.

(Deeds Registry Receipt No. 34462/1180 of 7.6.48 for 21s. 6d.)

THIS IS TO CERTIFY that the within is a true and correct copy of a DEED OF CONVEYANCE dated the 24th June, 1921, and registered as No. 81 at Page 273 in Volume 148 of the Register of Deeds kept in the Land Registry at Lagos, Nigeria.

(Sgd.) J. J.,
Deputy Registrar.

(Intld.) ?
Stamped
Register of Deeds
Lagos
Nigeria.

Nigeria 5 Jul 21 Ten Shillings Stamp Duties	Nigeria 5 Jul 21 Ten Shillings Stamp Duties	Nigeria 5 Jul 21 Ten Shillings Stamp Duties
Nigeria 5 Jul 21 Ten Shillings Stamp Duties	Nigeria 5 Jul 21 Ten Shillings Stamp Duties	Nigeria 5 Jul 21 Ten Shillings Stamp Duties
Nigeria 5 Jul 21 Two Shillings & Sixpence Stamp Duties	Nigeria 5 Jul 21 Two Shillings & Sixpence Stamp Duties	

No. 81. Volume 148. Page 273.

Samuel Williamson Savage to Mustafa Ajose.

This Indenture made the twenty-fourth day of June in the year of our Lord one thousand nine hundred and twenty-one Between Samuel Williamson Savage of 4 Banjoko Street Lagos in the Colony of Nigeria (hereinafter called the vendor) Clerk of the one part and Mustafa Ajose of Obadina Street Lagos aforesaid (hereinafter called the purchaser) trader of the other part whereas by a receipt dated the 30th day of November 1899 portion of the hereditaments herein assured was sold to one Alfred Williamson Savage in fee simple in possession free from incumbrances by one Omiyale but no Conveyance of the said hereditaments was executed to the said Alfred Williamson Savage and whereas by a receipt dated the 23rd day of August 1900 the other portion of the said

Exhibits.

D1.
Conveyance S.W.Savage to M. Ajose, 24th June 1921, *continued.*

hereditaments was sold to the said Alfred Williamson Savage in fee simple in possession by one James Abon but no Conveyance of the said hereditaments was executed to the said Alfred Williamson Savage and whereas the said Alfred Williamson Savage died some years ago leaving the said Vendor his heir him surviving and whereas by the direction of the said vendor the said hereditaments were sold by private contract by R. E. Williams Licensed Auctioneer to the said purchaser for the sum of Six hundred and fifty pounds (£650) Now This Indenture witnesseth that in pursuance of the said recited agreement and in consideration of the said sum of six hundred and fifty pounds (£650) paid by the said purchaser to the said vendor (the receipt whereof is hereby acknowledged) the said vendor as beneficial owner doth hereby grant unto the said purchaser all that piece or parcel of land with the buildings thereon and the appurtenances thereto situate at Denton Street Ebute Metta in Lagos aforesaid and which with its dimensions and abuttals is more fully described on a plan drawn at the foot of these presents and therein edged yellow TO Hold the same unto and to the use of the said purchaser his heirs and assigns and the vendor for himself his heirs executors and administrators covenants with the purchaser his heirs executors and assigns that notwithstanding anything by the vendor or the purchaser done or knowingly suffered the vendor now has power to grant all the said premises to the use of the said purchaser free from encumbrances and that all the said premises may be quietly entered into held and enjoyed by the purchaser without any interruption by the vendor or any person claiming through or in trust for any of them and that the vendor and every person claiming through and in trust for him will at all times execute and do all such assurances and things for further or better assuring all or any of the said premises to the use of the purchaser as by him shall be reasonably required.

In witness whereof the said vendor hereto has hereunto set his hand and seal the day and year first above written

(Sgd.) S. WILLIAMSON SAVAGE.

Signed Sealed and Delivered by the within-named Samuel Williamson Savage in the presence of :—

(Sgd.) Y. I. LAWANI (Clerk) 85 Tokunboh St. Lagos.

(Sgd.) Y. L. OSHODI (Clerk) 14 Omididun St. Lagos.

The within instrument is in the opinion of the Commissioner of Stamp Duties chargeable with a duty of Three Pounds five shillings and the duty thereon has been assessed accordingly.

(Sgd.) S. W. S. MACGREGOR, 29.6.21,
Commissioner of Stamp Duties.

This Instrument was proved before me by the oath of Yesufu Idowu Lawani within named at 9 o'clock in the forenoon this 8th day of July, 1921.

(Sgd.) L. R. C. SUMMER,
De. Registrar.

Registry of Deeds, Lagos, Nigeria.

PLAN PLAN PLAN

J.—DEED OF MORTGAGE—S. Ajose to Messrs. Oshodi and Apena, Ltd.

Exhibits.

J.
Deed of Mortgage S. Ajose to Messrs. Oshodi and Apena Ltd., 5th July 1948.

Ex. " J " by Defendant. Suit No. 91/1950.

A. ASSAF

Vs.

M. OKUNUBI

(Sgd.) J. E. G. Registrar. 22.9.50.

THIS INDENTURE made the 5th day of July, 1948. Between SARMINU AJOSE Trader, of No. 2, Oke Street, Lagos, in the Colony of Nigeria (hereinafter called the Mortgagor which expression shall wherever the context so admits include his heirs and Legal Personal Representatives) of the one part and Messrs. THE OSHODI AND APENA LIMITED of No. 37, Marina, Lagos, aforesaid, Registered Moneylenders (hereinafter called the Mortgagees which expression shall wherever the context so admits include their Successors and Assigns) of the other part WHEREAS under and by virtue of an Instrument dated the 24th day of June, 1921, made between the parties thereto and registered as No. 81 at page 273 in Volume 148 of the Register of Deeds kept in the Lands Registry in the Office at Lagos aforesaid one Mustafa Ajose late of No. 2, Oke Street, Lagos, aforesaid was well or otherwise sufficiently seised in fee simple in possession free from all incumbrances of the certain freehold hereditaments which are hereinafter described and expressed to be hereby assured for a like estate AND WHEREAS the said Mustafa Ajose had died intestate in Lagos aforesaid on the 19th day of February, 1944, leaving him surviving his children and several hereditaments them entitled AND WHEREAS by an Order of the Supreme Court of Nigeria in the Lagos Judicial Division in an Action by Raliatu Ajose and 3 others against Sabiu Ajose and 2 others in Suit No. 273 of 1947 it was ordered among other properties that the Mortgagor be given the said hereditaments AND WHEREAS the Mortgagees have agreed to advance to the Mortgagor the sum of One thousand pounds (£1,000) sterling upon having repayment thereof with interest thereon as hereinafter mentioned secured in manner hereinafter expressed NOW THIS INDENTURE WITNESSETH and it is hereby agreed and declared as follows :—

1. In pursuance of the said agreement and in consideration of the sum of One thousand pounds (£1,000) sterling now paid to the Mortgagor by the Mortgagees (the receipt whereof is hereby acknowledged) the Mortgagor HEREBY COVENANTS WITH the Mortgagees to pay to the Mortgagees within six calendar months the sum of One thousand pounds (£1,000) sterling with interest thereon from the 5th day of July, 1948 at the rate of Two pence halfpenny (2½d.) on £1 per month AND ALSO SO LONG as any principal money remains due under these presents after the said six calendar months to pay to the Mortgagees with interest thereon at the rate as aforesaid by monthly payments.

2. For the consideration aforesaid the Mortgagor as Beneficial owner hereby grants and conveys UNTO and to the USE of the Mortgagees ALL THAT piece or parcel of land with the buildings thereon situate lying and being at No. 130 Denton Street, Ebute-Metta, in the mainland of Lagos, aforesaid, and which said hereitaments are more particularly

Exhibits.

J.
Deed of Mortgage S. Ajose to Messrs. Oshodi and Apena Ltd., 5th July 1948, *continued.*

described and delineated with their dimensions and abuttals on the plan drawn or attached to the above recited instrument and thereon edged yellow TO HOLD the same UNTO and TO THE USE of the Mortgagees in fee simple SUBJECT to the Proviso for redemption following (namely) that if the Mortgagor or any person or persons deriving title under him shall pay to the Mortgagees after the expiration of the said six calendar months the sum of One thousand pounds (£1,000) sterling with interest thereon from the date hereof at the rate as aforesaid then the premises hereinbefore conveyed shall at any time thereafter at the request and cost of the Mortgagor or any person or persons deriving title under him be duly re-conveyed to him or them.

3. The Mortagor or any person or persons deriving title under him shall not except with the consent in writing of the Mortgagees or the persons for the time being deriving title under them exercise the powers of leasing or agreeing to lease conferred by the Conveyancing Act, 1881, on a Mortgagor while in possession.

4. The powers of sale conferred on Mortgagees by the Conveyancing Act, 1881, shall take effect as regards these presents as if section 20 had been omitted from that Act but the said power shall not be exercised unless default is made in payment hereinbefore provided of any instalment of Principal or Interest for one calendar month after a notice in writing demanding payment thereof signed by the Mortgagees or their Solicitor shall have been delivered to the Mortgagor or to one of his executors or administrators or left upon or affixed to some part of the mortgaged premises or UNLESS there shall have been a breach of any obligation statutory or otherwise binding on the Mortgagor or any of the covenants whether expressed or implied herein contained and on his part to be observed and performed (other than the foregoing covenants for payment of the Principal money and interest hereby secured) IN WITNESS whereof the Mortgagor hereto hath hereunto set his hand and affixed his seal the day and year first above written.

The Mortgagor hereby acknowledges the receipt of a copy of the Mortgage Deed.

(Sgd.) A. AJOSE. (L.S.).
5.7.48.

SIGNED SEALED and DELIVERED by the within-named Mortgagor Sarminu Ajose in the presence of :—

(Sgd.) D. L. ODEKU,
2, Alli Street, Lagos,
Clerk.

THE COMMON SEAL of the within-named Mortgagees Messrs. The Oshodi and Apena Limited was affixed hereto in the presence of :—

(Sgd.) AKINOLA MAJA, (L.S.)
Director.

(Sgd.) J. A. K. JOHNSON,
Secretary.

J.
Deed of Mortgage S. Ajose to Messrs. Oshodi and Apena Ltd., 5th July 1948, *continued.*

The within instrument is in the opinion of the Commissioners of Stamp Duties chargeable with a Duty of Two Pds. ten shillings (£2 10s.) and the duty thereon has been assessed accordingly and duly stamped.

(Sgd.) ? ,
Commissioner of Stamp Duties.
5.7.48.

D.—LETTER, A. L. Johnson to Messrs. Irving & Bonnar.

D.
Letter A. L. Johnson to Messrs. Irving & Bonnar, 12th October 1948.

UT TIBI SIC ALTERI. Ex.D by Pltff. Suit No. 91/50.

ANTONIO ASSAF Vs. *MUSURU OKUNUBI*

(Sgd.) J. E. G. Registrar. 22.9.50.

Telephone No. 190.
5 Onikepo Street,
Onibuwe Chambers,
P.O. Box 92,
Lagos, Nigeria.
12th October, 1948.

A. LATUNDE JOHNSON, LL.B. (Lond.)
Messrs. IRVING & BONNAR,
Solicitors,
Lagos.

Dear Sirs,

Re Sarminu Ajose's Mortgage Accounts.

Yours of the 11th October, 1948, came to hand and duly noted.

Mr. Sarminu Ajose has two mortgages with Messrs. The Oshodi & Apena Ltd., one at No. 130, Denton Street, Ebute Metta, and the other at Igbobi Village, Yaba, both Mortgages are at the Lands Registry Lagos for registration which has not yet completed.

The certified true copies of conveyances in respect of these properties are herewith enclosed.

The mortgage debt on the two properties are as follows :—

Re 130 Denton Street, Ebute Metta .	£1,000	0	0
Interest at 2½d. on £1 p.m. from 29.9.48— 29.10.48	10	8	4
Re Igbobi Village, Yaba . . .	300	0	0
Interest at 3d. on £1 p.m. from 29.9.48— 29.10.48	3	15	0
Total ..	£1,314	3	4

I shall be glad to receive your cheque for the above sums at your earliest convenience.

Yours faithfully,

(Sgd.) A. L. JOHNSON,
Solicitor for Oshodi & Apena Ltd.

Exhibits.

E.
Letter G. B. A. Coker to Irving & Bonnar, 25th October 1948.

E.—LETTER, G. B. A. Coker to Messrs. Irving & Bonnar.

Ex.E by Pltff. Suit 91/1950.

ANTONIO ASSAF Versus *MUSURU OKUNUBI.*

(Sgd.) J. E. G. Registrar, 22.9.50.

Reference C. Gen./48/124.

G. B. A. COKER, LL.M. (Lond.)
Barrister-at-Law,
Solicitor of the Supreme
Court of Nigeria.

13, Idumagbo Avenue,
Lagos, Nigeria.
Date 25th October, 1948.

Messrs. IRVING & BONNAR,
Solicitors etc., Lagos.

Dear Sir,

Re Sarminu Ajose : Property at No. 130 Denton Street, E.B.

I have been instructed by Mr. Sarminu Ajose to countermand the instructions already given with regard to the sale of the above-named property. Mr. Ajose informs me that the contract of sale in respect of the property has not been completed by you with anyone at all and as he has now got another more reasonable offer than that proposed by you, I think you would agree that he should stick to the higher offer the more so as the property is at present under a mortgage.

2. In the circumstances, I shall be much obliged if you would be good enough to stay any further steps with regards to the sale of the property until further instructions : The mortgagee—Mr. Latunde Johnson has also been informed of this.

With many thanks,

Yours faithfully,

(Sgd.) G. B. A. COKER.

F.—LETTER, Irving & Bonnar to G. B. A. Coker.

Exhibits.

F. Letter Irving & Bonnar to G. B. A. Coker, 25th October 1948.

Ex. " F " by Plaintiff. Suit No. 91/1950.

Antonio Assaf vs. *M. Okunubi.*

(Sgd.) J. E. G., 22.9.50.

25th October, 1948.

G. B. A. COKER Esq.,
Solicitor,
13, Idumagbo Avenue, Lagos.

Dear Sir,

Mr. Sarminu Ajose.

130, Denton Street, Ebute Metta.

We are in receipt of your letter of today's date with regard to the above.

We were also acting for the purchaser Mr. A. E. Assaf and we presume his agreement to the cancellation of the sale to him has been obtained.

We hold the purchase price paid by Mr. Assaf to Mr. Ajose's credit in our client's account.

Yours faithfully,
IRVING AND BONNAR.

G.—LETTER, A. L. Johnson to Irving & Bonnar.

G. Letter A. L. Johnson to Irving & Bonnar, 26th October 1948.

Ex. " G " (By Plaintiff). Suit No. 91/1950.

Antonio Assaf vs. *Musuru Okunubi.*

(Intld.) J. E. G., 22.9.50.
5, Onikepo Street,
Onibuwe Chambers,
P.O. Box 92,
Lagos, Nigeria.

26th October, 1948.

A. LATUNDE JOHNSON,
LL.B. (Lond.),
Barrister-at-Law,
Solicitor of the Supreme Court of Nigeria,
Member of the International Law Association.

Messrs. IRVING & BONNAR,
Broad Street,
Lagos.

Exhibits.

G. Letter A. L. Johnson to Irving & Bonnar, 26th October 1948, *continued.*

Re Sarminu Ajose.

Mortgage of 130, Denton Street, E.B.

I have to inform you that Sarminu Ajose has paid off the whole mortgage debt with interests thereon since 25th Oct., 1948.

Will you kindly return the certified true copies of the conveyances I sent you on the 12th of this month as to enable me to return same to him.

Yours faithfully,

(Sgd.) A. L. JOHNSON.

H. Conveyance S. Ajose to E. M. Okunubi, 29th October 1948.

H.—CONVEYANCE, S. Ajose to E. M. Okunubi.

Ex. " H " by Defendant. Suit No. 91/1950.

A. Assaf Vs. *M. Okunubi.* (Intld.) J.E.G. 22.9.50.

THIS INDENTURE made the 29th day of October, 1948, Between SARMINU AJOSE, Trader of No. 2, Oke Street, Lagos, in the Colony of Nigeria (Hereinafter called the Vendor which expression shall wherever the context so admits include his heirs and Legal Personal Representatives) of the one part And EMANUEL MUSURU OKUNUBI, Trader of No. 32, Idumagbo Avenue, Lagos, aforesaid (hereinafter called the Purchaser which expression shall wherever the context so admits include his heirs and Legal Personal Representatives) WHEREAS under and by virtue of an Instrument dated the 24th day of June 1921 made between the parties thereto and registered as No. 81 at page 273 in Volume 148 of the Register of Deeds kept in the Lands Registry in the Office at Lagos, aforesaid one Mustafa Ajose late of No. 2, Oke Street, Lagos, aforesaid was well or otherwise sufficiently seised in fee simple in possession free from all incumbrances of the certain freehold hereditaments which are hereinafter described and expressed to be hereby assured for a like estate AND WHEREAS the said Mustafa Ajose had died intestate in Lagos, aforesaid on the 19th day of February 1944 leaving him surviving his children and several hereditaments them entitled AND WHEREAS by an order of the Supreme Court of Nigeria in the Lagos Judicial Division in an Action by Raliatu Ajose and 3 others against Sabiu Ajose and 2 others in Suit No. 273 of 1947 it was ordered among other properties that the Vendor be given the said hereditaments and premises which is hereinafter described and expressed to be hereby assured for a like estate AND WHEREAS the Vendor has agreed with the said Purchaser for the absolute sale thereof to him for the sum of Two thousand seven hundred pounds (£2,700.– –) sterling NOW THIS INDENTURE WITNESSETH That in pursuance of the said agreement and in consideration of the said sum of Two thousand seven hundred pounds (£2,700.–.–) sterling now paid by the said Purchaser to the said Vendor as purchase money (the receipt whereof is hereby acknowledged) The Vendor as Beneficial Owner by

inheritance hereby grants and conveys unto the said Purchaser ALL THAT piece or parcel of land with the buildings thereon situate lying and being at No. 130, Denton Street, Ebute Metta, in the mainland of Lagos, aforesaid, and which said hereditaments are more particularly described and delineated with their dimensions and abuttals on the plan drawn or attached to the above recited instrument and thereon edged Yellow TO HOLD the same Unto and TO THE USE of the said Purchaser his heirs and assigns in fee simple in possession free from all incumbrances AND the said Vendor hereby covenants with the said Purchaser that in addition to the qualified or restricted covenants by the said Vendor for the title to and further assurance of the said hereditaments and premises which are herein implied the same or the like covenants for the title to and further assurance thereon shall be deemed to be hereby implied on the part of the said Vendor but without any qualifications or restrictions as regards the person or persons to whose acts defaults or omissions such covenants extend IN WITNESS whereof the said Vendor hereto hath hereunto set his hand and affixed his seal the day and year first above written.

Signed sealed and delivered by the within named Vendor Sarminu Ajose in the presence of :— (Sgd.) S. A. AJOSE (L.S.)

(Sgd.) J. AKIN JOHNSON,
4, Olopade Street, Lagos, Clerk.

The within instrument is in the opinion of the Commissioner of Stamp Duties chargeable with a duty of Twenty-seven pounds (£27) and the duty thereon has been assessed accordingly and duly stamped.

(Sgd.) ?

Commissioner of Stamp Duties.

29.10.48.

Plan Plan Plan

Exhibits.

B. Judgment in Suit No. 317/48 Assaf *v.* Ajose, 28th June 1949.

B.—JUDGMENT in Suit No. 317/48—Assaf v. Ajose.

Exhibit "B" (put in by Plaintiff). Suit No. 91/1950 : *Antonio Assaf* v. *Musuru Okunubi.*

(Intld.) J. E. G.

IN THE SUPREME COURT OF NIGERIA.

In the Supreme Court of the Lagos Judicial Division.

Holden at Lagos.

Tuesday, the 28th day of June, 1949.

Before

HIS HONOUR JAMES REALI GREGG, Esq., Puisne Judge.

Suit No. 317/1948.

Between ANTONIO ELIAS ASSAF . Plaintiff

and

SAMIWU AJOSE . . . . Defendant.

JUDGMENT.

In this case the Plaintiff seeks to recover from the Defendant possession of a house and landed property situate at 130 Denton Street, Ebute Metta, and prays for specific performance of an alleged contract of purchase between himself and the Defendant.

It is admitted by the Defendant that during the month of October, 1948, he offered to sell to the Plaintiff the house and landed property mentioned ; and the Plaintiff avers that he and the Defendant agreed that the purchase price would be £1,600.

The Defendant, however, states in paragraph 4 of his statement of defence : " that although the plaintiff offered to buy the property in question for £1,600, yet the defendant only agreed to this offer on condition that a higher offer was not obtained by the defendant until the 28th day of October, 1948."

Evidence has been adduced by the Plaintiff to show that, following verbal arrangements between the Plaintiff and the Defendant, both parties went together to the office of Messrs. Irving & Bonnar, Solicitors, on the 9th of October, 1948, and that there the Defendant told Mr. Cameron, a member of the firm of Irving & Bonnar, that he agreed to sell to the Plaintiff property at 130 Denton Street, Ebute Metta, for the price of £1,600. In evidence Mr. Cameron states in effect, that the

Defendant informed him that there was a mortgage outstanding on the property to a Mr. Latunde Johnson and that there was a sum of £1,300 still owing on the mortgage.

Mr. Cameron states further that the Defendant instructed him to obtain the title deeds from Mr. Latunde Johnson and to prepare a re-conveyance from Mr. Latunde Johnson to himself (the Defendant) and a conveyance from himself to the Plaintiff. These conveyances have been prepared but have not yet been executed.

The Plaintiff paid Mr. Cameron a deposit for which Mr. Cameron issued a receipt (Ex. B) of £300 and the Defendant instructed Mr. Cameron to retain this money until the balance of £1,300 was paid. On the 11th of October, 1948, Mr. Cameron wrote to Mr. Latunde Johnson, who is a Barrister and Solicitor and obtained from him certified true copies of the title deeds. These title deeds were found to be in order and the Plaintiff then paid Mr. Cameron the balance of the purchase price, namely, £1,300, which was credited by Mr. Cameron to the Defendant's account. A receipt issued by Irving & Bonnar for this amount has been tendered in evidence as Ex. C. On the 25th of October, 1948, Mr. Cameron received a letter (Ex. E) of the same date from the Defendant's Solicitor, Mr. G. B. A. Coker, stating in effect that the Defendant, Ajose, had got another more reasonable offer for the property in question and requesting that any further steps with regard to the sale of the property be stayed. Messrs. Irving & Bonnar replied to this letter on the same day stating that they were also acting for the purchaser, Mr. Assaf, and that they presumed Mr. Assaf's agreement to the cancellation of the sale had been obtained. They also stated in their reply (Ex. F) that they hold the purchase price paid by Mr. Assaf to Mr. Ajose's the Defendant's credit in their clients' account.

On the 26th October, 1948, Messrs. Irving & Bonnar received a letter (Exhibit "G") from Mr. Latunde Johnson saying that Ajose, the Defendant had paid off the mortgage debt with interest and requesting the return of the title deeds. This request has not been complied with and the title deeds are still with Messrs. Irving & Bonnar. The Defendant admits in his evidence that he accepted the Plaintiff's offer of £1,600 but states in effect that he did so, provided he received no higher offer before the end of October, 1948. He got this higher offer and on 25th October instructed his solicitor to write Ex. " E " to Irving & Bonnar cancelling the sale of the property in question to the Plaintiff.

The property was sold, according to the Defendant, to one Mr. Okunubi, and the Defendant states that he executed a conveyance to Mr. Okunubi. This conveyance has not been put in evidence—and no purchase receipt or cheque has been tendered.

Under cross-examination the Defendant states : " I told the Plaintiff I would accept his offer of £1,600 provided I did not get a higher offer before October 28th, 1948."

On the evidence before me I cannot accept the Defendant's story that his acceptance of the Plaintiff's offer was subject to the condition he mentions. Apart from the fact that it is, on the face of it, a most unlikely condition, there is no evidence other than the Defendant's own story to support it.

Exhibits.

B. Judgment in Suit No. 317/48, Assaf *v.* Ajose, 28th June 1949, *continued.*

Taking into account the verbal evidence adduced by the parties together with the written evidence contained in Exhibits "A," "B," "C," "D," "E" and "F," two of which (Exhibits "B" and "C") have been signed by Irving & Bonnar as agents for the Defendant, I hold that there is a definite contract between the parties with regard to the sale and purchase of the property in question and that the Plaintiff has in fact purchased the house and landed property situate at No. 130 Denton Street, Ebute Metta, for £1,600.

Accordingly I order that all parties concerned do execute the relevant conveyances now in the hands of Messrs. Irving & Bonnar within 30 days from today and that on the execution of the said conveyances the Plaintiff shall have possession of the said property.

Judgment entered for the Plaintiff accordingly with costs. Fifty-five guineas costs allowed Plaintiff.

(Sgd.) J. R. GREGG,
Puisne Judge,
28.6.49.

C. Conveyance Ajose to Assaf, 13th September 1949.

C.—CONVEYANCE—Ajose to Assaf.

Ex. "C" (Put in by Plaintiff). Suit No. 91/50.

ANT. ASSAF Vs. *MUSURU OKUNUBI.* (Intld.) J. E. G. 22.9.50.

IRVING & BONNAR,
Solicitors,
Lagos.

THIS INDENTURE made the 13th day of September, 1949, Between SARMINU AJOSE of No. 2, Oke Street, Lagos, Nigeria (hereinafter called "the Vendor") of the one part and ANTONIO ELIAS ASSAF of No. 5, Egerton Road, Lagos, Nigeria (hereinafter called "the purchaser") of the other part :—

WHEREAS by an Indenture of Conveyance dated the 24th day of June, 1921, and registered as No. 81 at Page 273 in Volume 148 of the Lands Registry, Lagos, one Mustafa Ajose since deceased was seised in fee simple free from incumbrances of the hereditaments hereinafter described and intended to be hereby conveyed (hereinafter referred to as "the said hereditaments").

AND WHEREAS the said Mustafa Ajose (hereinafter referred to as "the Intestate") died on the 19th day of February, 1944, Intestate leaving him surviving the Vendor and several others his children.

AND WHEREAS by virtue of a Scheme of Distribution dated the 22nd day of November, 1947, agreed to by all the children of the Intestate and filed in the Supreme Court of Nigeria under suit No. 273 of 1947 which

said scheme of distribution was on the 24th day of November, 1947, embodied in the judgment in the said suit the said hereditaments and others were allotted to the Vendor as his share of the Estate absolutely.

AND WHEREAS the Vendor has since the date of the said Distribution been seised in fee simple free from incumbrances of the said hereditaments.

AND WHEREAS the Vendor has agreed with the Puchaser for the sale to him of the said hereditaments for the sum of One thousand six hundred Pounds Sterling (£1,600).

NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement and in consideration of the said sum of One thousand Six hundred pounds now paid by the Purchaser to the Vendor (the receipt of which sum the Vendor hereby acknowledges) the Vendor as Beneficial Owner hereby conveys Unto the Purchaser ALL THAT piece or parcel of land together with the buildings thereon situate at and known as No. 130, Denton Street, Ebute-Metta Lagos, Nigeria, which is more particularly delineated with its dimensions and abuttals on the plan hereto and thereon edged Pink TO HOLD the same Unto and TO THE USE of the Purchaser in fee simple free from all incumbrances.

IN WITNESS whereof the Vendor hath hereunto set his hand and seal the day and year first above written.

Signed, Sealed and Delivered by the within-named Sarminu Ajose in the presence of :— } (Sgd.) S. A. AJOSE (L.S.)
13.9.49

(Sgd.) APENO,
c/o Irving & Bonnar,
Lagos, Clerk.

The within instrument is in the opinion of the Commissioner of Stamp Duties chargeable with a duty of Sixteen pounds (£16) and the Duty thereon has been assessed accordingly and duly stamped.

(Sgd.) E. HARDING.
Commissioner of Stamp Duties.
21.9.49

Document presented Treasury 30.9.49
„ withdrawn 10.10.49

(Sgd.) E. HARDING,
C.S. Duties.
10.10.49.

Plan Plan Plan

No. 3 of 1953.

In the Privy Council

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL AT LAGOS.

BETWEEN

ANTONIO ASSAF . . . . . *(Plaintiff/Respondent) Appellant*

AND

DANIEL OLATUNJI FUWA, MICHAEL OREDOLAPO ONAYEMI and ABIGAIL PELEWURA OSIFESO the Executors and Executrix of MUSURU OKUNUBI, deceased *(Defendant/Appellant) Respondents.*

RECORD OF PROCEEDINGS

LEWIS & LEWIS AND GISBORNE & CO.,
10, 11 & 12 ELY PLACE,
HOLBORN, E.C.1,
Solicitors for the Appellant.

HATCHETT JONES & CO.,
66A FENCHURCH STREET,
LONDON, E.C.3,
Solicitors for the Respondents.

The Solicitors' Law Stationery Society, Limited, Law and Parliamentary Printers, 49 Bedford Row, W.C.1
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