ORIGINAL (10.

IN THE HIGH COURT OF AUSTRALIA

PARKER

V.

WILLIAMS

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Wednesday, 21st February 1962

W. M. HOUSTON, Govt. Print., Melb.

C.1978/55

PARKER

v.

WILLIAMS

ORDER

Appeal dismissed with costs.

PARKER

v.

WILLIAMS

JUDGMENT DIXON C.J.

PARKER

v.

WILLIAMS

I have found this a difficult case but in the end I have come to the conclusion that the appeal must fail, and substantially for the reasons stated in the judgment of Owen J. which sets out the facts and places upon them an interpretation or complexion which in the state of the evidence appears almost inevitable. One matter which, as it seems to me, stands out is that after July 12th, or at all events 15th, 1958 neither according to the documents nor according to what appears clearly enough to have been the true intention of the parties was the defendant-appellant to be under a personal liability for debt for money lent. The more I have considered the unsatisfying evidentiary materials in the case, whether documentary or oral, the more importance, I have felt, attaches to clause 7 of the agreement of 27th February 1958. Perhaps the clause was an afterthought : that possibility is suggested by the fact that it follows a cancelled testimonium. But, be that as it may, it is consistent with a view of the transaction which may be shortly expressed thus. For reasons of his own the plaintiff wished to put in the form of options his proposal to acquire the shop, fittings and equipment; the defendant on his side was sufficiently assured that the plaintiff would exercise the options or one of them without delay and thus would provide the defendant with the funds he needed; the defendant would be left in possession as a lessee and would retain the right ultimately to take back, if he chose to do it, the shop and

chattels but at a very high premium on the original price paid by the plaintiff. This version of the transaction is in some degree speculative and may go somewhat further than the judgment of Owen J. in which I agree, but in any case it provides the defendant with no answer to this suit.

The appeal should be dismissed.

PARKER v. WILLIAMS

JUDGMENT KITTO J.

I also agree in the judgment of my brother Owen and I have nothing to add.

PARKER

v.

WILLIAMS

JUDGMENT OWEN J.

PARKER

v.

WILLIAMS

This is an appeal against a decree made by Myers J. for specific performance of a contract for the sale of land. The contract of sale upon which the plaintiff's suit was based arose out of the exercise by him on 3rd December, 1959 of an option to purchase the land in question given to him by a written agreement made between the parties on 27th June, 1958 which I will call the option agreement. The defence to the suit was to the following effect. The option agreement was entered into as part of a moneylending transaction in which the plaintiff, a registered moneylender, had lent certain moneys to the defendant. Its purpose was to provide the plaintiff with security over certain of the defendant's assets, including the land the subject of the suit, for the repayment of moneys advanced and interest thereon, a repayment which the defendant by his statement of defence offered to make. If the plaintiff was permitted to exercise the option to purchase the land in question, the security would become irredeemable. The option agreement therefore created a clog upon the defendant's equity of redemption and, in these circumstances, equity would not recognize or enforce any right in the plaintiff to exercise the option. It was claimed also that the contract of loan was not made in accordance with the requirements of Section 22 of the Moneylenders & Infants Loans Act and was unenforceable and that, for this reason, the suit must fail.

The oral evidence given by the defendant in support of the defence and that given by the plaintiff in denial of it differed greatly and it is necessary to examine the conflicting versions with care in order to determine what were the true facts. The plaintiff was a grazier in the Bathurst district and was also a registered moneylender while the defendant carried on business at 65 William Street, Bathurst as a butcher in a building erected on land of which he was the registered proprietor and which was mortgaged to an insurance company to secure the repayment of a loan of £5,000. In his butcher's shop there was a quantity of plant and equipment some of which the plaintiff owned and some of which was held by him under a hire purchase agreement under which in June 1958 £1,313 remained to be paid to complete the hiring. Much of the oral evidence of the events surrounding the making of the option agreement of 27th June and the execution of certain other documents on that day and thereafter was far from clear, but that given by the plaintiff accorded reasonably closely with the documentary evidence. The defendant's evidence, on the other hand, was most confused and the impression left on my mind after much reading of the transcript is that, although he was endeavouring to give an honest account of the transactions in which he found himself involved, he had little or no real understanding of them. He trusted the plaintiff and the solicitor who was acting in the matter for them both and signed whatever he was asked to sign with but little appreciation of the real nature of the transactions. The only other witness who was called was one who might have been expected to be able to throw light on the matter. He was a Mr Peacocke, the solicitor who prepared the documents. He had been the solicitor for the plaintiff but was acting for both parties in these transactions and, although they were of an unusual kind and had taken place only three

years before the suit was heard, he said that he had little or no independant recollection of what had occurred.

It is clear enough that shortly before the 27th June the defendant was anxious to raise money in order to pay a debt which he owed. He wished also to remain in possession of his butcher's shop and to continue to carry on his business there. According to the plaintiff, the defendant proposed to him that he, the plaintiff, should buy the land and the building thereon together with the plant fittings and fixtures for £8,500 of which £5,500 was to represent the price of the land and £3,000 the price of the plant etc. He suggested further that if the plaintiff bought these assets he should allow the defendant to remain in possession under a lease for a long period at a rental not exceeding £20 per week. The plaintiff, after making inquiries of his bank to see if it would advance him the money for this purpose, told the defendant that it would not do so and suggested that he find a buyer elsewhere. The defendant replied that he could easily find another buyer but that in that event he would have to give vacant possession and would be unable to carry on his business. According to the plaintiff, the defendant then suggested that he should take an option to purchase the land and a further option to purchase the plant etc. and that, if he did so, the option to purchase the plant should be exercised first and without delay and that the exercise of the option to buy the land should be left until later. The plaintiff said that he decided to agree to the defendant's proposition and so informed the defendant and told him that when he could find the money he would exercise both options. His evidence suggests that, if he could not raise the necessary finance from his bank, he intended to find the money by selling some shares since he regarded the proposal as offering a good investment. The

parties then went to see the solicitor, Mr Peacocke, and explained the proposal to him and instructed him to draw up the necessary documents. A few days later the defendant again saw the plaintiff and said that he needed £1,500 of the £3,000 which would be payable by the plaintiff on the exercise of the proposed option to buy the plant and asked the plaintiff to lend him £1,500. They again visited the solicitor who advised the plaintiff against making the loan. The defendant however explained the urgency of his need and gave an assurance to the solicitor that he would sign the option agreement which was then in course of preparation. The plaintiff accordingly agreed to make a loan of £1,500 to be secured by a bill of sale over the plant and by a second or perhaps a third mortgage (it is not clear which) over other land owned by the defendant. According to the plaintiff the arrangement was that when the option agreement was completed and the option to purchase the plant exercised by him, the £1,500 lent by him to the defendant was - to use the plaintiff's words - "to be part of the purchase money" or "to be incorporated in the purchase price". On 27th June, 1958 three documents were signed in the solicitor's office and £1,500 was paid by the plaintiff to the defendant. One of the documents was a trader's bill of sale over the defendant's plant, stock in trade and the goodwill of the business to secure the repayment of £1,500, the term of the loan being expressed to be for two years with interest at 12½%. The others consisted of a second (or third) mortgage over the defendant's other land, not being the land on which the butcher's shop stood, given as collateral security for the repayment of the £1,500 and of the option agreement. This recited that the defendant was the owner of the land on which the butcher's shop stood and of certain plant described in a

schedule to the agreement and was purchasing by way of hire purchase certain other plant described in another schedule. By Clause 1 it was provided that in consideration of £5 paid (as it in fact was) by the plaintiff to the defendant the latter agreed to give the former an option to purchase the land for £5,500 and to purchase the plant described in the two schedules for £3,000, the options being exercisable in writing within two years from the making of the agreement. Clause 2 provided that the options might be exercised independently or together and should "not be confined to one or the other or both". In the event of the plaintiff exercising both options Clause 3 required him to grant to the defendant a lease of the land and the plant for a term of five years at a rental of £20 per week with an option of renewal for a further term of five years, the lease to be in the form of a document then initialled by the parties. Clause 4 provided that the exercise of the option to purchase the plant should be conditional upon the plaintiff leasing it to the defendant for two years at a rental of £8 per week. And, by Clause 6, if the plaintiff exercised that option the £1,500 secured by the bill of sale was to be immediately repayable and to be "utilized" towards the £3,000 payable as the price of the plant. Clause 5 dealt with the position which would arise if the plaintiff should exercise the option to buy the land at a date later than that upon which the option to buy the plant was exercised. It provided that in that event the rental of £8 per week mentioned in Clause 4 of the agreement should become merged in the rental of £20 per week which would be payable under the lease contemplated by Clause 3 and the term of two years mentioned in Clause 4 should be read as five years. By this I take it that it was intended that if the option to buy the land was exercised after the option to buy the plant a

lease for five years at £20 per week with an option of renewal for a further five years covering both land and plant should take the place of the lease of the plant for two years at a rental of £8 per week. Finally the agreement provided, by Clause 7, that if both options were exercised by the plaintiff the defendant should be entitled to repurchase the land and plant for £11,500, such option of repurchase to be exercisable only within two months prior to the termination of the lease contemplated by Clause 3. The documents having been signed, the solicitor sent the bill of sale and the second (or third) mortgage to Sydney for registration and the mortgage was registered but the bill of sale was not. On 12th July, 1958 the parties entered into a further written agreement which recited that the plaintiff had exercised his option to purchase the plant for £3,000. It went on to provide for a lease of the plant from the plaintiff to the defendant for two years at a rental for the term of £832 payable at the rate of £8 per week. Of the purchase price of £3,000 the amount of £1,500 already paid by the plaintiff to the defendant on 27th June was, in accordance with the option agreement, treated as part payment of the purchase price. Following the execution of this document on 12th July the bill of sale was withdrawn from registration and the second (or third) mortgage was discharged. On 15th July the balance of the purchase price of the plant, namely £1,500, was paid by the plaintiff discharging the defendant's indebtedness of £1,313 to the hire purchase company and paying the balance into the defendant's bank account. A few days later the defendant told the plaintiff that he needed a further £500 to reduce his overdraft and asked the plaintiff for it, suggesting that the price payable by the plaintiff for the land under the option agreement should be reduced by £500 and that the price already paid for

the plant should be increased by £500. The plaintiff agreed to this proposition and on 21st July a further agreement in writing, prepared by the solicitor, was signed. It recited the making of the option agreement and of the agreement of 12th July and went on to amend the option agreement by altering the price of the plant from £3,000 to £3,500 and reducing the price of the land from £5,500 to £5,000. It provided also that wherever the words and figures "eight pounds (£8.0.0)" were mentioned in that agreement the words and figures "ten pounds (£10.0.0)" should be substituted. It also amended the agreement of 12th July, by providing that wherever the sum of £832 was mentioned in that agreement the sum of £1,040 should be substituted for it, and that wherever £8 was mentioned in that agreement £10 should be substituted for it. The plaintiff then paid to the defendant the sum of £500 for which he had asked.

This, as I understand it, was the case which the plaintiff sought to make. The substance of it seems to me to be that the loan of £1,500 made by the plaintiff to the defendant on 27th June secured by the bill of sale and the second (or third) mortgage was to be treated as a purely temporary measure to operate only until the plaintiff exercised his option to buy the plant, both parties knowing that he intended to do as soon as he had the money available. When that option was exercised, as both parties knew it would be, the loan of £1,500 was notionally repaid and applied by the plaintiff in part payment of the price of the plant. The balance of the price was paid by the plaintiff discharging the defendant's indebtedness to the hire purchase company and paying the balance into his bank account. When the defendant later required another £500, the price of the plant was increased by that amount and the price payable for the land

was correspondingly reduced, the option agreement being amended accordingly and the rental for the plant being increased so as to provide an additional return to the plaintiff on his increased outlay on the plant.

The defendant's evidence was that he had, on two earlier occasions, borrowed money from the plaintiff. He said that in June 1958 he needed £1,500 to repay a loan which was about to fall due and asked the plaintiff to lend him the money. He told the plaintiff that he could give security in the form of a second or third mortgage over some land which he owned, not being the land on which the butcher's shop stood, and that he had unencumbered plant and fittings in the shop to the value of about £1,000 and other plant held on hire purchase on which about £1,500 remained to be paid to complete the hiring. The plaintiff told him that he would consider the matter. A few days later the defendant again spoke to the plaintiff as a result of which an appointment was made for them both to see Mr Peacocke. They met at the solicitor's office where the defendant repeated what he had already told the plaintiff about the security that he could make available against the proposed loan of £1,500. He says that the plaintiff agreed to lend the money and the solicitor was told to prepare the necessary documents. His evidence suggests that at this meeting the arrangement come to was that the plaintiff would pay the defendant £1,500 by way of loan and would also pay off the amount, then thought to be £1,500 but later shown to be £1,313, remaining to be paid for the plant held on hire purchase and that the repayment of the total of both these amounts, should be secured by a bill of sale over the plant with interest at the rate of £8 per week, but this is not what the bill of sale in fact provides. The defendant said also that he thought the loan was to be repayable in two

to three years time. He says that a few days later the parties again visited the solicitor when the bill of sale, the second (or third) mortgage and the option agreement were signed. He said that he signed this last agreement "because the option in the agreement, according to Mr Williams, was necessary to be signed so as to give him a safe security over his loan - the money he was lending me - and it was the only way in which I could obtain the money - by signing the agreements as they had been drawn up. I could not get it any other way". He was asked how the figure of £11,500, being the amount at which the option to repurchase might be exercised, was arrived at and said:

> "Yes; the £11,500 - it was part of the money made up of the £3,000 - the £1,500 that I had borrowed and the amount of money that had been paid to Stuart Walker" (the hire purchase company) "and the further £500 which we have not come to, was borrowed, plus an extra £3,000 which Mr Williams said I would have to pay to regain possession of the property, at the expiration of the time that the money had to be paid - that is how that £11,500 was made up".

In this respect the witness was obviously very confused. No question had arisen up to this time of a further sum of £500 being paid to him by the plaintiff. I would have thought that it was clear enough that the figure of £11,500 mentioned in the option agreement was arrived at by taking the original £3,000 purchase price of the plant (later altered to £3,500) and the original £5,500 purchase price of the land (later altered to £5,000) together with £3,000 representing either part of the consideration for the loan of money, as the defendant's evidence suggested, or else representing, as the plaintiff said, an estimate of the possible or probable future increase in the value of the land. The defendant went on to say that a few days after the documents had been executed and the £1,500 paid to him, he again saw the plaintiff and Mr Peacocke. He said that it was explained to

him that the bill of sale could not be registered because a caveat had been lodged by a company to which a small amount of about £32 was owing by the defendant but that this difficulty could be overcome by drawing up another agreement "which would still mean the same thing, and cover the securities for Mr Williams". This new agreement is apparently the one dated 12th July by which the plaintiff exercised the option to purchase the plant etc. and leased it back to the defendant for two years at a rental of £832 for the term, payable at the rate of £8 per week. Of this agreement the defendant said:

> "Yes; the agreement drawn up at this particular time to overcome the matter of the bill of sale, was to sell the plant and fittings to Mr Williams instead of the bill of sale, because the bill of sale could not be registered, and as he said that it would make no difference as far as I was concerned - it would just cover the same thing".

The defendant said that some days later he was required by his bank to reduce his overdraft by £500 and asked the plaintiff to lend him the money. They again visited Mr Peacocke. There the plaintiff agreed to lend the £500 and it was in fact paid to the defendant's account and the agreement of 21st July was signed by which the price of the plant was increased by £500, the price of the land was reduced by that figure and the amount of £8 per week payable under the lease of the plant was increased to £10 per week. As to this the defendant said:

> "I said to Mr Williams that it did not make any difference to me how he put the £500 in and I was agreeable to paying the extra £2 a week interest, which meant that I was paying £10 a week instead of £8. Mr Williams then asked Mr Peacocke to draw up another agreement for the loan of the £500 and the agreement was drawn up by Mr Peacocke, which I signed probably within the next day or two after that, and Mr Williams advanced the extra £500".

The learned judge of first instance made no express finding as to the credibility of the witnesses but the view which he took of the facts coincided more with the plaintiff's version than with that given by the defendant. In the result

it appeared to his Honour that "the parties did not intend that the loan of £1,500 should be treated as a mortgage transaction at all if the option should be exercised before redemption. In that event they intended the advance to be in the nature of a prepayment and the transaction would only take on the substance, and the nature of a mortgage transaction if the option should not be exercised". In these circumstances his Honour said "one does not reach the stage of considering whether the transaction amounted to a clog on the equity or to an invalid collateral advantage; but even if that view be incorrect I am of the opinion that there was no clog and no invalid collateral advantage in this case. In the intention of the parties there were two separate transactions - the grant of an option and the loan of a sum of money. They had agreed on the option and on its terms before there was any suggestion of a loan, and when the loan was agreed to, the security that the defendant intended to give and that the plaintiff intended to accept, was the property subject to the option and not the property unfettered in any way at all". His Honour therefore held that the defence failed and that the plaintiff was entitled to a decree for specific performance.

While I agree with his Honour's ultimate conclusion, I differ in some respects from the interpretation which he placed upon the evidence. The true position was, in my opinion, that the bill of sale and the second (or third) mortgage were intended merely to provide temporary security for the loan of £1,500 pending the exercise by the plaintiff of the option to purchase the plant. When that option was exercised, the loan transaction came to an end and thereafter the rights and obligations of the parties were to be found in the option agreement as later amended when the further £500 was paid to the defendant. In these circumstances the option agreement

was not intended to provide the plaintiff with security for the repayment of moneys lent but was what, on its face, it purported to be, and the fact that the Moneylenders & Infants Loans Act was not complied with when the bill of sale was executed is of no significance.

This view of the facts accords with the documentary evidence and finds strong support in the undisputed fact that when the option to purchase the plant was exercised the bill of sale was withdrawn from registration and the second (or third) mortgage was discharged. Furthermore if the purpose of the option agreement was to provide security for the repayment of money lent, it is impossible to understand why its only reference to the loan of money and the repayment thereof was that contained in Clause 6 which provided that on the exercise of the option to purchase the plant the loan of £1,500 should be immediately repayable and should be applied in part payment of the price of the plant.

Counsel for the defendant directed our attention to a number of matters which, he argued, supported his submission that the transaction was in reality one of mortgage. He pointed to the fact that the solicitor's costs were required to be paid by the defendant and this, he submitted, afforded evidence that the transaction was one of mortgage. In this connection he referred us to Coote's Law of Mortgages 8th Ed. p. 26 and the cases there cited. In the circumstances of the present case the fact that the defendant paid the costs seems to me to carry his case no further. On any view of the facts he was the party who was in pressing need of money to meet his obligations and it is not surprising in these circumstances that he was required to pay the costs of preparing the necessary documents.

Counsel referred also to the fact that the interest

payable under the bill of sale was 12½% per annum and said that the figure of £8 per week which the option agreement fixed as the rental for the lease of the plant when its purchase price was £3,000 and the figure of £10 per week, which was substituted for £8 per week when the purchase price was increased to £3,500, represented approximately 12½% on those sums, but that submission requires a very wide meaning to be given to the word "approximately". Eight pound per week is £416 per annum and 12½% on £3,000 is £350 per annum; £10 per week is £520 per annum and 12½% on £3,500 is £442 per annum. Counsel also drew our attention to the plaintiff's evidence which seemed to show that he had made only perfunctory inquiries as to the value of the plant and of the land with which the option agreement dealt. But this does not seem to me to carry the matter any further. In the first place, the plaintiff lived near Bathurst and it may well be that he had a good general idea of values. Added to that is the fact that he had known the defendant for some time and may have been disposed to accept his statements as to the value of the plant and the land. Finally the fact that he apparently did not investigate those values in any detail seems to me to be consistent with either view of the facts.

For all these reasons I am of opinion that the appeal fails and should be dismissed with costs.