1957 *Present:* Basnayake, C.J., Pulle, J., K. D. de Silva J., T. S. Fernando, J., and L. W. de Silva, A.J.

W. N. WILLIAM FERNANDO, Appellant (in Appeal No. 99), *and* N. ROSLYN COORAY, Respondent

S. C. 99—D. C. Colombo, 6,639/L

H. W. H. SIRIWARDENA *et al.*, Appellants (in Appeal No. 476), *and* W. D. SARNELIS *et al.*, Respondents

S. C. 476—D. C. Gampaha, 3,604/C/D

Vendor and purchaser—Sale of immovable property—Reservation of condition for re-conveyance—Parol evidence of a mortgage—Admissibility—Evidence Ordinance, ss. 21, 92 (provisos 1 and 6).

Held (BASNAYAKE, C.J., dissenting), that in the absence of any allegation of fraud or trust, it is not open to a party, who conveys immovable property for valuable consideration by a deed which is *ex facie* a contract of sale but subject to the reservation that he is entitled to re-purchase it within a stipulated period on the repayment of the consideration together with interest thereon, to lead parol evidence of surrounding circumstances to show that the transaction was not a sale but a mortgage. Such parol evidence, even if admitted without objection, would offend the provisions of section 92 of the Evidence Ordinance and cannot be acted upon.

APPEALS from a judgment of the District Court, Colombo, and a judgment of the District Court, Gampaha. These two appeals were referred to a Bench of five Judges under section 51 (1) of the Courts Ordinance.

H. W. Jayewardene, Q.C., with *G. T. Samerawickreme, B. S. C. Ratwatte* and *N. R. M. Daluwatte*, for plaintiff-appellant in Appeal No. 99.

E. B. Wikramanayake, Q.C., with *A. L. Jayasuriya, Colin Mendis* and *E. D. Wikramanayake*, for the defendant-respondent in Appeal No. 99.

A. M. Ameen, with *M. Hussein*, for the plaintiffs-appellants in Appeal No. 476.

C. V. Ranawake, with *A. Nagendra*, for the 2nd and 3rd defendants-respondents in Appeal No. 476.

Cur. adv. vult.

[The following judgment was delivered in Appeal No. 99 :—]

November 18, 1957. K. D. DE SILVA, J.—

The plaintiff-appellant purchased the two small allotments of land which form the subject matter of this action on deed No. 407 dated November 3, 1941 (D1) for a sum of Rs. 300. By deed No. 2560 of August

2——J. N. B 680—1,593 (12/57)

18, 1950 (P1) he sold and transferred the same to the defendant-respondent for a consideration of Rs. 3,407/87, subject to a condition, in the following terms :— " To have and to hold the said premises hereby sold and conveyed with the rights and appurtenances unto the said vendee and her heirs, executors and administrators and assigns absolutely forever subject however to the condition that she shall reconvey the said premises to the vendor within two years from this date at the cost of the vendor if he shall repay to the vendee or her aforesaid the sum of Rs. 3,407/87 together with interest at 15% per annum from this date and until such payment the vendor shall be in possession of the same. "

The plaintiff having failed to pay the sum of Rs. 3,407/87 within the stipulated period which expired on August 18, 1952, the defendant entered into possession of the lands thereafter.

In his action which was instituted on September 16, 1952, the plaintiff alleged that he " was always of the impression " that the deed P1 was given as security for the sums of money borrowed by him from the defendant and he pleaded that this deed was really a document to secure the repayment of money. In the prayer, he asked, *inter alia*, that the deed P1 be declared a security and not a transfer and that he be restored to possession of the lands.

The defendant in her answer averred that the deed P1 was an outright transfer subject to the condition set out therein and that on the failure of the plaintiff to comply with that condition she lawfully entered into possession of the lands.

The case proceeded to trial on several issues and the learned District Judge held that the deed P1 was an outright transfer subject to the vendor's right to claim a re-conveyance within two years on the payment of the stipulated sum. He also took the view, relying on the decision in *Setuwa v. Ukku* [1], that it was not open to the plaintiff to seek to vary the unambiguous terms of the deed P1 by attempting to show that it is something other than what it purports to be. Accordingly he dismissed the action with costs. This appeal is from that judgment. In view of the conflicting decisions on the question of law which arises for determination in this case My Lord the Chief Justice has, in terms of section 51 (1) of the Courts Ordinance (Cap. 6), referred this appeal to a Bench of five Judges.

The main question for decision is whether the transaction relating to P1 amounts merely to a security for money lent or whether it is a contract of sale of immovable property subject to a condition for reconveyance. Mr. Jayewardene, for the appellant, submitted that it was the former, while Mr. Wikramanayake for the respondent, contended that it was the latter. If this deed created only a security for money lent the document would be regarded as a mortgage and the equity of redemption cannot be lost despite the time limit laid down for the performance of the conditions—*Saminathan Chetty v. Vanderpoorten* [2]. But,

[1] *(1955) 56 N. L. R. 337.*

[2] *(1932) 34 N. L. R. 287.*

if it is a bill of sale subject to a condition, time is of the essence of the contract and the condition must be performed within the stipulated period—de Silva v. de Silva. [1]

P1 on the face of it purports to be a contract of sale subject to a condition. However, Mr. Jayewardene argued that, no matter what label the parties attached to a particular transaction, it was the duty of the Court to scrutinize it carefully and ascertain its true nature. This view finds support from Grotius and Voet. Grotius expressed the view that an agreement embodied in a written contract relating to two ships, although drawn up in the form of a sale was a transaction in the nature of a pledge. [2]

Dealing with "Disguised Pledge" Voet states, "Such a contract of pledge, though it is sometimes cloaked by the contracting parties under the title of purchase or of giving by way of payment, nevertheless does not on that account remain the less a pledge, when the accompanying circumstances prompt that view according to the opinion of Hugo Grotius." [3] This principle has been acted upon by the Courts both here and in South Africa. It was held in *Zandberg v. Van Zyl* [4] that regard should be had to the substance of the transaction and not to the designation that the parties attach to it. Innes J. who was one of the three Judges who decided that case stated, "Not frequently, however, (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavour to conceal its real character. They call it by a name, or give it shape, intended not to express but to disguise its true nature. And when a Court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is; not what in form it purports to be." A similar view was expressed in *Bhunja v. Khoja* [5]. In *de Silva v. de Silva* Hearne J. adopted the same view.

Mr. Wikramanayake conceded that it was the duty of the Court to ascertain the true nature of the transaction evidenced by the deed but he maintained that for that purpose the Court was not entitled to go outside the document itself. He relied on the decision in *Setuwa v. Ukku.* [6] Mr. Jayewardene submitted that case was wrongly decided and that the correct statement of law was as laid down in *Palingu Menika v. Mudiyanse* [7] which is a case decided by My Lord the Chief Justice when he was a Puisne Justice. *Setuwa v. Ukku* is a recent case decided by Gratiaen J. and Sansoni J. Most of the relevant Ceylon cases on this question have been referred to by Sansoni J. in his judgment in that case. The facts in that case are as follows :—In the year 1929 the 1st defendant borrowed a sum of Rs. 700 from the 1st plaintiff on a mortgage bond. In 1937 the 1st defendant sold the land in dispute and another land to the

[1] *(1937) 39 N. L. R. 169.*
[2] *Opinion No. 74 of Opinions of Grotius—De Bruyn's Translation.*
[3] *Voet Bk. 3, Title 7, Section 1—Gane's Translation, Vol. 3, page 54.*
[4] *1910 A. D. 302.*
[5] *1937 N. L. R. 246.*
[6] *(1955) 56 N. L. R. 337.*
[7] *(1948) 50 N. L. R. 566.*

1st plaintiff for a sum of Rs. 1,410 of which Rs. 1,350 was set off against the principal and interest due on the mortgage and the balance was paid in cash. By a contemporaneous deed the 1st plaintiff agreed to retransfer the lands to the 1st defendant if she paid a sum of Rs. 1,410 within a period of 5 years. The 1st defendant failed to comply with the terms of the agreement and the 1st plaintiff in 1949, gifted the land in dispute to the 2nd plaintiff. In an action brought by the plaintiffs against the 1st defendant and 4 others for a declaration of title etc., the defendants pleaded that the deed of sale in favour of the 1st plaintiff though in form a transfer was in fact a mortgage for the repayment of Rs. 1,410 and that the 2nd plaintiff had no title to the land. In support of this contention evidence, both oral and documentary, of the circumstances surrounding the transaction of 1937 and the subsequent conduct of the parties was led by the defendants. After considering the numerous decisions on the matter, Sansoni J. observed, "If I may sum up the result of the authorities I have referred to I would say that it is never open to a party who executes a conveyance which is unambiguously a deed of sale to lead parol evidence to show that it is a deed of mortgage." In *Palingu Menika v. Mudiyanse* [1] which was decided before the last mentioned case the relevant facts were the following:—Palingu Menika and one Nadar on P1 sold and transferred a land to Mudiyanse the plaintiff for Rs. 75 reserving the right to re-purchase the same within a period of three years by payment of that sum together with interest. Nadar became a party to that deed because on a prior deed P2 similar in terms to P1, Palingu Menika conveyed the same land to him. It was conceded by Mudiyanse that even after the execution of P1 Palingu Menika, by agreement, was allowed to remain in possession of the land. Palingu Menika failed to obtain a re-conveyance of the property within the stipulated period. Mudiyanse thereafter sued Palingu Menika and two others for a declaration of title and ejectment. The defendants pleaded that P1 related to a money lending transaction. The question which arose for decision was whether the deed P1, in law, was a mortgage or a transfer with an undertaking to re-sell within a specified time. In deciding this question Basnayake J. observed, "In order to determine the nature of the transaction the circumstances leading up to and surrounding the execution of the document under consideration and the language employed therein may all be taken into account." That observation was based on the Privy Council decision in *Saminathan Chetty v. Vanderpoorten* [2]. The learned Judge then proceeded to consider whether P1 was a conditional transfer and stated, "P1 is not the form in which a *pactum de retrovendendo* [3] is expressed, for Voet says: 'Nearly allied to the *pactum commissorium* is the *pactum de retrovendendo*, agreement for repurchase (or *Jus Redimendi*), the effect of which, when annexed to a purchase, is that the vendor may within or after a time fixed, or at any time, redeem or take back the thing sold, on restoring the same price he actually received for it, and not what may be the just price and equivalent to the commodity at the time of the redemption, unless it has been expressly agreed otherwise'." The stipulation of interest and the retention of possession by the vendor in that case were held to be circumstances

[1] *(1948) 50 N. L. R. 566.* [2] *(1932) 34 N. L. R. 287.*

[3] *Voet, Bk. XVIII, Tit. III, Section 7.*

which went a long way to negative the claim that P1 was a *pactum de retrovendendo*. The plaintiff's evidence in cross-examination that money was "borrowed" on P1 to pay Nadar's "loan" was taken into consideration in support of the view that the transaction evidenced by P1 was one between debtor and creditor. Sansoni J. in *Setuwa v. Ukku* [1] has disagreed with the view that oral evidence of a stipulation for payment of interest and the retention of possession by the vendor was admissible to negative the express terms of the deed. He probably held that view because in his opinion the reception of that evidence would offend the provisions of section 92 of the Evidence Ordinance.

In *Saminathan v. Vanderpoorten* [2] two deeds Nos. 471 and 472 executed on the same day came up for consideration before their Lordships of the Privy Council. The first deed was an out and out transfer of a large tract of land in favour of Vanderpoorten by a number of persons referred to as the Syndicate while the second deed, i.e., No. 472 was an agreement whereby Vanderpoorten undertook to pay the profits from the land to the members of the Syndicate *pro rata*. The plaintiffs alleged that Vanderpoorten was attempting to effect a fictitious sale fraudulently and in breach of trust. In the circumstances of that case their Lordships held that the transaction effected by the two deeds was the creation of a security for money advanced by Vanderpoorten which in certain events imposed upon him duties and obligations in the nature of trusts. That was probably the reason as was pointed out by Soertsz J. in *Wijayawardene v. Peris* [3] that circumstances leading up to and surrounding the execution of the two deeds were considered in construing those documents. No fraud was alleged and no trust was pleaded either in *Setuwa v. Ukku* or *Palingu Menika v. Mudiyanse* [4]. In the instant case too no such pleas were set up in appeal.

Mr. Jayewardene cited several Indian and English decisions which support the view that it is open to the Courts to examine closely a deed which purports on the face of it to be a transfer to ascertain whether the transaction evidenced by it is in fact a contract of sale or a mortgage. One such case is *Balkishen Das and others v. Legge* [5] decided by the Privy Council. In that case, two deeds, one an outright transfer of immovable property by Legge in favour of Balkishen Das and another and the other an agreement by the vendees to re-convey the same property to Legge on the payment of a stipulated sum within a specified period came up for consideration. It was contended that the two deeds together constituted a mortgage and oral evidence was led in support of that contention. Their Lordships held that section 92 of the Indian Evidence Act of 1872 must be complied with. That section is identical with section 92 of our Evidence Ordinance. Lord Davey who delivered the judgment stated, "The case must therefore be decided on a consideration of the contents of the documents themselves, with such extrinsic evidence of surrounding circumstances as may be required to shew in what manner the language of the document is related to existing facts." The extrinsic evidence referred to above is evidence that is admissible under proviso 6 of section 92.

[1] *(1955) 56 N. L. R 337.*
[2] *(1932) 34 N. L. R 287.*
[3] *(1935) 37 N. L. R. 179.*
[4] *(1948) 50 N. L. R 566.*
[5] *1899, 27 Law Reports Indian Appeals 58.*

That under the Roman-Dutch Law the Court is entitled to ignore the label and the form that the parties give to a particular transaction evidenced by a deed and ascertain its substance and true nature is beyond question. For that purpose the conduct of the parties and the surrounding circumstances leading up to the transaction would be relevant. But this right which springs from our common law has been restricted by statute law. That is section 92 of the Evidence Ordinance. Any evidence which a party is entitled to lead for the purpose of ascertaining the true nature of the transaction must not offend the provisions of section 92. Evidence which is forbidden by that section, even if admitted without objection, cannot be acted upon. If the terms of the deed are clear and unambiguous no evidence of the conduct of the parties and the circumstances surrounding the transaction is admissible for the purpose of construing the document. The intention of the parties has to be gathered from the document itself. It is only when there is an ambiguity in the deed that evidence of conduct and surrounding circumstances becomes admissible in terms of proviso 6 of section 92.

The terms of the deed P1 in this case are clear and unambiguous. It is an outright transfer of the premises to the defendant subject to an undertaking by her to re-convey the property if the sum of Rs. 3,407/87 with interest at 15 per cent. is paid to her by the plaintiff within a period of two years. Therefore time is of the essence of the contract. On the expiry of the period of two years the defendant is relieved of the undertaking to re-transfer the property. No extraneous evidence is necessary to construe this document.

Mr. Jayewardene's first submission that the Court is entitled to inquire into the transaction executed by the deed P1 unfettered by the restrictions of section 92 is untenable. He made a second submission that even if section 92 is operative he was entitled to lead parol evidence under proviso 1 to show that what was paid to him on deed P1 was not the purchase price but a loan and that what passed on that deed was not the dominium to the property but merely security. This proposition is clearly obnoxious to the main section because such evidence would have the effect of contradicting the deed. The final submission made by Mr. Jayewardene was that even if section 92 applied there was no bar which prevented the Court from examining all the surrounding circumstances for the sole purpose of ascertaining whether time was of the essence of the contract. Here again there is no purpose of examining the surrounding circumstances when this can be ascertained from the document itself.

Mr. Jayewardene also argued that the stipulation for the payment of interest in the deed P1 was inconsistent with a *pactum de retrovendendo*. Voet's definition of this *pactum* reads, " Allied to these agreements is the agreement for selling back. By attaching this agreement to purchases it is arranged that the seller shall have the freedom to buy back or receive back the property within or after a definite time or at any time on refunding the same price given not, unless it was expressly otherwise agreed, a price which could seem at the time of buying back to be

just and suitable to the property. "[1] This definition shews that it is possible by agreement to fix a fair price at which the property is to be re-purchased. In the deed P1 the vendor is entitled to obtain a re-conveyance within a period of two years on the payment of Rs. 3,407/87 with interest at 15 per cent. I see no valid objection to fixing the price at which the property is to be bought back in terms of interest. Such an agreement would, in my opinion, be more favourable than not to the original vendor because if he decides to buy back the property within a month of his sale, for instance, the additional amount he has to pay would be negligible.

In the attestation clause of P1 it is stated that the sum of Rs. 3,407/87 which forms the consideration was made up of the amounts due to the vendee on the mortgage bonds D3, D5 and D6 and a further sum of Rs. 500 paid in cash at the time of the execution of the deed. It was argued that this was evidence of a money lending transaction. I am unable to agree with that submission. The fact that existing mortgage debts due to the vendee formed the whole or part of the consideration on P1 cannot alter the character of the deed.

In the case of *Saverimuttu v. Thangavelautham* [2], a case decided by the Privy Council, the plaintiff sought to establish a trust by leading oral evidence. That oral evidence is admissible for the purpose of proving a trust is conceded. Their Lordships held that the oral agreement sought to be proved in that case amounted not to a trust but to an agreement to transfer immovable property which would be invalid as it contravenes the provisions of section 2 of the Prevention of Frauds Ordinance. Their Lordships also held that the decision in *Perera v. Fernando* [3] sets out correctly the law of Ceylon. In that case it was held that where a person transferred a land on a notarial deed which on the face of it is a sale it was not open to the transferor to lead oral evidence to show that the transaction was in fact a mortgage because such evidence comes within the direct prohibition of section 92. It was also held there that evidence of subsequent conduct of parties was not admissible because "conduct can only corroborate the oral evidence as to the original agreement."

I wish to observe that in *Palingu Menika v. Mudiyanse* [4] there is no indication that an objection was taken to the reception of oral evidence. The effect of section 92 of the Evidence Ordinance also was not considered in that case.

In my view *Setuwa v. Ukku* [5] was correctly decided. Accordingly I dismiss the appeal with costs.

PULLE, J.—I agree

T. S. FERNANDO, J.—I agree.

[1] *Voet Bk. XVIII, Title 3, Section 7—Gane's Translation.*
[2] *(1954) 55 N. L. R. 529.*
[3] *(1914) 17 N. L. R. 486.*
[4] *(1948) 50 N. L. R. 566.*
[5] *(1955) 56 N. L. R. 337.*

L. W. de SILVA, A.J.—

I agree with my brother K. D. de Silva J. and wish to refer to two aspects of the case. Since the question for decision is whether the deed creates a security for money lent or whether it is a sale with an agreement for a re-purchase, the court has to find out the substance of the transaction and give effect to its findings. As stated by *Wille on Mortgage*, 75, 76 : " Each case must depend upon its own facts ; no general rule can be propounded which can meet them all. " But proof of a transaction recognized by the Common Law is governed by the restrictive requirements of the Evidence Ordinance. Since the deed is on the face of it a sale subject to the vendor's right to claim a reconveyance within a specified time on payment of a stipulated sum, evidence forbidden by law (section 92 of the Evidence Ordinance) cannot be admitted to prove that the deed is a mortgage. I find it impossible to regard the deed as a mortgage without substituting other suitable words for " vendor, " " vendee, " " sold, assigned, transferred, " " sold and conveyed, " " shall reconvey, "—terms which do not have more than one meaning and which are used throughout the deed. The period of two years within which the reconveyance has to be obtained cannot be treated as superfluous. There is no rule of legally admissible evidence which permits a plain deed of sale like this to be transformed into a mortgage. The plaintiff has not alleged fraud or the like. Learned Counsel for the appellant urged however that the intention of the parties must be gathered. The answer to this has been given by the Privy Council in *Chandra Nandi v Prashad Singh* [1] :

> " In construing the terms of a deed, the question is not what the parties may have intended, but what is the meaning of the words which they used. "

The other matter to which I refer is the point pressed by learned Counsel for the appellant that the stipulation in the deed for the payment of interest is very strong intrinsic evidence that the transaction is a mortgage, and that such a stipulation is alien from the ingredients of a *pactum de retrovendendo*. He relied on Voet xviii–3–7. For a determination of this question, it is necessary to consider two passages from this citation. The first passage is at the commencement of section 7 and defines the pact. It is as follows :

> " est et vicinum hisce pactum de retrovendendo, quod emtionibus adjecto id agitur, ut venditori liceat vel intra vel post certum tempus vel quandocunque redimere seu recipere rem, reddito pretio eodem quod datum est, non eo, quod tempore redemtionis justum ac rei respondens videri posset, *nisi aliud nominatim actum sit.* "

> " The agreement to resell has a close resemblance to this (i.e. *the pactum commissorium*). When it is annexed to purchases, the arrangement is to permit the vendor to repurchase or take back the property within or after a fixed period of time or at any time upon a refund of

[1] *A. I. R. (1917) Privy Council 23.*

the price actually paid, and not, *unless it has been expressly otherwise agreed,* a price which may appear at the time of the repurchase to be a just return for the property. "

The second passage from section 7 relates to *interest and profits* and is as follows :

" caeterum uti solum pretium emtori offerendum est ad redemtionem faciendam, non item usurae ejus ; eo quod venditor, in cujus gratiam redimendi jus pacto inductum fuit, nullam videri potest *moram* commisisse ; ita nec emtor venditori redimenti ad medii temporis fructus restituendos obstrictus est, sed tantum ad eos, qui post moram, seu oblatum a venditore pretium, percepti sunt. "

" But as a tender has to be made only of the price and not also interest on it to the purchaser for the purpose of making the repurchase because the vendor, in whose favour the right of repurchase was introduced by the agreement, cannot be regarded as having made any *default,* so the purchaser is liable to make good to the repurchasing vendor not the profits of the intervening period but only those profits which have been appropriated after his own default or after the tender of the price by the vendor. "

Voet goes on to say that the result of a *pactum de retrovendendo* is a new sale rather than an invalidation of the previous sale. He does not appear to draw any distinction between movables and immovables except for certain covenants which are necessary if they are to run with the land.

The point to be noted in the first passage I have cited is this : by an express agreement annexed to the deed, the parties may fix the price of repurchase at a different figure which may appear at the time of the repurchase to be a just return for the property. The point in the second passage is the reason given why interest is not payable for the purpose of making the repurchase. This passage appears to me to mean that there is no legal liability to pay interest in the absence of an agreement in the deed. In other words, without an agreement to pay interest, there can be no default. The word used by Voet for *default* is *mora* which (accodring to Berwick's note) was necessary by Roman Law, in the absence of express contract, to render one liable for interest. It appears therefore, according to Voet, interest is not forbidden if provision for its payment is embodied in the deed by the agreement of the parties.

Having regard to both citations, I am of the opinion that the stipulation for the payment of interest is in fact less onerous to the vendor. If he exercises his option to repurchase within a short period after his transfer, his financial liability is bound to be considerably less than on a covenant for the payment of a lump sum the whole of which he would become liable to pay irrespective of the period of time within which he may choose to buy back the property. I therefore regard the provision for the payment of interest as a lawful method of arriving at an estimate of the market price.

The fact that the consideration in the deed is made up of sums of money due on certain mortgage bonds granted by the vendor together with a

cash payment made to him makes no difference to the substance of the transaction. The former relationship of mortgagor and mortgagee is not continued in the deed merely because the interest was accumulated and utilized as consideration for the sale.

The appeal is accordingly dismissed with costs.

BASNAYAKE, C.J.—

The question that arises for decision in this appeal, which has been referred to a Bench of five Judges on account of the conflict of decisions of this Court, is whether the deed P1 is a mortgage or a contract of sale with a condition for the reconveyance of the land by the vendee on the payment of the purchase price with interest thereon at 15 per cent within two years from the date of its execution.

Briefly the relevant facts are as follows : The plaintiff was the owner of the two allotments of land described in P1. They are adjoining allotments and are about half an acre in extent. On 19th March 1950 the plaintiff borrowed Rs. 2,000 from the defendant on a mortgage of those lands by Bond No. 2,489. On 30th April 1950 the plaintiff borrowed a further sum of Rs. 200 from her on Bond No. 2,507. On 30th June 1950 he borrowed a still further sum of Rs. 500 on Bond No. 2,534. When the plaintiff applied for still another loan of Rs. 500 the defendant said (these are her very words) : " The plaintiff came and spoke to me about the moneys that were due to me. I told him that I will not advance him any more money on bonds and to execute a conditional transfer. " The deed P1 was then executed the consideration specified therein being Rs. 3,407/87, the aggregate amount of all the loans given by the defendant to the plaintiff together with accrued interest.

It is common ground that an acre of land in this area is worth from Rs. 10,000 to Rs. 12,000. At that rate the price of this land would work out to Rs. 5,000 to Rs. 6,000. But the plaintiff places a much higher value on it—Rs. 25,000 to Rs. 30,000. He claims to have built a house on this land for the construction of which he spent all the money he borrowed and more. It is a house with plastered cabook walls ; but with a cadjan roof. The plaintiff was in possession of the land till about 18th August 1952, when he was forcibly ousted by the defendant who is in possession since and has improved it by building a large house thereon costing about Rs. 15,000.

The plaintiff claims that P1 is a mortgage ; the defendant denies it and states that it is a transfer with a condition to reconvey the land within the stipulated period on payment of the purchase price and interest at 15 per cent on it.

The learned District Judge has held in favour of the defendant. This appeal is from that decision. Before I proceed to discuss the principles of law applicable to this case I think it will be useful if I were to set out below the material paragraphs of the deed P1.

" Know all men by these Presents that Weerasangili Nakathige William Fernando of Maharagama (hereinafter sometimes referred

to as the said Vendor) for and in consideration of the sum of Rupees three thousand four hundred and seven and cents eighty seven (Rs. 3,407/87) of lawful money of Ceylon well and truly paid to him by Nawalage Roslin Cooray of Maharagama (the receipt whereof I do hereby admit and acknowledge) granted bargained sold assigned transferred and set over and do by these Presents grant bargain sell assign transfer and set over unto the said Nawalage Roslin Cooray (hereinafter sometimes referred to as the Vendee) her heirs executors administrators and assigns the premises fully described in the Schedule hereunder written together with all and singular the rights ways easements advantages servitudes and appurtenances whatsoever to the said premises belonging. . . . .

"To have and to hold the said premises hereby sold and conveyed with the rights and appurtenances unto the said vendee her heirs executors and administrators and assigns absolutely for ever subject however to the condition that she shall reconvey the said premises to the vendor within two years from this date at the cost of the vendor if she shall repay to the vendee or her aforesaid with the sum of Rs. 3,407/87 together with interest at 15 per cent per annum from this date until such payment the vendor shall be in possession of the same. . . . . "

It is settled law that no matter what name or title parties give to a transaction the Court will inquire into the substance of it and give legal effect to what it finds it to be in truth and fact. This principle of law is not of recent origin. It is expressed in the Roman Law maxim *plus enim valet quod agitur, quam quod simulate concipitur* (Code 4, 22)—(That which is done is of more avail than that which is pretended to be done.) Voet says [1]: "An agreement of pledge, though it may be disguised as a sale by the contracting parties, nevertheless remains a pledge whenever the surrounding circumstances point to this." It is almost a universal rule. In support of his contention learned counsel for the appellant relied on not only decisions of this Court [2] but also on decisions from the

[1] *Voet 13.7.1. Gané's translation.*

[2] *Somasunderam Chetty v. Todd, 13 N. L. R. 361 at 368.*
Perera v. Fernando, 17 N. L. R. 486.
Adaicappa Chetty v. Karuppen Chetty, 22 N. L. R. 417.
Don v. Don 31 N. L. R. 73.
Fernando v. Peiris, 32 N. L. R. 25.
Mohamadu v. Pathumah, 11 Law Recorder 48.
Wijewardene v. Peiris, 37 N. L. R. 179.
de Silva, v. de Silva, 39 N. L. R. 169.
Jonga v. Nanduwa, 45 N. L. R. 128.
Sobana v. Mecra Lebbe, 5 C. L. J. 46.
Thambipillai, v. Muthucumarasamy, 58 N. L. R. 387.
Silva v. Zoysa, 58 N. L. R. 303.
Appuhamy v. Saiya Nona, 46 N. L. R. 313.
Belgaswatte v. Ukkubanda, 43 N. L. R. 281.
Dingiri Naide v. Kirimenike, 57 N. L. R. 559.
Penderlan v. Penderlan, 50 N. L. R. 513.
Ukku v. Dintuwa, 1 S. C. C. 89.
Saverimuttu v. Thangavelautham, 55 N. L. R. 529 at 532 and 535.
Valliyammai Atchi v. Andul Majeed, 48 N. L. R. 289.
Abeywickreme v. Carlo, 3 Lorenz 68.
Jayawardene on Mortgage, p. 15.
Saminathan Chettiar v. Vander Poorten, 34 N. L. R. 287 at 294.

American [1], English [2], South African [3] and Indian [4] Courts. Hence though the parties may call their contract a conditional transfer or a mortgage the Court will determine its true nature. The practice of disguising a disposition granted by way of security for a loan as an absolute disposition to a creditor is a very old one. The principle that a Court may look beyond the terms of the instrument to the real transaction and give effect to the actual contract of the parties when a deed absolute in form is shown to be executed as a security for a loan of money is too well-established to admit of any dispute. The only question is what evidence may the Court use in piercing the veil that shrouds the transaction. Section 92 of our Evidence Ordinance which enacts a rule of law, which itself is one of universal application, excludes evidence of any oral agreement or statement as between the parties to an instrument, or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from its terms. I think it is now settled by several decisions of the Privy Council that oral evidence of the intention of any party cannot be admitted for the purpose of ascertaining the true intent of the parties or construing the deeds. But it has been repeatedly stated in those self same decisions that it is open to the Court to decide the question " on a consideration of the contents of the documents themselves, with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts " (*Balkishen's* case). In the case of *Raja Bahadur Narasingerji Gyanagerji* the Privy Council affirmed its decision in *Balkishen's* case and proceeded to decide the true meaning of the deed by examining the surrounding circumstances. This view was reiterated in *Baijnath Singh's* case where the Board said : " Section 92 merely prescribes a rule of evidence ; it does not fetter the Courts' power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances ". The law is that in examining a transaction such as the one before us the Court will not take into account the evidence of the parties as to their intention so as to vary, add to or subtract from the terms of the instrument recording it, but will look into all the other evidence of " surrounding circumstances ". This rule has been put into the following simple form by Wigmore [5] : " When a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of this act."

[1] *Peugh v. Davis (1877) 96 U. S. Supreme Court Reports 332–336, Bk 24 Lawyers' Edn, 775.*

[2] *Beckett v. Tower Assets Company, (1891) 1 Q. B. 638.*
Trustee of C. Mellor v. Maas and another, (1903) 1 K. B. 226, 1905 A. C. 102.
Samuel v. Salmon & Gluckstein Ltd. (1915) 2 All E. R. 520.
Woods v. Wise, (1955) 1 All E. R. 767.

[3] *Zandberg v. Van Zyl, 1910 A. D. 302 at 307 and 315.*
Wille on Mortgage, p. 76.
Norman on Purchase and Sale in South Africa, pp. 16–18.
Lee—Introduction to Roman Dutch Law 187 (5th Edn.).

[4] *Hanif-u-Nissa and another v. Faiz-un-Nissa and another 33 I. L. R. Allahabad p. 340.*
Baijnath Singh v. Hajee Vally Mohamed Hajee Abba, (1925) A. I. R. P. C. 75
Bhagwan Sahai v. Bhagwan Din & others (1890) 17 L. R. I. A. 98.
Raja Bahadur Narasingerji Gyanagerji v. Raja Dhanarajagirji, (1924) A. I. R. P. C. 226.
Balkishen Das & others v. Legge, (1899) 27 L. R. I. A. 58 at 64.
Shah Mukhun Lall & others v. Baboo Shree Kishen Singh & others (1868) 12 Moo. I. A. 157.

[5] *Wigmore on Evidence, Vol. IX, s. 2425.*

Having laid down this rule and having amplified and examined its historical development Wigmore goes on to say " the intent of the parties must be sought where always intent must be sought, namely in the conduct and language of the parties and the surrounding circumstances. The document alone will not suffice ".

The view taken in *Setuwa v. Ukku* [1] is in my opinion too rigid a view of section 92 of the Evidence Ordinance and in my opinion introduces a greater restriction on parol evidence than is imposed by that section.

Having ascertained the nature of the evidence that may be looked at I shall now proceed to ascertain the true nature of the document P1 by reference to it. The plaintiff had within the space of four months in 1950 obtained three loans of Rs. 2,000, Rs. 200, and Rs. 500 from the defendant on primary, secondary, and tertiary mortgages of the lands affected by P1. The interest on these loans was 15 per cent and 18 per cent if the interest was not paid timeously. The plaintiff approached the defendant for a fourth loan of Rs. 500 when the defendant informed him that no further " advances " could be given except on a " conditional transfer ". The result was deed P1. The consideration mentioned therein is the total amount of the three loans plus the sum of Rs. 500 which the plaintiff sought to borrow and accrued interest up to the date of the execution of the deed. The deed states that the plaintiff the vendor is to remain in possession. Both according to the plaintiff, and the defendant's witness the headman, land in the locality in question is worth Rs. 10,000 to Rs. 12,000 per acre. In fact the plaintiff places it as high as Rs. 25,000 to Rs. 30,000. Even taking the admitted figure of Rs. 10,000 to Rs. 12,000, the land in question would be worth at least Rs. 5,000 as it is a little over half an acre in extent. There is a further circumstance of the stipulation of 15 per cent interest, and the fact that the plaintiff improved the house on the land with the money he borrowed and more. The defendant and his witness the headman do not concede that the house is as good and as large as the plaintiff says it was (it has since been pulled down by the defendant) but they admit that it was of cabook with walls plastered in lime with a cadjan roof. To my mind all these circumstances negative the defendant's claim that the transaction is a sale subject to the right of repurchase in two years. The transaction is not in reality a *pactum de retrovendendo* although it endeavours to assume its garb. Voet says : " Allied to these agreements is the agreement for selling back. By attaching this agreement to purchases it is arranged that the seller shall have freedom to buy back or receive back the property within or after a definite time or at any time on refunding the same price as was given—not, unless it was expressly otherwise agreed, a price which could seem at the time of the buying back to be just and suitable to the property ". In the leading case of *Zandberg v. Van Zyl* [2] Lord de Villiers C.J. observed : " It is quite true, as was remarked by Mr. Justice Hopley, that Voet (18.3.7 & 8) refers to the *pactum de retrovendendo*—by virtue of which it is agreed that the seller shall have the right to repurchase a thing sold by him for

[1] *(1955) 56 N. L. R. 337.* [2] *1910 A.D. 302.*

the same price which he has received—as being a usual and legal pact ; but Voet appears to assume that, until the exercise of such right, the thing would be in possession of the original purchaser. If the thing is allowed to remain in the possession of the seller, and it is manifest that the real object of the parties was not to transfer the ownership to the purchaser, but to secure the payment to him of a debt owing to him by the seller, the obvious conclusion is that the intention of the parties was to effect a pledge and not a sale." The same view is expressed in Voet 13.7.1.

For the reasons I have given above, I would allow the appeal with costs and enter judgment for the plaintiff as prayed for with costs.

Appeal dismissed.

[The following judgment was delivered in Appeal No. 476:—]

November 18, 1957. K. D. DE SILVA, J.—

This appeal has been referred to a Bench of five Judges by My Lord the Chief Justice in terms of section 51 (1) of the Courts Ordinance (Cap. 6).

The plaintiffs-appellants by deed No. 6317 of March 27, 1953 (P1) conveyed for a consideration of Rs. 1,000 three allotments of land to the 1st defendant in the following terms :—" . . . . have hereby sold transferred assigned, set over and assured unto the said Wanniaratchige Don Sarnelis Appuhamy the property described in the schedule hereto together with everything appertaining thereto, and having reserved the right with us to effect a retransfer of the said property within a full period of five years on payment of the said sum of Rupees one thousand together with the interest thereof at the rate of sixteen per centum per annum, at once." The 1st defendant by deed No. 7,863 of May 10, 1950 (P2) sold and transferred the premises in question to the 2nd defendant who by deed No. 2158 of February 15, 1953 (3D1) sold and transferred one of the lands dealt with on P1 to the 3rd defendant. The plaintiffs failed to pay the sum of Rs. 1,000 with interest within five years of the date of execution of the deed P1. They instituted this action on May 6, 1953, seeking to redeem the lands conveyed on P1 alleging that the deed P1 was in fact a mortgage though drawn up in the form of a transfer. The learned District Judge held that this deed was a sale with an agreement to retransfer and not a mortgage and dismissed the action. This appeal is from that judgment. No allegation of fraud or a claim based on trust arises on this appeal.

The question for determination on this appeal is whether it is open, to a party who conveys immovable property for valuable consideration by a deed which is *ex facie* a contract of sale but subject to the reservation that he is entitled to re-purchase it within a stipulated period on the repayment of the consideration together with interest thereon, to lead parol evidence to show that the transaction was not a sale but a mortgage.

There is a long series of decisions on this point. In *Palingu Menika v. Mudiyanse* [1], which was decided by a single judge, Basnayake J. took the view that in order to determine the nature of the transaction parol evidence relating to circumstances leading up to and surrounding the execution of the document under consideration was admissible. In *Seluwa v. Ukku* [2] Gratiaen J. and Sansoni J. took the opposite view. In that case Sansoni J. observed, " It is never open to a party who executes a conveyance which is unambiguously a deed of sale to lead parol evidence to show that it is a deed of mortgage.".

In the matter of a document of this nature it is open to the Court according to the Roman-Dutch Law to consider the substance and the true nature of the transaction ignoring the label that the parties have attached to it in the document. That is the view held by Grotius in his opinion No. 74 of Opinions of Grotius—De Bruyn's Translation. Dealing with " Disguised Pledge " Voet states, " Such a contract of pledge, though it is sometimes cloaked by the contracting parties under the title of purchase or of giving by way of payment, nevertheless does not on that account remain the less a pledge, when the accompanying circumstances prompt that view, according to the opinion of Hugo Grotius ". [3] That view has been followed by the Courts both in South Africa and Ceylon—*Zandberg v. Van Zyl* [4] and *de Silva v. de Silva.* [5] In the latter case Hearne J. was, however, careful to observe that the true nature of the transaction had to be ascertained by evidence that is legally admissible.

Although according to the common law it was open to a party to show that what purported to be a sale on the face of the document was in fact a mortgage the provisions of section 92 of the Evidence Ordinance have considerably restricted that right. Within the ambit of that section a party is entitled to exercise his common law right of showing the true nature of the transaction. In *Perera v. Fernando* [6] it was held that where a person transferred a land on a notarial deed which on the face of it is a sale it was not open to the transferor to lead oral evidence to show that the transaction was a mortgage in view of the provisions of section 92. In the Indian case *Balkishen Das v. Legge* [7] the Privy Council took the same view. Their Lordships of the Privy Council held in *Saverimuttu v. Thangavelautham* [8] that the decision in *Perera v. Fernando* [6] sets out correctly the law of Ceylon on this question. The position, therefore, is that if the terms of the deed are clear and unambiguous no parol evidence can be led for the purpose of construing the document. Extraneous evidence can be adduced only if there is an ambiguity in the terms of the deed. The terms of the deed P1 which comes up for consideration on this appeal are clear. There is no ambiguity whatsoever in it. It is an outright transfer with a *pactum de retrovendendo* attached to it. The learned Counsel for the appellants relied on certain admissions made

[1] *(1948) 50 N. L. R. 566.*
[2] *(1955) 56 N. L. R. 337.*
[3] *Voet Bk. 3, Title 7, Section 1—Gane's Translation Vol. 3 page 54.*
[4] *1910 A. D. 302.*
[5] *(1937) 39 N. L. R. 169.*
[6] *(1914) 17 N. L. R. 486.*
[7] *1899 Law Reports Indian Appeals 58.*
[8] *(1954) 55 N. L. R. 529.*

by the 1st and 2nd defendants in the course of the trial. The 1st defendant admitted that the transaction evidenced by P1 was a money lending transaction while the 2nd defendant stated that at the time of the execution of P2 he was aware that P1 represented a money lending transaction. It was contended on behalf of the appellants that these admissions are admissible in evidence under section 21 of the Evidence Ordinance. I am unable to agree with that submission in view of the provisions of section 92. The receipt P3 too, is inadmissible because it would have the effect of contradicting the deed.

It was also submitted by the appellant's Counsel that the stipulation of interest in P2 was inconsistent with the requirements of a *pactum de retrovendendo*. But Voet's definition of this *pactum* [1] shows that the parties are permitted to fix by agreement at the time the contract is entered into, a higher price at which the property is to be bought back. There is nothing objectionable, in principle, to that higher price being calculated in terms of interest.

The appeal therefore fails and I accordingly dismiss it with costs.

PULLE, J.—I agree.

T. S. FERNANDO, J.—I agree.

L. W. DE SILVA, A.J.—I agree.

BASNAYAKE, C.J.—

The question that arises for decision on this appeal is whether the deed P1 is a mortgage or a deed of sale subject to a condition to reconvey. The material portion of the deed is set out below.

> "Know all men by these Presents that we Handupathirennehelage Chandrawathie Menike and husband Heenkenda Mudalige Wilmot Henry Siriwardena residents of Gampaha Pahalagama in the Raigam Pattu of Aluthkuru Korale in consideration of the sum of Rupees One thousand (Rs. 1,000) of lawful money of Ceylon well and truly paid to us by Wanniaratchige Don Sarnelis Appuhamy of Orutota in the Meda Pattu of Siyane Korale (the receipt whereof is hereby admitted and acknowledged by us) have hereby sold transferred assigned set over and assured unto the said Wanniaratchige Don Sarnelis Appuhamy the property described in the schedule hereto together with everything appertaining thereto, and having reserved the right with us to effect a retransfer of the said property within a full period of five years on payment of the said sum of Rupees One Thousand together with the interest thereof at the rate of sixteen per centum per annum at once (එකවර)."

Shortly the facts are as follows :—On 13th December 1947 the plaintiffs who are husband and wife executed deed P1 in favour of the 1st defendant. On 2nd February 1949 the 1st plaintiff paid him Rs. 300

[1] *Voet Bk. XVIII, Title 3, Section 7—Gane's Translation Vol. 3, page 296.*

and obtained a receipt P3. On 10th May 1950 the 1st defendant transferred the lands dealt with in P1 to the 2nd defendant who is the plaintiff's nephew. The possession of the lands continued to be in the 1st plaintiff, deed P1 notwithstanding. It is not seriously disputed that the lands are worth many times more than the amount stated in P1. The village headman values them at about Rs. 8,000. The 1st and 2nd defendants do not deny that the deed though in form a conditional sale was intended to serve as security for a loan of Rs. 1,000. In his evidence the 1st defendant admitted that he lent Rs. 1,000 on P1 and accepts the position that P1 was intended to be a mortgage.

I have stated my view of the law applicable to a case such as this in my judgment in S. C. 99/D. C. Colombo Case No. 6,639 and it is unnecessary to repeat what I have said there. The circumstances which are in evidence in my opinion clearly show that P1 though in form a sale is in fact meant to serve as security for the loan of Rs. 1,000.

The circumstances which I have in mind are :—

(*a*) the stipulation of interest,
(*b*) the fact that possession continued to be in the plaintiff after the execution of P1,
(*c*) the wide disparity in the "consideration" stated in the deed and the market value of the lands,
(*d*) the fact that though both parties were agreed as to the terms of P1 neither intended that it should operate as a sale,
(*e*) the admitted payment of Rs. 300 by the plaintiff to the 1st defendant.

I am of opinion that the appeal should be allowed with costs and judgment entered for the plaintiff as prayed for.

Appeal dismissed.