AUGUSTA MARIA CASSELL, Appellant, *v.* C. WELLINGTON CAMPBELL, deceased, substituted by his widow, EMMA L. CAMPBELL, Sole Executrix, Appellee.

APPEAL FROM THE CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued June 4, 1975 Decided June 27, 1975.

1. A pleading may once be amended at any stage of the proceedings before the case is tried.
2. The party filing the last pleading is entitled to move the court first on any legal defect in his adversary's pleading.
3. No party may assign as error the giving or the failure to give instructions unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.
4. Whether a conveyance, assignment, or other instrument transferring an estate is a security for money or a mortgage must be determined from the original intention of the parties, whether this intention appears from the same, or any other, instrument.
5. In an ejectment action the plaintiff has the burden of proving his title.
6. A deed cannot be varied by oral testimony.
7. The statute of frauds provides that all deeds, agreements, or contracts relating to the sale, transfer, or exchange of real property shall be in writing.
8. Where a party not under legal disability stands by and allows property, which he claims, to be conveyed, titles perfected, and adverse possession taken without objecting at the proper time, he is afterword estopped from raising his claims or disturbing the peaceful possession of the occupant.
9. A wife may be estopped from subsequently asserting dower interest when she joins with her husband in a valid conveyance of land.

In 1946, appellant's husband came into possession of the property at issue, which was conveyed by appellant and his wife to a purchaser, who, in turn, conveyed to appellee. Appellant, who survived her husband, brought an action of ejectment against appellee in 1971, to recover the property conveyed, alleging she was entitled to dower therein, resting her argument on the contention that the conveyance, in 1946, was security for a loan and consequently the instrument amounted only to a mortgage, leaving her right of dower intact. After trial, a

verdict was returned against the appellant, who excepted and appealed from the judgment.

The Supreme Court ruled that in the face of the claim raised by appellant, it was necessary to measure all surrounding facts and circumstances to determine the intent of the parties in the 1946 conveyance by appellant and her husband. It was clear, the Court maintained, that the parties intended to convey the property and not mortgage it. The judgment was *affirmed*.

T. Gyibli Collins for appellant. *Philip J. L. Brumskine* for appellee.

MR. JUSTICE HENRIES delivered the opinion of the Court.

According to the record, the appellant's husband, James D. Cassell, Sr., came into possession of Lot No. 13 situated on Benson Street, Crown Hill, Monrovia, by virtue of an administrator's deed, after the death of his father, Dr. Nathaniel H. B. Cassell, who died intestate. On September 3, 1946, appellant and her husband executed a deed for this property to William V. S. Tubman, Sr., who, with his wife, Antoinette, deeded the property to C. Wellington Campbell, on May 31, 1962.

Appellant's husband died in 1968; William V. S. Tubman died in office as President of Liberia in 1971; and appellant brought this action of ejectment against C. Wellington Campbell on December 8, 1971, to recover the said Lot No. 13, alleging that her late husband was possessed of, and she was entitled to her dower in, this parcel of land which was being unlawfully detained from her. C. Wellington Campbell died in 1972, and was substituted by his widow, the executrix, and A. B. Cummings, the executor. The action was tried in the Civil Law Court for the Sixth Judicial Circuit, Monrovia; a judg-

ment was rendered in favor of the appellee. Appellant excepted and appealed to this Court.

The appellant filed a five-count bill of exceptions which, in our opinion, raised three issues, and which, in essence, are: (1) whether the transfer deed executed by appellant and her late husband constituted an absolute transfer or a mortgage; (2) was it error for the trial judge to charge the jury that "whenever there exists a written instrument for the re-transfer of property given to secure payment of a loan, it is a mortgage"; in the absence of which it is not a mortgage?, and (3) did the trial judge err when she denied appellant's motion to dismiss, which was filed after appellee had withdrawn her answer and filed an amended answer to which no responsive pleading was filed? We shall traverse these issues in reverse order.

With respect to the last issue, the record shows that the appellee filed an answer on December 17, 1971; appellant filed her reply on December 28, 1971; appellee withdrew her answer on April 20, 1972; the appellant did not file an amended reply, but filed a motion to dismiss the amended answer. In argument before this Court, the appellant contended that the appellee could not withdraw and file an amended answer five months after the pleadings had rested; that appellee did not give appellant notice of the filing of the amended answer which merely inserted "new matter" in the form of the transfer deed executed to appellee's husband. Therefore, the trial judge should have granted the motion to dismiss.

The relevant portion of the statute on amended pleadings is contained in our Civil Procedure Law.

> "*1. Amendment to pleading permitted.* At any time before trial any party may, insofar as it does not unreasonably delay trial, once amend any pleading made by him by:

"(a) Withdrawing it and any subsequent pleading made by him;

"(b) Paying all costs incurred by the opposing party in filing and serving pleadings subsequent to the withdrawn pleading; and

"(c) Substituting an amended pleading.

"*2. Pleading in response to amended pleading.* There shall be an answer or reply to an amended pleading if an answer or reply is required to the pleading being amended. Service of such an answer or reply shall be made within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders." Rev. Code 1:9.10.

We interpret this section as permitting amendment to a pleading once at any stage of the proceedings before the case is tried. Indeed, this has been the procedure in our courts for a number of years. See *Harmon* v. *Woodin & Co., Ltd.*, 2 LLR 334, 336 (1919); *United States Trading Co.* v. *King*, 14 LLR 579 (1961). We must also note that the appellant has neither alleged nor shown that an unreasonable delay was caused by, or that prejudice resulted from, the amended answer.

As to appellant's contention that the appellee did not follow the procedure in the case of newly discovered evidence, as set forth in section 9.11 of the Civil Procedure Law, when she amended her answer and filed the transfer deed from the Tubmans to C. Wellington Campbell, we do not see the relevance of the section on newly discovered evidence. The deed was pleaded in, but not filed with, the answer because it could not be found; when the answer was withdrawn, the deed was filed with the amended answer. The deed having been pleaded in the answer, it cannot be regarded as newly discovered evidence merely because of its being repleaded in, and filed with, the amended answer.

As to the filing of a motion to dismiss the defendant's amended answer upon alleged defects therein, we must state that under our practice the party filing the last pleading is entitled to move the court first on any legal defect in his adversary's pleading. A party will not be permitted to move the court on any legal defect in the pleading of his adversary to which the attention of the court had not been previously called by some regular pleading. See *Horace* v. *Harris,* 9 LLR 372 (1947); and *Gould* v. *Gould,* 1 LLR 389 (1903). Therefore, for these reasons the trial judge did not err in denying the motion to dismiss the amended answer.

The second issue deals with the trial judge's charge to the jury, specifically that portion of the charge which states that "whenever there exists a written instrument for the re-transfer of property given to secure payment of a loan, it is a mortgage, in the absence of which it is not a mortgage." We observe from the record that the appellant excepted to the charge without specifying the matter to which she objected, contrary to our Civil Procedure Law, Rev. Code 1:22.9, which provides that "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Furthermore, we do not find this particular portion of the charge to be erroneous, as will be seen later from our traversal of the last issue.

In order to properly traverse the issue of whether the deed executed by appellant and her late husband constituted a mortgage or an absolute transfer, it might be necessary to recount the following facts: appellant's husband came into possession of Lot No. 13 upon the death of his father; appellant and her husband executed a deed to William V. S. Tubman conveying the parcel of land; sixteen years later William V. S. Tubman and his wife executed a deed for the said lot to C. Wellington Campbell,

husband of the appellee; nine years after appellant and her husband had executed a deed in favor of Mr. Tubman, appellant brought this action claiming her right to dower in Lot No. 13, and contending that the deed executed by her and her husband was a mortgage.

This Court, ever since *Saunders* v. *Gant,* 3 LLR 152 (1930), has consistently held that whether a conveyance, assignment or other instrument transferring an estate is a security for money, or a mortgage, must be determined from the original intention of the parties, whether this intention appears from the same, or any other, instrument; and a deed absolute in form will be regarded merely as a mortgage if at the time of the conveyance the parties entered into a separate agreement that the deed was designed to operate as a mortgage.

Recourse to the deed from appellant and her husband to William V. S. Tubman, shows that the granting clause states clearly that appellant and her husband "do hereby give, grant, bargain, sell and convey unto the said William V. S. Tubman, his heirs and assigns," Lot No. 13. Equally clear is the habendum clause which states: "To have and to hold the above granted premises to the said William V. S. Tubman, his heirs and assigns to his and their use and behoof forever." The clause is followed by an express convenant "to warrant and defend the same." The deed does not show that the conveyance was made to secure the payment of a debt; and there was no separate agreement entered into between the parties to this effect.

To assist us in determining the nature of the transaction between appellant and her late husband, the late William V. S. Tubman, we quote two letters that were proferted by the appellee with her amended answer. The first letter is from appellant's husband to C. Wellington Campbell, appellee's husband.

"Bushrod Island.
"16th April 1958

"My dear 'C. Wellington',

"What my wife and I talked with you last Saturday at my house during the time we were playing Scrabble concerning our ardent desire to repurchase from you the lot on Benson Street (Crown Hill) which we sold to President Tubman, you indicated that we would hear from you after giving the matter consideration.

"We confirmed the proposal made to you to survey the lot situated in Oldest Congotown in addition to payment of $60.00.

"As I explained to you this is the only piece of realty from my late father of sacred and sainted memory which has descended to me situated in Monrovia, I should not have sold it, but circumstances beyond my control impelled my doing so. I am sure you will agree with me that there is cogent reasons why I should do everything in my power to recover the same property.

"I am the first to recognize the fact that President Tubman came to my rescue in the nick of time, failing which, I do not know what my plight would have been at the time. But he has relinquished his right to you in the property, you would certainly be doing great favor, for which I shall be eternally indebted to you. Please give this matter favorable consideration.

"Where are we playing this weekend? Is it Clark's or Edwin Cooper?

"Personal regards,

"Friendly,

[Sgd.] JAMES D. CASSELL, SR."

The second letter is from appellee's husband to James D. Cassell, Sr., appellant's husband.

"Carey & Lunch Streets,
Monrovia, Liberia.
"April 19, 1958

"Dear 'Jim',

"After careful consideration of your approach to me to repurchase the lot given to me as gift for my

graduation from College by President Tubman, as I explained to you and Gus, it is most embarrassing to give the matter favourable consideration.

"In the first place, this is a gift from my Godfather upon my completion of College. For me to part with this property without his knowledge and consent would seem lack of appreciation.

"Next, even though he placed me in possession of the property in 1949 physically and I am exercising authority over it, I have not been given a deed and hence cannot convey the property by deed.

"If you explain your position to President Tubman and he calls me in and requests that I cooperate, I would be in a position to make a decision.

"Because of the above explanation, I cannot do anything in this matter. I trust you understand my position.

"We shall be playing at Clark's on Saturday.

"Regards to Gus and you.

"Friendly,

[Sgd] C. WELLINGTON CAMPBELL."

Taking the letters one at a time, we observe that the letter from appellant's husband was written twelve years after he and his wife had, to use his word, "sold" the property to William V. S. Tubman, and four years before Mr. Tubman and his wife had conveyed the property to appellee's husband. Moreover, the letter was not written to Mr. Tubman, his grantee, but to appellee's husband, who at that time had not legally come into possession of Lot No. 13. Even more important is the fact that even though appellant's husband did express a desire to repurchase the property, he gave as his reason for wanting to repurchase, the fact that "this is the only piece of realty from my late father of sacred and sainted memory, which has decended to me situated in Monrovia. I should not have *sold* [emphasis supplied] it, but circumstances beyond my control impelled my doing so."

The second letter was from appellee's husband, written three days after the first letter and it points out correctly that, even though he was exercising authority over the property, he could not convey the property to appellant's husband because he had no deed for it. He, therefore, suggested that the question of repurchasing the property be discussed with President Tubman. Here again, after a careful perusal of these letters, the only documentary evidence which throws some light on the deed, we have been unable to discover any intent among the parties to create a mortgage. In the absence of sufficient evidence to indicate such intent, we must hold that the conveyance was a sale. See *Brown* v. *Settro,* 8 LLR 284 (1944); *Bryant* v. *Harmon,* 12 LLR 330 (1956); *Carew* v. *Jessenah,* 13 LLR 168 (1958).

Even though the appellant offered written evidence of an intent to create a mortgage, she, together with her two witnesses, Albert Nebo and Joseph Brent, testified that appellant's husband told them that the property was mortgaged or being held as security for a debt. Assuming this to be true, such evidence is hearsay and, hence, inadmissible. But even if it were admissible, it is settled that parol evidence cannot ordinarily be received to vary or contradict the terms of a written contract. Rev. Code 1:25.9; *Butchers' Association of Monrovia* v. *Turay,* 13 LLR 365 (1959). In an ejectment action, the plaintiff has the burden of proving his testimony. *Neal* v. *Kandakai,* 17 LLR 590 (1966).

Appellant's counsel argued that the mortgage was created by a verbal arrangement, but can a verbal agreement be permitted to defeat the title created by deed? We hold that it cannot, for the statute of frauds provides that all deeds, agreements, or contracts relating to the sale, transfer, mortgage, exchange or otherwise of real property shall be in writing; and the Property Law contained in the 1956 Code 29:2, provides that such documents or agreements shall be registered and probated within four

months from execution. As the late Judge Edward Summerville correctly observed, it is impossible to probate and register spoken words. Therefore, even if there were a verbal agreement between appellant's husband and President Tubman, no oral contract relating to realty can be permitted to set aside title conveyed by a duly probated and registered deed. See *Massaquoi* v. *Republic,* 8 LLR 112 (1943).

We have already pointed out that the appellant and her late husband signed the deed which conveyed Lot No. 13 to President Tubman without any indication that the deed was security for a loan. We have observed further that neither appellant nor her husband objected to the probation of their deed to President Tubman or to the deed from President Tubman to Mr. Campbell, even though they knew, as evidenced by the letters quoted above, that Mr. Campbell did expect a future interest in the property. If they had objected timely to the probation of either deed, such objection might have led to a clarification of the nature of the transaction since, indeed, Messrs. Cassell and Campbell and President Tubman were alive. Their failure to object to the instrument being probated strengthens appellee's contention that the transaction was a sale. *Dennis* v. *Holder,* 11 LLR 14 (1951).

Moreover the plea of estoppel, as raised by appellee, is a good plea, and will prevent a party from denying his own acts, if well-founded. Over a hundred years ago, this Court in *Blunt* v. *Barbour,* 1 LLR 58 (1872), said that where a party not under legal disability stands by and allows property which he claims to be conveyed, title perfected, and adverse possession taken, without objecting at the proper time, he is afterward estopped from raising his claims or disturbing the peaceful possession of the occupant. See also *Reeves* v. *Hyder,* 1 LLR 271 (1895); *McAuley* v. *Madison,* 1 LLR 287 (1896); *Johnson* v. *Beysolow,* 11 LLR 365 (1954).

We also discovered from the record of the trial that as administratrix of her late husband's estate, appellant and her son, James, as administrator, made no reference whatsoever to Lot No. 13 being a part of the intestate estate. In fact, in count 3 of their petition to close the estate, they stated: "that the intestate left a dwelling house in the City of Monrovia and fifty acres of land in the settlement of Paynesville which are left to all of the heirs of the said James D. Cassell and which are presently under the guardianship of the widow for her natural life according to the dying testimony of the intestate." The fact that Lot No. 13 is not mentioned as part of the intestate estate leads to the conclusion that appellant, being a signatory to the deed, knew that her husband had parted with title to the property during his lifetime and, therefore, did not die seized of it.

Moreover, it is difficult to understand how appellant expected to successfully claim that she is entitled to dower in Lot No. 13, when she, by executing the deed with her husband, had relinquished her right to dower. According to 17 AM. JUR., *Dower,* § 107, "a wife may be estopped from subsequently asserting dower interest where she joins with her husband in a valid conveyance of land." See also *Cole* v. *Dixon,* 6 LLR 301 (1938). See also 25 AM. JUR. 2d, *Dower and Curtesy,* §§ 115, 133.

Finally, we must conclude that in view of the facts and circumstances attending the transaction involving Lot No. 13, the evidence adduced at the trial, and the law cited herein, the transaction was in the nature of a sale and not a mortgage, and that the appellant, having joined in the conveyance, and having failed to prove the essential allegations of her complaint, is not entitled to dower interest in the said parcel of land. Therefore, the judgment of the lower court is affirmed, with costs against the appellant. And it is hereby so ordered.

Affirmed.