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*Oct. 7.
*Dec. 9.

DAVID M. WILSON (PLAINTIFF).....APPELLANT;

AND

MILTON H. WARD (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Contract—Construction—Nature of transaction—Whether loan secured on land or agreement of sale of land with option of re-purchase—Admission of parol evidence—Findings on the evidence—Transaction in substance a loan on security—Stipulation for right of purchase in lender, void as repugnant to equitable right of redemption.

It was *held,* reversing judgment of the Appellate Division, Alta., 24 Alta. L.R. 48, and restoring judgment of Boyle J. at trial, that the agreement embodied in the document in question, between P. (appellant's assignor) and respondent, was, not for the sale of land from P. to respondent with an option of repurchase, but for a loan from respondent to P. on security of the land. The document, taken by itself, in certain respects favoured the latter construction. But, further, the parties' rights were not to be determined exclusively by examining the terms in the document; evidence was admissible, not only of the surrounding circumstances, but also of all the oral or written communications between the parties relating to the transaction, for the purpose of determining its true nature (*Lincoln* v. *Wright,* 4 De G. & J. 16, at p. 22; *Maung Kyin* v. *Ma Shwe La,* 45 Indian L.R. [Calcutta series], 320, at p. 332, and other cases cited). Even where the instrument professes fully and clearly to give the reasons and considerations on which it proceeds, collateral evidence is admissible to shew that the transaction is not thereby truly stated, although, in such cases, only the most cogent evidence avails to rebut the presumption to the contrary (*Barton* v. *Bank of N.S.W.,* 15 App. Cas. 379, at p. 381). In the present case, in view of the summary character of the document and the superficial incoherence of its terms, resort to parol evidence was peculiarly appropriate; and upon all the evidence (as viewed by this Court, and with the findings thereon by the trial judge) the substance of the transaction must be held to have been a loan on security. In such case the court will disregard, as repugnant to the equitable right of redemption, a stipulation professing to confer upon the lender the right of purchase, even if the parties, between themselves, had intended that it should be binding (*G. & C. Kleglinger* v. *New Patagonia Meat & Cold Storage Co. Ltd.,* [1914] A.C. 25, at p. 52, and other cases, cited).

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Alberta (1) which held, reversing the judgment of Boyle J. at trial, that the agreement set out in the document in question (quoted

*PRESENT:—Anglin C.J.C. and Duff, Rinfret, Lamont and Smith JJ.

(1) 24 Alta. L.R. 48; [1929] 2 W.W.R. 122.

in full in the judgment now reported), made between one Pellon (who later transferred to plaintiff his interest in the land in question and in said agreement) and the defendant, was an agreement of sale of land from Pellon to the defendant, and not, as contended by the plaintiff, in effect a mortgage to secure a loan from the defendant to Pellon.

By the judgment now reported the appeal was allowed, with costs in this Court and in the Appellate Division, and the judgment of the trial judge was restored.

W. N. Tilley K.C. for the appellant.

E. Lafleur K.C. and *A. A. Ballachey K.C.* for the respondent.

The judgment of the court was delivered by

DUFF J.—In May, 1927, A. L. Pellon was the registered owner of section 23 and of the south half and the north-east quarter of section 25, Township 20, Range 24, Alberta (1120 acres), subject to a lease in favour of the respondent for two years from the 1st of February, 1927, and to a charge securing a balance of purchase money owing to the Crown, and to certain executions. The beneficial owner of the lands in section 25 was the appellant, and for some years Pellon had farmed both parcels, for the appellant and himself as partners. Pellon had become involved in financial difficulties, judgments had been recovered against him, and executions thereunder had been filed against the appellant's land as well as his own.

In these circumstances Pellon applied for a loan on the 13th of May, 1927, to the respondent, who paid to Pellon, on the same day, $1,500 by cheque. The issue in the appeal is: What was the character of the transaction, between these parties, of that date?

The appellant, to whom, in April, 1928, Pellon transferred section 23, says that Pellon borrowed from the respondent $1,500, and that this sum, together with $300 borrowed in March of the same year, was made a charge upon section 23, the whole principal of $1,800, with interest from the dates of the respective loans, being repayable in ninety days. The respondent denies the loan and avers

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that the agreement between him and Pellon was an agreement for the sale of section 23 on terms set forth in a document of that date.

The trial judge found that the agreement was in fact of the character contended for by the appellant, and his judgment was reversed by the Appellate Division (1), who held that the transaction was a sale.

The document is in these words:

This Agreement is made in duplicate this 13th day of May, 1927,

Between

Arthur L. Pellon, party of the first part,
and
Milton H. Ward, party of the second part.

Whereas the party of the first part is the owner of Section 23, Township 20, Range 24, West of the Fourth, and is desirous of obtaining a loan on the same for the sum of $1,800, and whereas the party of the second part is willing to advance the said amount on the following conditions:

Namely that in consideration of the said loan the party of the first part hereby agrees to sell the said lands to the party of the second part at or for the sum of $24,320. The sum of $1,800 being paid on the execution of this Agreement, receipt is hereby acknowledged, and the balance to be paid at the rate of $5,000 per year on December 1 of each year until paid, beginning with December 1, 1927.

Providing, nevertheless, that an option is hereby granted to the party of the first part to purchase back the said lands from the party of the second part herein within 90 days from the date hereof, at or for the sum of $1,840, said option to be exercised by him within 90 days from the date hereof.

In witness hereof both of the parties hereto have set their hands and seals this 13th day of May, 1927.

Arthur L. Pellon (Seal)
M. H. Ward (Seal)

The document is unusual in form, and upon the construction of it as it stands, there is room for divergent views. On the part of the respondent, it is contended that it embodies an agreement for sale and purchase of the lands mentioned for the sum of $24,320, of which $1,800 is acknowledged as paid on the execution of the agreement, and of which the residue is to be paid according to the terms stated; with a stipulation in favour of the vendor awarding him an option of re-purchase at the price of $1,840, to be exercised within ninety days of the date of the document, that is to say, on or before the 11th of August ensuing.

(1) 24 Alta. L.R. 48; [1929] 2 W.W.R. 122.

This view of the document was accepted by the Court of Appeal. It is a view, however, open to criticism. In the first paragraph, the parties declare that the appellant is desirous of obtaining a loan of $1,800, secured on the property in question, and that on the "following conditions" the respondent is willing to "advance the said amount." The "conditions" are then set forth. It is important, in considering the document, that while the subsequent paragraph contains the terms of an undertaking to sell on the part of Pellon, this undertaking is expressed to be in "consideration of the said loan"—that is to say, if the words are not to be emptied of all meaning, in consideration of a loan, by the respondent to Pellon, secured upon Pellon's property.

The view for which the respondent contends necessitates the rejection of this recital with which the document opens and which professes to declare its central purpose. By that I mean, that the application for the loan is affirmed, that the assent of the lender to grant the loan is affirmed; true, the assent is upon conditions, but when the conditions are stated, they are stated as conditions agreed to in consideration of the loan, which has been arranged between the parties. The basis of the transaction is a loan. All this, if we are to accept the respondent's construction, must be deleted as meaningless. A "loan" which does not involve an obligation of repayment is a contradiction in terms.

The appellant's construction is by no means free from difficulty, but in truth it involves no such radical operation as that required by the respondent's. Strictly, to establish the appellant's contention, it is necessary to ascribe to the recital its full effect and to read the proviso giving an option to Pellon to repurchase the land as a proviso for redemption on repayment of the loan with interest. That, of course, would be a departure from the literal meaning of the words, but in that manner of reading them one would be doing only what, in countless cases, the courts have done in similar circumstances.

Reading the document thus, it would present no difficulty from the legal point of view. The agreement for sale, on this hypothesis, is part of the security transaction, that is to say, it is one of the terms of the loan, and is a term which, on failure by the borrower to exercise the contractu-

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al right of redemption, imposes a fetter upon the equitable right, or rather limits and circumscribes the equitable right in such a way as to entitle the lender to require the borrower to transfer the subject of the security to him on the payment of certain specified sums of money. To this subject it will be necessary to recur. For the present it is sufficient to say that such a term, where the transaction is primarily and substantively a loan on the security of the debtor's property, will be disregarded by the courts.

It is unnecessary to say more on the construction of this irregular document. In its terms it is not indubitably a contract of sale or a contract for security, and the rights of the parties are not to be determined exclusively by an examination of those terms. The learned trial judge rightly held that evidence was admissible, not only of the surrounding circumstances, but as well, of all the oral or written communications between the parties, relating to the transaction, for the purpose of determining whether they were truly effecting a sale of Pellon's property to Ward or a loan on the security of Pellon's land. The pertinent rule is founded upon principle, and the principle is thus stated by a great equity judge, Turner L.J., in *Lincoln* v. *Wright* (1):

> The principle of the Court is that the Statute of Frauds was not made to cover fraud. If the real agreement in this case was that as between plaintiff and Wright the transaction should be a mortgage transaction, it is, in the eye of this Court, fraud to insist on the conveyance as being absolute, and parol evidence must be admissible to prove the fraud.

This passage was approved and adopted by the Judicial Committee (the Board including Lord Dunedin, Lord Shaw and Lord Sumner) in *Maung Kyin* v. *Ma Shwe La* (2); and the rule is enunciated or exemplified in a great number of reported cases. *England* v. *Codrington* (3); *Vernon* v. *Bethell* (4); *Reeks* v. *Postlethwaite* (5); *Hodle* v. *Healey* (6); *Barton* v. *Bank of New South Wales* (7); *G. & C. Kreglinger* v. *New Patagonia Meat and Cold Storage Co. Ltd.* (8).

(1) (1859) 4 De Gex & Jones 16, at p. 22.
(2) (1917) 45 Indian Law Reports (Calcutta Series) 320, at p. 332.
(3) (1758) 1 Eden, 169.
(4) (1762) 2 Eden, 110.
(5) (1815) G. Coop., 161.
(6) (1813) 1 V. & B. 536.
(7) (1890) 15 App. Cas. 379.
(8) [1914] A.C. 25, at p. 47.

Even where the instrument in question professes fully and clearly to give the reasons and considerations on which it proceeds, collateral evidence is admissible to show that the transaction is not thereby truly stated, although in such cases, only the most cogent evidence avails to rebut the presumption to the contrary, *Barton* v. *Bank of N.S.W.* (1). In the case before us, in view of the summary character of the document and the superficial incoherence of its terms, resort to parol evidence is peculiarly appropriate.

Pellon gave a plain statement of his dealings with the respondent. He said that in March, 1927, he had borrowed $300 from the respondent, and that on the 13th of May, the date of the document, he requested a further loan on the security of lot 23. He suggested a mortgage; the respondent was doubtful about the suggestion, in view of the fact that there were judgments and executions against Pellon, and finally after interviewing his banker, he informed Pellon that the banker had made a suggestion which was this: that Pellon should give to the respondent an option on his property, which the respondent could use as security for a loan from the bank, which was necessary to enable the respondent to make the advance. To this Pellon assented, and they went together to a solicitor, who drew up up the document in question, which they executed. Some discussion arose as to the price to be named in the agreement, and Pellon, according to his story, said that, in the circumstances, the price was wholly immaterial, and the arbitrary figure of $38 an acre was inserted, on that footing. At first, Pellon desired credit for only fifteen days, and eventually ninety days was agreed to. In sum, Pellon's account is, that both the respondent and himself understood the transaction to be, as described in the recital, a loan upon security, and that the agreement was given the form in which we find it solely to conform to the requirements of the banker.

Pellon fully expected to repay the loan on the stipulated date, but finding that the source, from which he hoped to provide himself with the means of doing so, had failed him, he informed the respondent of this by telegram on the 20th of July, and requested him to make arrangements to bor-

(1) (1890) 15 App. Cas. 379, at p. 381.

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row, on the security of Pellon's share of the crop, for the purpose of liquidating the debt. Receiving no answer to the telegram, he went to Arrowwood, travelling from Montana, only to find that the respondent was absent in Eastern Canada. Later, on his return home, he found a letter purporting to be signed by the respondent, in these terms:

Arrowwood, Alberta,
August 11, 1927.

Mr. Arthur L. Pellon,
Linton, Oregon, U.S.A.

Dear Sir:

Register and Return

Re All of Section Twenty-three (23) in Township Twenty (20), Range Twenty-four (24). West of the 4th Meridian, Province of Alberta.

In connection with our Agreement of Sale dated the 13th day of May, 1927, as you have not exercised your option to repurchase this land from me within the 90 days as set out therein, I am now presuming that the land is mine and that you have decided to carry out the Agreement according to the tenor thereof as I have not heard from you to date.

Yours very truly,
M. H. Ward.

Copy sent to the addressee at Linton, Oregon, U.S.A. and at Greybull, Wyoming, U.S.A., and at Northern Hotel, Billings, Montana, U.S.A.

On receiving this letter, Pellon wrote to the respondent as follows:

Greybull, Wyo. 8/21/27.

M. H. Ward, Esq.,
Arrowwood, Alta.

Dear Sir,—

Upon my return to Greybull after an absence since July 12, I find your letter of August 11, and am surprised at its contents.

I wired you from Twin Falls, Idaho, about July 20, about this loan and never received a reply and then I went to the expense of coming up to Canada to see you and arrange with you to get a loan on my share of the crop and reimburse yourself to the extent of $1,840, but you were absent in Eastern Canada so my trip was for nothing.

To make a long story short, I was called back here on a very important business matter and could not wait longer in Calgary—having been there over a week waiting for your return.

You are hereby authorized to secure the amount of loan $1,840 and use as security, my share of crop. This will take care of you if you can not carry the loan until you can sell sufficient wheat to do so.

Certainly you remember you said this agreement was only for the purpose of getting the money from banker, and for that purpose alone.

That land would cost you at least twice the price mentioned in agreement and after I personally explain the situation believe you will carry out our plan as originally agreed, and, as I believe, mutually understood.

Your letter smacks too much of Lyle-Hempleman procedure to come from one whom I have always considered a square-shooter and a friend.

Better follow suggestion as above and let me hear from you again.

Yours very truly,

A. L. Pellon.

No reply to this letter was received or sent, and after a lapse of some days, Pellon again went to Arrowwood, and this time succeeded in interviewing the respondent. The respondent's testimony as to what occurred on that occasion will be noted in some detail; in the meantime it is sufficient to say that Pellon, according to his own account, having interrogated Ward as to the meaning of his letter of the 11th, was met by excuses. Ward said the letter was necessary for his own protection because of the seizure of the crop by Pellon's execution creditors, but that the matter would be cleared up satisfactorily when the crop was threshed. Pellon's words are:

Q. What conversation did you have with him?

A. Well, I said to him, "You surely didn't mean what you said in your letter that I received a few weeks ago, did you?

Q. Meaning the letter of August 11th?

A. Yes, and he said, "I had to do that to protect my own interests and to satisfy the banker. They have been hounding the life out of me every week about that."

Q. Yes.

A. And he went on to say that he had to do it, too, because these fellows had made a seizure of all the crop and that is about the gist of the conversation, there was not very much of anything said further than that, except as soon as he got threshed it would be all fixed up.

Q. As soon as you got threshed?

A. Yes.

Q. Was there a good crop on the land?

A. Yes.

Q. What did half the value of the crop amount to on this land in 1927?

A. Something a little over $5,000.

Q. Something over $5,000 from half the crop?

A. Yes.

Q. And one-half of that one-half of course had to be paid to the Dominion Government?

A. Yes.

Q. And the other half was yours?

A. Yes.

Ward believed, there can be no doubt, that in the document of the 13th of May, he was armed with an instrument that enabled him to maintain the rights of a purchaser, subject to an option of repurchase vested in Pellon, which at

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this time had lapsed by reason of the expiry of the time limit. Nor is it, on the evidence, doubtful that the form of the transaction, whether suggested by the banker or not, was not in fact dictated by the necessity of conforming to the wishes of the banker, in order to enable Ward to obtain an advance from the bank, but was proposed by Ward for the purpose of enabling him to assert such rights, and in full confidence that Pellon would not exercise his option within the stipulated period.

If Pellon's evidence, therefore, is to be accepted, the conclusion of the learned trial judge appears to be unassailable. Ward permitted the appellant to believe that he was entering into a transaction, the essence of which was a loan upon security, while he himself was confident that the effect of it, in law, was to make him a purchaser, and from the beginning intended to take advantage of the transaction, in that sense, in asserting the rights of a purchaser. Beyond that, indeed, if Pellon's evidence is credible, Ward procured Pellon's assent to the transaction, in the form in which he proposed it, by misrepresenting material facts, as to the necessity, namely, of giving the agreement that particular form in order to enable him to make the advance to Pellon.

Assuming these facts, the legal result is not open to controversy. It is quite true that, *prima facie*, a sale, expressed in an instrument containing nothing to show the relation of debtor and creditor is to exist between the parties, does not cease to be a sale, and become a security for money, merely because the instrument contains a stipulation that the vendor shall have a right of repurchase. *Alderson* v. *White* (1); *Manchester, Sheffield & Lincolnshire Railway Co.* v. *North Central Wagon Co.* (2). But where the language of the instrument points to the existence of such a relation, the courts, as Lord Hardwicke said, have endeavoured to treat such instruments as securities. *Longuet* v. *Scawen* (3);. In *Douglas* v. *Culverwell* (4); Knight Bruce L.J., after stating that the plaintiff had executed the conveyance there in question with the inten-

(1) (1858) 2 De Gex & Jones 97, at p. 105.
(2) (1888) 13 App. Cas. 554, at p. 568.
(3) (1749) 1 Ves. Sen. 401, at p. 404.
(4) (1862) 4 De Gex F. & J. 20, at p. 23.

tion that it should take effect, not as an absolute conveyance, which it was in form, but as a security for money, proceeded thus:

> I am satisfied also that this understanding—this view of the matter—the plaintiff, before and on the occasion of his execution of the deed and before and when he received the money, was allowed, knowingly allowed, by the defendant to entertain. I am satisfied that the deed, at the time of its execution by the plaintiff, was accepted by the defendant with full knowledge that the plaintiff so understanding the matter so received the £101.

In these circumstances, the Lords Justices held that the instrument was to be treated as creating a security only. Here, according to the evidence of Pellon, not only did Ward fully know the state of Pellon's mind, the express arrangement was that the document was to be used as security.

Such being the substance of the transaction, the law, as already observed, would disregard the stipulations professing to confer upon the respondent the right of purchase, even if the parties, between themselves, had intended that these should be binding. Such stipulations are repugnant to the equitable right of redemption; they would have the effect of converting what was intended to be a security into something entirely different. It has long been settled that equity will not allow a mortgagee to enter into a contract with the mortgagor, at the time of the loan, for the absolute purchase of the subject of the mortgage for a specific sum in case of default in payment of the mortgage money at the appointed time. The rule had its origin in the Ecclesiastical Courts. In the Court of Chancery, it was a rule of policy based upon a recognition of the disposition of money lenders to use their power of dictating the form of a security transaction, in order to shape it in such a way as to make it possible to " wrest the estate out of the hands of the mortgagor." *Mellor* v. *Lees* (1); *Price* v. *Perrie* (2); *Willett* v. *Winnell* (3); *Bowen* v. *Edwards* (4); *Re Edwards* (5). And it applies, not only to mortgages, strictly so called, or to mortgages containing a contractual proviso for redemption, but, as well, to mortgages containing no such express proviso, and to agreements creating only an

(1) (1742) 2 Atk. 494, at p. 495.
(2) (1702) Freeman's Reports, 258.
(3) (1687) 1 Vern. 488.
(4) (13 Car. 2) 1 Rep. in Ch. 221.
(5) (1861) 11 Ir. Ch. R. 367.

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equitable charge. If it is clear that the transaction is a transaction of loan, and that the interest in the property affected is vested in the lender by way of security only, then such stipulations are void as repugnant to the equitable right of redemption. As Lord Parker said in *G. & C. Kleglinger* v. *New Patagonia Meat and Cold Storage Company, Limited* (1), in such a case

> the right to redeem is from the very outset a right in equity only, and it is merely the right to have the property freed from the charge on payment of the moneys charged thereon. If the charge is for payment of a specified sum on a specified day, payment on that day will set the property free, and if the day passes without payment there will still be an equity to have the property so freed notwithstanding any provision in the nature of a penalty, such penal provision being a clog on the equity.

Here the learned trial judge held that the true nature of the transaction is disclosed by the recitals and the statement of the consideration. Although he has expressed his opinion that such is the effect of the document he had to consider, apart from the oral evidence as to what occurred between the parties, he has not limited himself to that; he has considered the evidence; assessed the relative weight of the testimony of the two principal witnesses, Pellon and the respondent; and stated his conclusions of fact. Among other things, he has held that Pellon's account of the transaction of May the 13th is true and should be accepted, and the cardinal question in the appeal is whether or not in this he is right, or rather, whether or not there are adequate grounds for holding he is wrong.

The learned trial judge, it may be said, in applying himself to the questions of fact, realized that he was confronted with a disagreeable duty of deciding for himself and expressing his decision, whether it was Pellon or the respondent who was endeavouring to mislead the court. And there was really no middle course open to him. If the respondent was honestly relating the facts as he recollected them, there could be no room for doubt that Pellon was dishonestly trying to escape from the bargain he had made; and it will also appear as I proceed, that if Pellon was telling the truth, it is impossible to reconcile that conclusion with the honesty of the respondent.

(1) [1914] App. Cas. 25, at p. 52.

I pass now to an examination of the respondent's account of these matters. He opens the story of his dealings with Pellon by a statement that during the negotiations for the lease executed in the autumn of 1926, Pellon said that he hoped the respondent would become the purchaser of sections 23 and 25. He says he lent Pellon at that time $1,000, Pellon promising to repay him when he sold his land, with a bonus of $4,000. Pellon says that the respondent paid him $1,000 at this time, but that this payment was a bonus on the lease, for which he had been offered, as bonus, still larger sums. The respondent admits that Pellon told him he had been offered a bonus of $1,500. The learned trial judge in delivering his judgment observed that he did not believe this story of the respondent, and counsel for the respondent intervened with the remark, "We withdrew that $1,000, my Lord, in our argument." Proceeding with the material incidents, in order of date, the respondent says, that in March, 1927, he paid Pellon $300. He says there were negotiations between him and Pellon for the purchase of Wilson's interest in section 25, and that, although these negotiations had not been concluded, this sum of $300 was paid to Pellon as an advance on account of the purchase money. On his examination for discovery, he persisted in declaring that this $300 formed no part of the sum of $1,800, the payment of which was acknowledged by the document of the 13th of May; that this latter sum was paid in two cheques, one for $1,750, and one for $50 on the last mentioned date. At the trial he abandoned this, admitting that only $1,500 had been advanced in May, that the sum of $1,800 acknowledged in the document comprised this advance together with the advance of $300 made in March.

His evidence, both on discovery, and in the early part of his examination at the trial, evinced a determination not to admit that any part of the sum of $1,800 had been advanced as a loan. Being obliged, at the trial, to admit that the $300, advanced in March, was included in it, he once more resorts to the position that the last mentioned advance was not a loan, but a payment on account of a prospective agreement of purchase. This, eventually, he is constrained to withdraw. The same anxiety is disclosed concerning the sum of $40, part of the $1,840 in the repayment or redemp-

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tion clause. Pellon had explained that this sum was made up by calculating interest on the two loans of $300 and $1,500 (together comprising the $1,800), from their respective dates to the end of the ninety days period of credit, which, at 8% came to $39. The Appellate Division seems to accept this account of the matter. On his examination for discovery, the respondent denied, at the outset, in the most explicit way, that this sum represented interest; later he declared that it was added by Pellon as interest on two sums, one, the $300, already mentioned, and the other, a sum of $200, for which he had given a cheque, some time before March, 1927, both sums being on account of purchase money for lot 25. At the trial, in his examination in chief, he again, in the most definite way, denies that the $40 was added as interest, declaring it was offered by Pellon, as a "bonus" for what he, the respondent, "had done"; finally he admits it was interest calculated, as he had said on discovery, on these two sums of $300 and $200. On further cross-examination, after an adjournment, he withdraws his statement that he had given a cheque for $200 prior to May, 1927, declared he had made an advance, which might have been of any amount between $100 and $300, and that this advance was a loan. Why the amount of this loan was not included in the sum secured (or credited, as the respondent contends) by the document of May, no reason is suggested. Throughout, Ward persists in denying that any part of it represents interest on the $1,500 advanced in May. But, as an account of the fixing of the redemption price at $1,840, his story is, of course, valueless; and the learned trial judge naturally would have none of it.

I have mentioned more than once the respondent's statement that prior to the execution of the lease in the autumn of 1926, Pellon had initiated negotiations for the sale to him of both Pellon's and the appellant's property, and his affirmation, many times repeated, that the payment of $300 in March was made as part of the purchase money under a prospective agreement for the purchase of section 25. As a witness, Ward displayed some persistence in picturing Pellon as the eager vendor. This is part of his evidence:

A. About the time the lease was drawn Mr. Pellon made the suggestion he would sell the land or eventually he would sell both parcels of land to me.

Q. And when next was the matter discussed?

Q. Well it almost continued at that time, off and on until such time as the deal was closed.

Q. That is until you ultimately purchased?

A. Purchased.

Q. Well it continued with which parcel of land?

A. Well, 25 was under negotiations for an agreement for sale from that time on until it was purchased and Mr. Pellon offered Section 23 for sale in May, 1927.

In pursuance of these efforts he asserts that, on the 13th of May, Pellon "seemed anxious to sell his land." Eventually, confronted by his examination for discovery, and by Pellon's proposal, which he admits, of a credit of only fifteen days, he is obliged to concede that Pellon told him he wanted to keep his land. The learned trial judge, very justly as it seems to me, treated this story, in its various elements, as to Pellon's suggestion about the sale of section 23 at the time of the execution of the lease, as to the character of the advance of the $300 in March, and as to Pellon's anxiety to sell in May, as unworthy of credence.

Another feature of the respondent's testimony, concerning the occurrences of the 13th of May, deserves notice. The learned trial judge comments upon the manner in which the respondent meets Pellon's evidence giving an account of his excuse for insisting upon the agreement for sale as a necessary part of the document evidencing the loan.

He seems determined, as the learned trial judge says, to make it appear that Pellon's narrative is wholly baseless. In answer to questions as to what he had told Pellon about his visit to the bank, he insists and reiterates that he did not "have to borrow" from the bank; and, later, that he did not in fact borrow "for such a purpose." He is forced to admit that on that day he did borrow $1,500 from the bank, and that this same amount of money he paid to Pellon in two cheques; but he declares that the loan from the bank had nothing to do with his advance to Pellon. Contrast this with his evidence on discovery:

Q. Did you have to make any arrangement with your banker in order to loan it to him or give it to him or pay it to him?

A. Not necessarily.

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Q. Did you, as a matter of fact, make any arrangements with your banker before you advanced this $1,800 to him?
A. I borrowed some money that day from the bank.
Q. For the purpose of making this advance to Pellon?
A. Yes.

This effort to discredit Pellon naturally affected the learned trial judge unfavourably. I will not multiply instances of such exploits of evasion. After carefully reading Ward's evidence, I am driven to the conclusion that the characterization of Ward by the trial judge, in the following passage, does him no injustice.

But I must say that in my opinion Ward was a very evasive and hedging kind of witness. It was very difficult indeed to get him to answer frankly the questions which were asked, he was anything but a frank witness. He was frank enough with respect to anything which was in his favour but he appeared to have a very keen sense of the situation and with respect to anything which was not in his favour it was extremely difficult to nail him down and get him to answer the questions directly which were asked him.

Ward's counsel emphasizes a letter written on November 15, 1927. Before examining this, one further passage in the evidence of Ward requires attention. I have already mentioned the interview between Ward and Pellon on the occasion of Pellon's visit to Arrowwood after his failure to get an answer to his letter of the 21st of August. Ward discusses the interview several times during his cross-examination. This is one passage in which he gives his account of it:

Q. So you say that all you can think of concerning the reason for Pellon's visit in August, 1927, was to see how the crop was getting along?
A. That is all.
Q. The crop on 25?
A. He just asked about his crop.
Q. His crop?
A. His crop.
Q. Did he mention 25?
A. He didn't mention any particular section.
Q. No, just his crop?
A. Just his crop.
Q. He didn't mention 25 or 23?
A. No, he didn't.
Q. Nothing said about that?
A. No.
Q. But he must have referred to 25, must he not?
A. He simply asked how his crop was, in that way, that is all.
Q. Do you know where he came from to see you at the end of August?
A. No, I don't exactly.
Q. Do you know he motored 800 miles to see you?

A. No, I don't.
Q. Did he tell you that?
A. He told me that. I don't know where he came from.
Q. To see how his one quarter of the crop on Wilson's land was getting along?
A. He came there and asked me about the crop.

In substance this account is repeated more than once. That Ward, having Pellon's letter of the 21st of August before him, could have doubted the object of Pellon's visit, is difficult to believe. That the interview could have been of the character described in this passage seems almost incredible, and the cross-examiner did succeed in dragging out of Ward the admission that Pellon begged him to say that he "didn't mean" the letter of the 15th. To this admission he afterwards adds that he told Pellon he must insist on carrying out the agreement. Here, as elsewhere, Ward's evidence is marked very conspicuously by lack of candour. Further discussion of this interview naturally falls into place with the consideration of the letter of November, to which I now come.

This is a letter written by Mr. Mavor, acting not for Pellon but for Wilson, and in order to appreciate the point made for the respondent, it is necessary to understand the circumstances in which it was prepared. The three quarter-sections of section 25, although owned by Wilson, were, as already stated, in Pellon's name, and executions had been filed against this property under judgments against Pellon. Wilson and Pellon together conceived the idea (Pellon being in debt to Wilson in about $25,000) of getting a settlement with Pellon's creditors at fifty cents in the dollar; and, in order to carry this plan into execution, they contemplated a sale to Ward of Wilson's interest in section 25, which Ward was most anxious to buy. Pellon was then to transfer section 23 to Wilson, and himself drop out. The letter in question was a letter addressed to Pellon's creditors generally, and it stated that Pellon had sold his interest in section 23 to Ward in May, and suggested the likelihood of Ward cancelling his agreement on the return of what he had paid. Pellon and Ward were both aware of the terms of this letter, and the fact that Pellon allowed the despatch of the letter, in these terms, without exception, is relied upon as an admission by him as to the nature of the transaction of May. Whether or not his conduct

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constitutes an admission, depends entirely on the circumstances; because the statement itself could only be evidence against him as imparting significance to his conduct. It must be remembered that Pellon had, by his letter of the 21st of August, taken up his position. Ward had not answered the letter, and if Pellon's evidence is credible, he had, on the occasion of Pellon's visit to him, acted as if he accepted Pellon's view of the transaction of May. Pellon's evidence is explicit that there was an understanding, between him and Ward, that Ward would accept the redemption money of $1,840, while he, on his part, had promised to sell section 23 to Ward on terms to be arranged. Pellon says that Ward offered him $43 an acre; Ward admits that there was some such understanding, but treats the subject with his usual lack of candour. At one time he says he is unable to remember whether or not he offered Pellon $43 an acre, at another that he made such an offer, but that the offer was conditional. Again he admits that he knew Mr. Mavor and Pellon believed that he was going to assent to a fresh arrangement, but avers that he himself had no intention of doing so. Pellon's evidence as touching the letter is that when it was read to him, he raised, in Ward's presence, the question of the suitability of the expressions now relied upon on behalf of Ward, but that, in view of the understanding with Ward, the letter was not thought to be calculated to mislead the creditors to their prejudice. Pellon says that from time to time the subject of the arrangements about section 23 was opened up with Ward, but that Ward insisted on postponing it until the title to section 25 was settled.

In May, 1928, after the creditors had been paid, and the title to section 25 transferred to him, Ward, for the first time, since the letter of August 11, declared to Pellon that he was the owner of section 23. The view of the learned trial judge is expressed in these words:

> I am satisfied that the characteristic that distinguished Ward in the witness box is one of his natural characteristics and that he is not frank, and I am satisfied that he was not frank with Pellon. I accept Pellon's evidence, because, while it was not admitted by Ward, Ward finally, after being closely examined and being closely pressed by Counsel, finally admitted that he had some discussion with Pellon about a new agreement, but he was not prepared to admit that Pellon was right in saying that they were to agree to the terms upon which he would buy the land.

His statement was, that if he felt like it and if he was well off and felt himself well off, or something to that effect, he might, out of generosity, pay Pellon something. I am satisfied that Pellon is telling substantially the truth as to what took place and that Ward hedged and evaded Pellon until he had secured the title to 25 and that he was anxious to do that and that he paid the money voluntarily, his main motive was to get the title to 25 and after he had obtained the title to 25, then he was prepared to stand strictly upon what he considered to be his legal rights and he is standing on those legal rights to-day.

I see no reason to disagree with this, and in this view the letter of November, 1927, is of little importance. All this has a bearing upon another aspect, also, of the case, which has been emphasized by the defence. On the 6th of October, 1927, a receiver by way of equitable execution was appointed, under one of the judgments against Pellon, to receive " the rents, profits and moneys whether payable as rent or purchase price " in respect of sections 23 and 25. In November, Ward entered into an agreement with the appellant and Pellon for the purchase of the appellant's interest in section 25, at the price of $15,000, payable in cash, and $6,000 in promissory notes. The intention was to apply the proceeds of this sale in liquidating the debts of Pellon who was thereafter to convey section 23 to the plaintiff, which was done. Ward paid the whole of the sum of $15,000 to the receiver or to the appellant's solicitors acting as receivers, and it is alleged that he also paid certain additional sums, which it is now contended could only have been payable under the alleged agreement of May. As to this, it is to be observed that Ward, as lessee, was responsible for the payment to Pellon of one-half of the threshed crop on both properties in each year, and, as one-quarter of the crop was payable to the Indian Department, on account of the lessor, the net rental in kind receivable by Pellon under the lease was one-fourth of the crop of 1927, which it appears was not threshed until the summer of 1928. Ward, it should be observed, claimed that the effect of the document of May, 1927, was to put an end to the lease. Obviously, it had no such effect. Ward was not, on his own construction of it, entitled to a transfer of section 23 until the whole of the purchase money had been paid. Until then, he was entitled, under the agreement, neither to possession nor to the benefit of the rents or profits. In December, he estimated the value of the crop on section 23 as $12,000, out of which Pellon

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would be entitled to $3,000 as his share after the payment of the share due to the Government; as to the value of the crop on section 25, we have no information.

Ward, it is to be observed in this connection, did not carry out the terms of the agreement of the 13th of May, even on his own construction of them. According to that construction, $5,000 was payable on the 1st of December. Ward paid $2,000 to the receiver by a cheque, expressed to be in payment of this sum of $5,000, after deducting $3,000, described as payable to the Indian Department as the Government's share of the crop. On Ward's own construction of the document, this sum of $3,000, which would be payable out of Pellon's share of the crop, was plainly not deductable from the instalment payable under the agreement. For this deduction of $3,000 there was no excuse; and on his own view of the transaction of May, Ward was in default after the 1st of December.

The defence as based upon the alleged overpayments could only be sustained on the ground that they were made in circumstances such as to establish a fresh agreement, on the part of Pellon or the appellant, to sell the equity of redemption in section 23 on the terms of the document of May, or an equitable estoppel precluding the appellant from denying the existence of such an agreement. In order to reach such a conclusion, one must find that Pellon's conduct amounted to an assent to such a fresh agreement, or that it was of such a character as to make it a fraud on his part to deny the existence of such an agreement. *Willmott* v. *Barber* (1).

In examining Pellon's and the appellant's conduct, it must not be forgotten that the respondent, as he admits, was aware that Pellon and the appellant believed that the respondent had agreed to accept the redemption price of section 23, on the understanding that there was to be a fresh agreement for sale, on terms to be agreed upon, while he, the respondent, had no intention of carrying out such an arrangement; and that, such being the state of mind of the parties, this matter of section 23 had, at the repeated suggestion of the respondent, been allowed to stand until the title to section 25 was cleared up. In light of this, and

(1) (1880) 15 Ch. D. 96.

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of Ward's default in the payment due (as he alleges) on the 1st of December, and in view of the passage in the judgment of the trial judge just quoted, it would be impossible to hold that the respondent was misled by any conduct of Pellon or the appellant into thinking that they were assenting to a fresh agreement to deal with the equity of redemption in section 23 on the terms of the document of May. The truth obviously is, as the learned judge finds, that the respondent believed he had a binding agreement for sale under that document, which he intended to assert, and was not in any way influenced, in his course of conduct, by anything which either the appellant or Pellon did. I agree with the learned trial judge that the appellant's rights are not prejudiced by any of the transactions subsequent to May.

The appeal should be allowed with costs, both here and in the Appellate Division, and the judgment of the trial judge restored.

Appeal allowed with costs.

Solicitors for the appellant: *Burns & Mavor.*

Solicitors for the respondent: *Ballachey, Burnet, Spankie & Heseltine.*