1944 *Present:* **Howard C.J. and Keuneman J.**

VALLIYAMMAI AÇHI, Apellant, *and* O. L. M. ABDUL MAJEED, Respondent.

30—D. C. Colombo, 1,961.

Trust—Arrangement between debtor and creditor—Transfer of property by debtor—Agreement to hold property in trust pending liquidation of debts—Parol evidence of agreement—Prevention of Frauds Ordinance (Cap. 57) s. 2, Evidence Ordinance (Cap. 11) s. 92.

Defendant's testator, N. C., who was a creditor of plaintiff, undertook the management of plaintiff's affairs and in pursuance of the said undertaking plaintiff transferred to N. C. for an ostensible consideration certain properties, all of which, except one, were under mortgage to him.

It was agreed between them that N. C. should collect the rents and profits of the properties and give credit for them to the plaintiff. The proceeds of sale of any properties, were to be appropriated by N. C. and applied in settlement of the debts. N. C. undertook to retransfer the properties remaining unsold to plaintiff after the debts had been paid.

In terms of the said agreement, N. C. by his agent entered into possession of the properties, collected the rents and profits and sold some, the proceeds of which were appropriated in payment of the debts.

When the debts had been liquidated, N. C. agreed to reconvey the properties remaining unsold to plaintiff. But on N. C's death before such re-conveyance the defendant, the executrix of N. C's last will, fraudulently repudiated the agreement and claimed the properties.

Held, that the defendant, as the executrix of N. C., held the properties remaining unsold in trust for the plaintiff, and that parol evidence was admissible to establish the trust.

APPEAL from a judgment of the District Judge of Colombo: the facts are stated in the head-note. The District Judge gave judgment for the plaintiff.

H. V. Perera, K.C. (with him *N. Nadarajah, K.C.*, and *S. J. V. Chelvanayagam*), for the defendant, appellant.—The plaintiff sold, by deed P 21 of March 3, 1930, certain properties to one Natchiappa Chettiar, of whose estate the defendant is the executrix. The transfer deed does not disclose any conditions, and was given for full consideration. The plaintiff now, after an interval of ten years, when properties have risen in value, seeks to get back the properties on the basis that the transfer was subject to a trust according to which the transferee was to pay off certain debts of the plaintiff out of the income or sale of the properties and, thereafter to reconvey to plaintiff such of the properties as remained unsold. The alleged trust is sought to be proved entirely by oral evidence.

P 21 was admittedly executed in order to prevent unsecured creditors from seizing the properties which were transferred. The purpose was illegal. Plaintiff, therefore, cannot maintain the present action. See *Sauramma et al. v. Mohamadu Lebbe*[1] and sections 404 and 406 of Penal

[1] *(1943) 44 N. L. R. 397.*

Code. Under section 2 of the Prevention of Frauds Ordinance (Cap. 57) a contract for the retransfer of immovable property has to be notarially executed—*Wijewardene v. Peiris et al.*[1]. Deed P 21 does not contain any condition for reconveyance. Section 92 of the Evidence Ordinance is also applicable, and no evidence of a contemporaneous oral agreement is admissible to prove any such condition. No oral evidence is admissible for the purpose of ascertaining the *intention* of the parties to a deed or to contradict the express terms of the document—*Balkishen Das et al. v. Legge*[2]*; Perera v. Fernando*[3]. The additional agreement which is pleaded by the plaintiff discloses, if true, not a trust but the creation of security for money lent. Such a contract in respect of immovable property has to conform to the provisions of section 2 of the Prevention of Frauds Ordinance. See *Adaicappa Chetty v. Caruppen Chetty*[4]*; Perera v. Fernando* (*supra*); *Saminathan Chetty v. Vander Poorten*[5]. Section 2 of our Prevention of Frauds Ordinance is more drastic than the corresponding law in the English Statute of Frauds, and rules of equity which obtain in England cannot be applied in Ceylon. The trial Judge has, in his judgment, referred to *Ranasinghe et al. v. Fernando et al.* [6], but the view taken in that case on this point was not upheld in *Arseculeratne v. Perera*[7], a case which was taken to the Privy Council[8]. See also *Balkishen Das et al. v. Legge* (*supra*).

There is no evidence, in this case, of any trust, whether express or constructive. Section 5 (1) of the Trusts Ordinance (Cap. 72) provides that a trust created by a non-testamentary instrument should be notarially executed, and sub-section (3) provides that that rule does not apply where it "would operate so as to effectuate a fraud". The fraud contemplated in sub-section 3 is fraud at the inception of the transaction, and by a particular person. It cannot be said that when P 21 was executed Natchiappa Chetty was guilty of any fraud. He did not come by the property by virtue of a prior representation made by him that he would hold it in trust. As to whether there is a constructive trust, section 83 of the Trusts Ordinance cannot be of assistance to the appellant. The expression "attendant circumstances" in that section has a limited meaning—*Narasingerji Gyanagerji v. Parthasaradhi Ryanim Guru*[9]*;* Aiyar on the *Indian Trust Act (1941 ed.) p. 230.* The plaintiff relied much, at the trial, on the decision of the Privy Council in *Saminathan Chetty v. Vander Poorten* (*supra*). That case can be easily distinguished and, indeed, supports the case of the defendant. In that case no question of the admissibility of parol evidence arose and the only question was one of the interpretation of a contract relating to immovable property as evidenced by two contemporaneous documents *both* of which were notarially executed. Sections 5 and 83 of the Trusts Ordinance have to be read with, and do not in any way modify, the provisions of section 92 of the Evidence Ordinance.

On the facts, too, it cannot be said that the alleged trust has been proved.

[1] *(1935) 37 N. L. R. 179.*
[2] *(1899) I. L. R. 22 All. 149.*
[3] *(1914) 17 N. L. R. 486.*
[4] *(1921) 22 N. L. R. 417.*
[5] *(1932) 34 N. L. R. 287.*
[6] *(1922) 24 N. L R. 170.*
[7] *(1926) 28 N. L. R. 1 at 12, 13, 23.*
[8] *(1927) 29 N. L. R. 342 at 345.*
[9] *A. I. R. (1924) P. C. 226.*

A. R. H. Canekeratne, K.C. (with him *C. Thiagalingam, C. Renganathan* and *M. M. K. Subramaniam*) for the plaintiff, respondent.—The plaintiff's case is not based on *Vanderpoorten's* case as contended by the appellant. The facts of this case are very similar to those in *Ranasinghe et al. v. Fernando et al.* (*supra*). It was held in that case that where a person has obtained possession of immovable property of another, subject to a trust or condition, and fraudulently claims to hold it free from such trust or condition he cannot be permitted to plead the Statute of Frauds in defence, and that oral evidence may be led to establish the trust. Similarly in *Theevanapillai et al. v. Sinnapillai*[1] where land was conveyed to a person on an express verbal understanding that she was to convey it to her son, when his debts were settled, it was held that oral evidence could be led to prove the trust. See also *Rochefoucauld v. Boustead* [2]; *Nanayakkara et al. v. Andris et al.*[3]; *Carthelis et al. v. Perera et al.*[4].

[HOWARD C.J.: How do you get over section 92 of the Evidence Ordinance?]

There is a great difference between a contract, and a trust, in respect of immovable property. If, by way of contract, A transfers to B a land on condition that B should retransfer it on the fulfilment of a certain condition, A loses all proprietary rights in favour of B. In the case of a trust, however, there is a separation of the legal and beneficial interests in the property. In the present case there is a trust, and deed P 21 relates solely to the transfer of the legal title. Section 92 of the Evidence Ordinance does not stand in the way of the plaintiff because P 21 does not embody all the terms of the transaction. Parol evidence is admissible to prove that the plaintiff retained the equitable title. Proviso 3 of section 92 allows it. *Adaicappa Chetty v. Caruppen Chetty* (*supra*) can thus be easily distinguished from *Ranasinghe et al. v. Fernando et al.* (*supra*). The Statute of Frauds does not affect equitable rights, and parol evidence can be led to show the circumstances in which a person holds property—*L.R. (1897) 1 Ch. 206; Narayanan Chetty v. James Finlay & Co.* [5].

The Statute of Frauds cannot be invoked in order to effectuate a fraud. Section 5 (3) of our Trusts Ordinance gives effect to this rule even in the case of express trusts. And section 2 of the Trusts Ordinance lets in English equitable principles in case of fraud. The fraud committed need not be at the inception of the transaction—*Ohlmus v. Ohlmus*[6]. Plaintiff's case may also come under section 83 or section 96 of the Trusts Ordinance. Parol evidence may, therefore, be led both on the basis of an express trust and of a constructive trust. Proviso (1) of section 92 of the Evidence Ordinance is also applicable in the present case. See *McCormick v. Grogen*[7]; *Lincoln v. Wright*[8]; *Re Duke of Marlborough*[9]; *Blackwell v. Blackwell* [10]; *Thiagarajah v. Vedathanni* [11]; *Monir's Law of Evidence (1940 ed.) pp. 634, 627.*

H. V. Perera, K.C., in reply.—The written agreement in P 21 is complete and cannot now be varied by parol evidence *as between the parties* to the contract, and cases decided in the English Court of Chancery

[1] *(1921) 22 N. L. R. 316.*
[2] *L. R. (1897) 1 Ch. 196.*
[3] *(1921) 23 N. L. R. 193.*
[4] *(1930) 32 N. L. R. 19.*
[5] *(1927) 29 N. L. R. 65.*
[6] *(1906) 9 N. L. R. 183.*
[7] *L. R. (1869) 4 H. L. 82.*
[8] *(1859) 4 De Gex & Jones 16.*
[9] *L. R. (1894) 2 Ch. 133.*
[10] *L. R. (1929) A. C. 318.*
[11] *A. I. R. (1933) Mad. 48 at 51.*

can have no application on the point in Ceylon. Section 2 of the Trusts Ordinance speaks of "principles of equity". Before such principles are applicable we must have facts, and facts can be proved only by such rules of evidence as are permitted by the Evidence Ordinance. The scope of section 92 of the Evidence Ordinance is fully considered in *Maung Kyin v. Ma Shwe La*[1]. See also *Mohamadu v. Pathumah et al.* [2]; Monir's *Law of Evidence (1940 ed.) p. 629 et seq.; Tsang Chuen v. Li Po Kwai*[3]; *Mian Feroz Shah v. Sohbat Khan et al.*[4].

The agreement which is sought to be proved relates to the creation of security for money advanced, and needs a notarial deed. Plaintiff cannot, by calling it a trust, make it a trust.

Cur. adv. vult.

March 31, 1944. HOWARD C.J.—

In this case the defendant appeals from a judgment of the District Court, Colombo, declaring that a transfer deed No. 1604 of March 3, 1930, was executed in trust for the plaintiff on the terms and conditions set out in paragraph 7 of the plaint and that the defendant retransfer and convey to the plaintiff certain properties on payment by the plaintiff to the defendant of any sum found to be due on an account being taken. The defendant was also directed to pay to the plaintiff the costs of the action. The defendant is the executrix of the estate of one Natchiappa Chettiar, a money lender who resided partly in Colombo and partly in South India. By virtue of the above-mentioned deed—P 21—the plaintiff in consideration of a sum of Rs. 203,300 well and truly paid to him by Natchiappa Chettiar sold, assigned and transferred to the said Natchiappa Chettiar, his heirs, executors and assigns, the premises and lands described in the schedule, to have and to hold the said lands and premises thereby conveyed together with the appurtenances unto the said Natchiappa Chettiar, his heirs, executors, administrators and assigns for ever. The plaintiff in his plaint alleged that at the beginning of March, 1930, he owned property, movable and immovable, of a total value of Rs. 660,115 and had debts amounting to a sum of approximately Rs. 539,114. These debts included, *inter alia*, (*a*) secured debts being money due on mortgage in favour of Natchiappa Chettiar amounting to Rs. 185,031.66, (*b*) unsecured debts due to Natchiappa Chettiar amounting to Rs. 5,280, (*c*) secured debts due to a third party amounting to Rs. 1,515, (*d*) rates and taxes amounting to Rs. 1,430, making a sum total of Rs. 203,256.66. The plaintiff further alleged that when in February, 1930, owing to lack of liquid cash he was financially embarrassed the said Natchiappa Chettiar by his agent, one Ramanathan, promised to act as trustee of the plaintiff and suggested to the plaintiff to give over the entire management of the plaintiff's affairs to the said Natchiappa Chettiar. It was thereafter agreed that the plaintiff should execute the transfer P 21 which should purport to be for the consideration therein stated. That the said Natchiappa Chettiar should hold the said properties in trust for the plaintiff and should collect the rents, profits and income thereof as trustee for and on behalf of the plaintiff. That the sums so collected should be devoted by the said Natchiappa Chettiar to pay the

[1] *I. L. R. 45 Cal. 320.*
[2] *(1930) 11 C. L. Rec. 48.*
[3] *A. I. R. (1932) P. C. 255.*
[4] *A. I. R. (1933) P. C. 178.*

said sum of Rs. 1,430 for rates and taxes, the said secured debt of Rs. 1,515 and finally the sums of Rs. 185,031.66 and Rs. 5,280 together with interest due to the said Natchiappa Chettiar. That the proceeds of any sales of property made by the said Natchiappa Chettiar should be paid in liquidation of the said sum of Rs. 203,300 and after such liquidation the said Natchiappa Chettiar should reconvey to the plaintiff such of the properties as remained unsold. That the plaintiff should remain in possession as true owner of two of the said properties, to wit, Nos. 78 and 81, Messenger street, Colombo. The plaintiff further alleged that within a few weeks of the execution of P 21 the said Natchiappa Chettiar, having come to Ceylon personally, agreed to hold the said properties in trust for the plaintiff and to carry out the terms hereinbefore referred to. Thereafter Natchiappa Chettiar collected the rents of the said properties (save and except the two properties mentioned) and from time to time sold and transferred to the purchasers certain of such properties. The said Natchiappa Chettiar died in India on December 31, 1938, and subsequently the defendant as executrix proved his will. It was also asserted by the plaintiff that in or about November, 1939, the defendant by her agent, the said Ramanathan, agreed and undertook to retransfer to the plaintiff the properties described in shedules B and C of the plaint and to account for the moneys received. In or about January, 1940, the defendant, according to the plaintiff, fraudulently and in breach of the trust, claimed, on behalf of Natchiappa Chettiar's estate, the properties aforementioned. According to the plaintiff all amounts due to Natchiappa Chettiar had been liquidated before his death and the latter held the remaining properties in trust for the plaintiff.

The District Judge found the following issues in favour of the plaintiff:—

(1) Natchiappa Chettiar, by his agent Ramanathan Chettiar, a friend of the plaintiff, did promise to act as trustee of the plaintiff and suggested to him to give over the entire management of his affairs to the said Natchiappa Chettiar.

(2) The plaintiff entered into the agreement set out in paragraph 7 of the plaint with Natchiappa Chettiar acting through Ramanathan and P 21 was executed in pursuance of such agreement and on the terms and conditions contained in paragraph 7. It was agreed, *inter alia*, that (*a*) P 21 should purport to be for a consideration of Rs. 203,300, (*b*) Natchiappa Chettiar should hold the said properties in trust for the plaintiff and collect the rents and profits as trustee, (*c*) on liquidation of the said sum of Rs. 203,300 Natchiappa Chettiar should reconvey such properties as remained unsold to the plaintiff.

(3) The value of the property transferred by P 21 valued by Mr. Beling at Rs. 460,115 was very much in excess of the amount due to Natchiappa Chettiar. Natchiappa Chettiar in October, 1930, handed over the title deeds of the properties to plaintiff's lawyers to draw up a deed of reconveyance to the plaintiff at which time Natchiappa Chettiar reaffirmed the trust and prevented the plaintiff from getting back the property.

(4) The beneficial interest in the properties remained in the plaintiff who continued in occupation of Nos. 78 and 81, Messenger street. The defendant was under a duty to account to the plaintiff for all sums received and to retransfer all properties as remained unsold.

(5) In June, 1935, Natchiappa Chettiar further reaffirmed the trust and agreed that the properties should be retransferred to the plaintiff in March, 1940.

(6) In or about 1940 the defendant fraudulently and wrongfully repudiated the trust and the plaintiff is entitled to obtain a retransfer of the properties mentioned in Schedules B and C of the plaint on payment of whatever sums of money are found due to the estate of Natchiappa Chettiar after an account has been taken.

In finding these issues of fact in favour of the plaintiff, the learned Judge has been very much influenced by the evidence of Mr. T. Canagarayer, a proctor, who testified to the arrangements entered into by the plaintiff and Ramanathan Chettiar. According to Mr. Canagarayer the final arrangement was made at the house of one Abdul Raheman, who was dead at the date of trial. It was agreed between Ramanathan Chettiar and the plaintiff that, in order to prevent the unsecured creditors of the plaintiff from seizing any of the properties, they should be transferred to Natchiappa Chettiar in trust. It was also agreed that the unsecured creditors should be given the stock-in-trade which, it was believed, was more than sufficient to meet their demands. The learned District Judge, in accepting the evidence of Mr. Canagarayer, has held that the agreement set out in paragraph 7 of the plaint has been proved. In this connection it would appear that the plaintiff at this time told Mr. Wilson, a proctor acting on behalf of the unsecured creditors, that he had transferred the properties in trust to Natchiappa Chettiar. Mr. Wilson's testimony was also accepted by the District Judge. Although there is no evidence to show that Natchiappa Chettiar was aware of the secret arrangement made by his agent at the time of the execution of P 21, there is evidence, which has been accepted by the learned Judge, that a few weeks after the execution of P 21 Natchiappa Chettiar came to Ceylon and ratified the arrangements made by Ramanathan Chettiar. At a later date also Natchiappa Chettiar reaffirmed his willingness to carry out the terms of the agreement. Though his agent, Natchiappa Chettiar entered into possession of the properties transferred and collected the rents and sold a number of such premises. The District Judge has held that in the majority of these cases the purchasers were introduced by the plaintiff who was then taking an active part in the sales. No accounts were, however, rendered to the plaintiff. According to the latter, Natchiappa Chettiar in 1935 finally promised to retransfer the properties in March, 1940, when the accounts would be settled between the parties. Before that date Natchiappa Chettiar died and the defendant was appointed his executrix. Objection was taken to the reception of oral evidence which would have the effect of furnishing proof that Natchiappa Chettiar through his agent agreed to retransfer the property on the happening of certain events and that he agreed to hold the property in trust for the plaintiff under certain circumstances. After hearing argument by Counsel the learned District Judge admitted oral testimony for the purpose of ascertaining whether a trust as alleged can be established on the evidence. He also held that this evidence fell within the dictum of Lord Warrington in

Blackwell v. Blackwell[1] as evidence of the nature of the obligation which the defendant is alleged to have undertaken. The learned Judge further held that oral evidence of an agreement by the defendant to reconvey can be admitted, not for the purpose of such an undertaking being held to be of force or avail against him, but as evidence of the trust under the personal obligation which Natchiappa Chettiar undertook with regard to the trust and for the purpose of ascertaining the terms and conditions upon which the transfer was executed and the nature of the obligation which the defendant was bound to fulfil.

The defendant appeals against the decision of the District Judge on the following grounds:—

(*a*) The Judge's order of January 29, 1942, that oral evidence of the transaction was admissible is wrong.
(*b*) Plaintiff was not entitled in law to contradict P 21 nor to prove any verbal trust of immovable property.
(*c*) The plaintiff's story amounts only to having transferred properties to Natchiappa Chettiar as a security and in such circumstances no trust is created.
(*d*) Even if plaintiff's story is accepted it amounts only to a promise by Natchiappa Chettiar to transfer whatever properties are left over after paying the debt due to him. Such a promise being only verbal can neither be proved nor enforced.
(*e*) The evidence called in support of the plaintiff's story of a trust of security is unreliable.
(*f*) The Judge's finding on the issue of prescription was wrong.
(*g*) If the learned Judge's finding that P 21 was executed in fraud of creditors is correct, the plaintiff cannot succeed inasmuch as he comes into Court with the case that his transfer was in fraud of creditors.
(*h*) Assuming that Ramanathan Chettiar promised to hold the properties in trust for the plaintiff, such trust would not bind Natchiappa Chettiar. Even if the latter subsequently agreed to hold the properties in trust, such trust being purely parol is not valid or enforceable.

Grounds (*a*), (*b*), (*c*), and (*d*) have been strongly pressed by Mr. Perera on behalf of the defendant. He contents that the admission of oral evidence is excluded by the provisions of section 92 of the Evidence Ordinance (Cap. 11). If such evidence is excluded the issue between the parties must be decided on an interpretation of P 21. This document is a conveyance of the properties by way of sale to Natchiappa Chettiar by the plaintiff. No question of a trust or a conveyance with a right of retransfer can be implied from P 21. If it stands by itself, the plaintiff's claim must fail. The first part of section 92 is worded as follows:—

" When the terms of any such contract, grant, or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as

[1] (*1929*) *A. C. 318.*

between the parties to any such instrument, or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from its terms. ''

The terms of the contract between the parties have been reduced to the form of a document, that is to say P 21, which has been proved according to section 91. Hence no evidence of any oral agreement or statement, so it is contended, shall be admitted as between the parties to P 21 or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms. There is no doubt that the arrangement between the parties, whether amounting in law to a trust or an agreement for the retransfer of the properties, with reference to which the plaintiff and his witness Mr. Canagarayer, have given oral testimony, does contradict, vary and subtract from the terms of P 21. Mr. Perera further contends that the plaintiff's story, even if accepted, shows that the arrangement was the creation of a security for money advanced. The agreement to retransfer could not, in these circumstances, by reason of section 2 of the Prevention of Frauds Ordinance (Cap. 57) be proved by oral evidence. In this connection Mr. Perera cited the case of *Adaicappa Chetty v. Caruppen Chetty*[1]. The facts in this case were as follows: The added-defendant being desirous of buying some pieces of land applied to a moneylending firm, of which planitiff and defendants were partners, for a loan. For securing the repayment of the sum with interest, the transfers were executed in the name of the first defendant. Subsequently, the firm requested the added-defendant to let them have absolutely for their benefit a half share of all the property alleged to be held in trust for him for the actual cost of such share, and in consideration offered to forego all claim for interest. The added-defendant accepted this offer, and acknowledged verbally the title of the firm to the half share on the footing of the agreement. In this action the added-defendant intervened and sought to establish by parol evidence that half share of the land was held in trust for him by the firm. In holding that parol evidence was inadmissible to establish the alleged trust, Lord Atkinson at pp. 425-426 stated as follows:—

'' The first question which it is necessary to determine is what is the real nature, the true aim, and purpose of the transaction described in the 6th paragraph of Perera's answer. The purchase money was paid by the Chetty firm through the medium of Perera. It was never lent to him to dispose of it as he pleased. If he got command of the money at all, he only had command of it in order to devote it to a particular purpose, the purchase of these lands. He was to repay it with interest at 10 per cent., and the conveyance was made to the first defendant: ' The deed of the land so purchased to be taken in the latter's name '. Not for the purpose, in the view of either party, of being held in trust for Perera or for Perera's sole benefit, but to secure to the firm the repayment of the money sunk in the purchase with interest. The object of the agreement was, in their Lordship's view, to create something much more resembling a mortgage or

[1] *22 N. L. R. 417.*

pledge than a trust. The arrangement differed absolutely in nature and essence from that entered into, where one man with his own proper money buys landed property and gets the conveyance of that property made to another. In such a case that other has no claim upon the property vested in him. It would be a fraud upon his part to contend that it belonged to him, or to insist that he was entitled to a charge or incumbrance upon it, or had a right to retain the possession of it against the will of the man who purchased it. But in the present case, until the purchase money with interest was repaid to the firm, the first defendant had a right to insist that his firm had a claim upon this land, and that he (the first defendant) had the right, in the interest of his firm, to retain the ownership of it. It is true that the deed which conveyed the land to the first defendant did not contain any provision for redemption. It was not a formal mortgage in that respect, but the agreement the parties entered into was much more an agreement to create a security resembling a mortgage than to create a trust. It was in effect a parol agreement providing for the conveyance of land to establish a security for money, and creating an incumbrance affecting land, that Perera desired to prove the existence of by parol evidence. The parol evidence, which must be taken to have been tendered, was properly held to have been inadmissible, for the simple reason that the agreement, if proved by it, must, under Ordinance No. 7 of 1840, subsection (2), have been held not to be of ' any force or avail in law '. This section is much more drastic than the fourth section of the Statute of Frauds.''

Lord Atkinson took the view that the first question to determine was the real nature, true aim and purpose of the transaction. He then held it was not for the purpose of the land being held in trust for Perera, but to secure to the firm the repayment of the money sunk in the purchase with interest. The judgment of Lord Atkinson in this case would also seem to negative the suggestion of Counsel for the appellant in that case that the plaintiff was using the Statute of Frauds to perpetrate a fraud on the appellant. In *Balkishen Das v. Legge*[1] a deed of sale of land for value was accompanied by a deed of agreement between the parties for purchase back by the vendor of the land on payment by him of money to the vendee on a future date fixed. The vendor did not exercise his right of repurchase but after many years gave notice of his intention to redeem and brought this suit to enforce his right of redemption as upon a mortgage by conditional sale. It was held that oral evidence for the purpose of ascertaining the intention of the parties to the deed was not admissible, being excluded by section 92 of the Indian Evidence Act. The following passage from the judgment of Lord Davey occurs at page 158:—

> '' Evidence of the respondent and of a person named Man was admitted by the Subordinate Judge for the purpose of proving the real intention of the parties, and such evidence was to some extent relied on in both Courts. Their Lordships do not think that oral evidence of intention was admissible for the purpose of construing the deeds or

[1] *I. L. R. 22 All. 149.*

ascertaining the intention of the parties. By section 92 of the Indian Evidence Act (Act I of 1872) no evidence of any oral agreement or statement can be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying or adding to, or subtracting from, its terms, subject to the exceptions contained in the several provisos. It was conceded that this case could not be brought within any of them. The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian Legislature. 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 show in what manner the language of the document is related to existing facts."

The passage cited above from the judgment of Lord Davey in *Balkishen Das v. Legge* (*supra*) was referred to with approval by Lord Blanesburgh in *Gyanagerji v. Rayanim Garu*[1] in the following words:—

> "It seems to their Lordships that they can dispose of the present case with no reference to any oral evidence, other than that of surrounding circumstances such as in Lord Davey's words in *Balkishen Das v. Legge* are clearly required to show in what manner the language of the documents was related to existing facts."

His Lordship then considered the surrounding circumstances and held that the transaction was a mortgage only. In his judgment in *Tsang Chuen v. Li Po Kwai*[2], Lord Glanesburgh at page 261 also dealt with the question of the admission of parol evidence to correct written instruments in the following passage:—

> "Indeed it appears from the authorities examined before their Lordships that the cases in which parol evidence when objected to is, apart from fraud or mistake, receivable to correct written instruments are cases where, for example, the evidence supplements, but does not contradict, the terms of the deed; where the provisions of the deed leave the question doubtful whether merely a mortgage and not an out and out sale was intended, or where the language sought to be explained in evidence is language in an ordinary conveyancing form not exhaustively accurate but without an actual mistatement of fact."

It will be observed that in this passage His Lordship used the words "apart from fraud or mistake". Lord Davey's dictum in *Balkishen Das v. Legge* (*supra*) was also approved by Sir George Lowndes in *Mian Feroz Shah v. Sohbat Khan*[3] in the following passage:—

> "Section 92, Evidence Act, forbids the admission or consideration of evidence as to the intentions of the parties, or to contradict the express terms of the document: see *Balkishen Das v. Legge*, and their Lordships think that no presumption can legitimately be drawn from the fact that there had been previous transactions between the parties of a similar character."

[1] *A. I. R. (1924) P. C. 226.* [2] *A. I. R. (1932) P. C. 255.*
[3] *A. I. R. (1933) P. C. 178.*

The judgment of Lord Davey in *Balkishen Das v. Legge* was also considered and explained in *Maung Kyin v. Ma Shwe Law*[1]. At pages 209-210, Lord Shaw stated as follows:—

> " In the opinion of their Lordships, this series of cases definitely ceased to be of binding authority after the judgment of this Board pronounced by Lord Davey in the case of *Balkishen Das v. Legge*. It was there held that oral evidence was not admissible for the purpose of ascertaining the intention of parties to written documents. Lord Davey cites section 92 of the Indian Evidence Act, and adds:—
>
> ' The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian Legislature. 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 show in what manner the language of the document is related to existing facts.'
>
> . . . . . .
>
> The principles of equity which are universal forbid a person to deal with an estate which he knows that he holds in security as if he held it in property. But to apply the principles, you must be placed in possession of the facts, and facts must be proved according to the law of evidence prevailing in the particular jurisdiction. In England the laws of evidence for the reasons set forth in *Lincoln v. Wright*[2] and other cases, permit such fact to be established by a proof at large, the general view being that, unless this were done, the Statute of Frauds would be used as a protection or vehicle for frauds. But in India the matter of evidence is regulated by section 92 of the Indian Evidence Act, and it accordingly remains to be asked. What is the evidence which under that statute may be competently adduced ? The language of the section in terms applies and applies alone ' as between the parties to any such instrument or their representatives-in-interest '. Wherever accordingly evidence is tendered as to a transaction with a third party, it is not governed by the section or by the rule of evidence which it contains, and in such a case accordingly the ordinary rules of equity and good conscience come into play unhampered by the statutory restrictions."

It will be seen, therefore, that their Lordships held that section 92 was not a bar to the reception of the parol evidence as the evidence was tendered as to a transaction with a third party. On the other hand at page 210 the judgment stated that if section 92 applied, proviso (1) would seem to be in point because it would be a fraud to insist upon a claim to property arising under such a transaction, the claimant knowing that the true owner had never parted with it.

The principles laid down in the Privy Council cases I have cited have been followed in our Courts. In *Perera v. Fernando*[3] where a person

[1] *A. I. R. (1917) P. C. 207.*

[2] *(1859) 4 de G & J. 16.*

[3] *17 N. L. R. 486.*

transferred a land to another by a notarial deed, purporting on the face of it to sell the land, it is not open to the transferor to prove by oral evidence that the transaction was in reality a mortgage and that the transferee agreed to reconvey the property on payment of the money advanced. The admission of oral evidence to vary the deed of sale is in contravention of section 92 of the Evidence Ordinance. The agreement to resell is not a trust, but is a pure contract for the purchase and sale of immovable property. In his judgment in this case on page 489 de Sampayo A.J., stated as follows:—

"Another aspect of the case is that arising from the provision of the Ordinance No. 7 of 1840, which requires a notarial instrument to establish any agreement relating to immovable property. Here the plaintiff refers to the alleged trust and relies on the decisions of this Court, which have laid down the principle that the Ordinance will not be allowed to be used for perpetrating a fraud, and of which *Ohlmus v. Ohlmus*[1] cited by the District Judge is an example. But those decisions when examined will be found not to apply to such a case as this. The argument as to the deed of sale being only a mortgage has been above disposed of, and the position then is reduced to this: that plaintiff seeks to enforce an agreement to resell the lands on repayment of the amount paid by the purchaser, Diege Perera. Such an agreement does not constitute a trust, but is a pure contract for the purchase and sale of immovable property, and the Ordinance No. 7 of 1840, declares it to be void in the absence of a notarial instrument."

In support of his contention that oral evidence is admissible, even if the transaction is in the nature of a security for money, Counsel for the respondent has relied to a certain extent on the judgment of Lord Tomlin in *Ana Lana Saminathan Chetty v. Vander Poorten*[2]. In this case the District Judge held that the respondent held the estate upon a trust and oral evidence was admissible. On appeal the Supreme Court allowed the appeal and the action was dismissed. On appeal to the Privy Council the finding of the District Judge in favour of the plaintiff was restored. In coming to this conclusion their Lordships held that the transaction effected by certain deeds Nos. 471 and 472 was the creation of a security for money advanced, which, in certain events, imposed upon the defendant, who was the creditor, duties and obligations in the nature of trusts. Their Lordships did not hold that there was a trust or that oral evidence was admissible.

Having regard to the authority of the various cases I have cited, the question with regard to the admission of oral evidence would, it is thought have been removed from the regions of doubt. *Balkishen Das v. Legge* (*supra*) and the cases that subsequently followed Lord Davey's dictum no doubt make it clear that, so far as the law of India is concerned, in a case where none of the provisos to section 92 of the Evidence Act apply, oral evidence is inadmissible for the purpose of construing certain deeds or ascertaining the intention of the parties to those deeds. That there are still difficulties is evident from a perusal of a summary of the effect of the various Indian cases culminating in Maung Kyin's case in the 2nd

[1] *(1906) 9 N. L. R. 183.*

[2] *34 N. L. R. 287.*

Edition of Monir's Law of Evidence at page 633, where it is stated as follows:—

> "It may, therefore, be taken now as generally settled that neither oral evidence of intention nor evidence of the acts and conduct of the parties to a document is admissible between them or their representatives in interest to show that the document did not mean what it purports to be, and that neither direct evidence nor indirect evidence, *e.g.*, evidence of the acts and conduct of the parties to an instrument, is admissible to prove a contemporaneous oral agreement varying the terms of the instrument. A contemporaneous oral agreement to reconvey, or allow redemption of property conveyed by a deed of absolute sale is inadmissible to show that the transaction was one of mortgage. It is, however, apprehended that the Privy Council decision in *Maung Kyin's case* does not set at rest the controversy in all its aspects. Firstly, however, considered the decision of the Privy Council on this point in *Maung Kyin's case* may be, it is no more than an *obiter dictum*, as the actual decision of the case proceeded on another ground, namely, that section 92 does not apply to a transaction with a third party."

The author also states on page 634 that, though the Privy Council has definitely held the equitable doctrine of *Lincoln v. Wright* (*supra*) to be inapplicable to India, it has clearly recognized the possibility of such cases falling within the first proviso to section 92. Moreover it has to be borne in mind that the passage I have cited from Lord Davey's judgment was an *obiter dictum* and no question of fraud arose. Again Lord Shaw in *Maung Kyin v. Ma Shwe Law* (*supra*) states at page 210 that it would be a fraud to insist on a claim to property arising under such a transaction, the claimant knowing that the true owner had never parted with it and the proviso to section 92 would apply.

At this stage it is relevant to consider what has been established by the evidence. In this connection I am of opinion that the findings of fact made by the learned Judge must be accepted. He is a Judge of wide experience and had the opportunity of watching the demeanour of the witnesses when they tendered their evidence. It is impossible to say that, in accepting the evidence of Mr. Canagarayer, the proctor, he has misdirected himself although it is possible we might have come to a different conclusion ourselves. The learned Judge has found that P 21 was executed in pursuance of an agreement by Ramanathan acting as the agent of Natchiappa Chettiar that the latter should act as trustee of the plaintiff in whom remain the beneficial ownership of the properties. That this agreement was ratified by Natchiappa Chettiar. The learned Judge has further found that the defendant has fraudulently repudiated the trust. Although the findings of the learned District Judge on questions of fact are accepted, it is incumbent on this Court to consider whether his interpretation of those findings and the inference to be drawn therefrom are correct. In other words we must, to use the words of Lord Atkinson in *Adaicappa Chetty v. Caruppen Chetty* (*supra*) determine the real nature, true aim and purpose of the transaction. Was the effect of the oral arrangement to create a security for money advanced? I think the learned Judge was right in holding it was not, but such oral

arrangement created a trust. In this connection it would appear that all except one of the properties transferred by P 21 were already mortgaged to Natchiappa Chettiar. How then can it be argued that the purpose and true aim of the arrangement was to create a security for money advanced ? The security was already in existence and only a small amount was advanced. If the properties were held in trust by Natchiappa Chettiar, such trust is an express one, arising not only by oral agreement, but also as a violent and necessary presumption from the nature of the transaction between the parties. It now becomes relevant to consider the provisions of section 5 of the Trusts Ordinance which is worded as follows:—

> "5. (1) Subject to the provisions of section 107 no trust in relation to immovable property is valid unless declared by the last will of the author of the trust or of the trustee, or by a non-testamentary instrument in writing signed by the author of the trust or the trustee, and notarially executed.
>
> (2) No trust in relation to movable property is valid unless declared by the last will of the author of the trust or of the trustee, or by a non-testamentary instrument in writing signed by the author of the trust or the trustee, or unless the ownership of the property is transferred to the trustee by delivery.
>
> (3) These rules do not apply where they would operate so as to effectuate a fraud."

The findings of the learned Judge imply that if a notarial agreement to prove the trust is required, a fraud will be effectuated inasmuch as such trust cannot be established by oral evidence In these circumstances, sub-section (1) would not apply and it is contended by Mr. Canekeratne that section 2 of the Trusts Ordinance comes into operation. Section 2 is worded as follows:—

> "2. All matters with reference to any trust, or with reference to any obligation in the nature of a trust arising or resulting by the implication or construction of law, for which no specific provision is made in this or any other Ordinance, shall be determined by the principles of equity for the time being in force in the High Court of Justice in England."

It is, in my opinion, impossible to maintain that specific provision for the manner in which a trust shall be established has not been made in this or any other Ordinance. Such provision is made by the Trusts Ordinance itself read in connection with section 92 of the Evidence Ordinance. It is suggested, however, that the judgment of the House of Lords in *McCormick v. Grogan*[1] is an authority for the proposition that in the case of fraud section 92 of the Evidence Ordinance can be excluded from consideration. At page 97 Lord Westbury stated as follows:—

> "My Lords, the jurisdiction which is invoked here by the Appellant is founded altogether on personal fraud. It is a jurisdiction by which a Court of Equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud. Now, being a jurisdiction founded on personal fraud,

[1] *(1869) L. R. 4 H. L. 82.*

it is incumbent on the Court to see that a fraud a *malus animus*, is proved by the clearest and most indisputable evidence. It is impossible to supply presumption in the place of proof nor are you warranted in deriving those conclusions in the absence of direct proof, for the purpose of affixing the criminal character of fraud, which you might by possibility derive in a case of simple contract. The Court of Equity has, from a very early period, decided that even an Act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an Act of Parliament intervenes, the Court of Equity, it is true, does not set aside the Act of Parliament but it fastens on the individual who gets a title under that Act, and imposes upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud. In this way the Court of Equity has dealt with the Statute of Frauds, and in this manner, also, it deals with the Statute of Wills."

So in this case it is urged that the equitable principle formulated, proceeding on the ground of fraud, converts the defendant who has committed it into a constructive trustee for the plaintiff who is injured by that fraud. To hold that section 92 of the Evidence Ordinance is excluded would, in my opinion, be contrary to the dictum of Lord Davey in *Balkishen Das v. Legge* (*supra*) and that of Lord Shaw in *Maung Kyin v. Ma Shwe Law* (*supra*) when he said that principles of equity are of universal application but they can only be applied when they rest on facts which can be proved according to the law of evidence prevailing in a particular jurisdiction.

In *Manuel Louis Kunha v. Jnana Coelho & others*[1] it was held that under English law, where a testator disposes of property in favour of a legatee, and, at the time of such disposition or at any subsequent period during his lifetime, the testator informs the legatee that the disposition in his favour, although apparently for his benefit, was so made in order that he may carry into effect certain wishes of the testator which are communicated to him, and the legatee expressly, or impliedly, undertakes to carry out the wishes so expressed to him by the testator, the legatee will be treated as a trustee, and will be compelled to carry out the instructions so confided to him. The reason for this rule is that it would be a fraud on the part of the legatee not to give effect to the testator's intentions, and the law will not permit him to benefit by his own fraud. The Legislature in enacting section 5 of the Indian Trusts Act and the proviso thereto intended to make this rule of Equity applicable in India. In my opinion a legatee who expressly or impliedly undertakes to carry out the wishes of a testator and does not do so is not guilty of a greater fraud than the grantee of property who undertakes to hold it for the benefit of the grantor. The Court would, therefore, apply section 5 (3) of the Trusts Ordinance. This provision, however, does not deal with the admissibility of evidence. It merely saves certain trusts from the rules formulated by section 5 (1) and (2). The question therefore arises, in what way does section 92 of the Evidence Ordinance operate in regard to the admission of oral evidence to prove a trust to which sub-section (1) of section 5 does not apply ? It was said by Lord Shaw in *Maung*

[1] *I. L. R. 31 Mad. 187.*

Kyin's case that, if section 92 applied, proviso 1 would seem to be in point, because it would be a fraud to insist upon a claim to property arising under such a transaction, the claimant knowing that the true owner had never parted with it. But does Lord Shaw's dictum apply to the transaction which took place in this case between the plaintiff and the agent of Natchiappa Chettiar? The defendant who is his executrix cannot be in any better position than Natchiappa Chettiar and therefore it would be a fraud on her part as it would have been on the part of Natchiappa Chettiar to deny the trust. Although there is no clear decision on the point, proviso 1 would seem to permit the introduction of oral evidence to prove such a trust.

In *Cutts & another v. T. F. Brown & others*[1] it was stated by Garth C.J. that the rule laid down in section 92 of the Evidence Act is taken almost verbatim from Taylor on Evidence and the exceptions to that section which follow in the provisos are discussed in the same work. That being so, it was legitimate to refer to Taylor as a means of ascertaining the true meaning of the provisos. In paragraph 1135 of the 12th Edition it is stated that the rule (that is to say the rule excluding parol evidence) is not infringed by the admission of parol evidence, showing that the instrument is altogether void, or that it never had any legal existence or binding force, either by reason of forgery or fraud. In paragraph 1136 it is stated that "if a person has been induced by verbal fraudulent statements to enter into a written contract for the purchase of a house, a ship, or the like, it is competent for him, in an action for deceitful representation, to prove the fraud by evidence *aliunde*, though the written contract or the deed of conveyance is silent on the subject to which the fraudulent representations refer". In this connection see *Dobell v. Stephens*[2]. In this case there was a misrepresentation with regard to a state of affairs that existed in the past. But Taylor draws no distinction between a representation made in regard to the past or the future. Untrue statements which deceive the person to whom they are made and which lead him to act to his prejudice as he would not otherwise have acted if he had not been deceived may be proved by parol evidence. Applying this principle to the facts of the present case it is open to the plaintiff to establish by parol evidence the untrue statement made by Natchiappa Chettiar's agent that he would hold the properties in trust. This statement deceived the plaintiff and led him to act to his prejudice and execute the deed P 21. It is true that in *Cutts & another v. T. F. Brown & others* (*supra*) Garth C.J. stated that the proviso applied to cases where evidence is admitted to show that a contract is void upon the ground of fraud at its inception. On the other hand as I have already observed. Taylor imposes no such limitation on the applicability of the proviso. The words of the proviso are very wide and declare that any act of fraud might be proved which would entitle any person to any decree relating to a document. The words of the proviso are in my opinion wide enough to let in evidence of subsequent conduct as in the view of a Court of Equity would amount to fraud and would entitle the grantor to a decree restraining the grantee from proceeding upon his document. The conduct of Natchiappa

[1] *Ind. Decs. N. S. 6 Calc. 339.*

[2] *107 E. R. 864.*

Chettiar in refusing to reconvey the premises and insisting that the transaction was an out and out conveyance amounted to fraud and hence the plaintiff is entitled to a decree restraining the defendant from proceeding upon P 21.

Even if the transaction is regarded not as a trust, but merely as the creation of a security with a right in the plaintiff to a retransfer of the property on payment of the amount due, I am of opinion that, having regard to the dictum of Lord Shaw, proviso 1 to section 92 would apply as it would still be a case of a person making a fraudulent claim to property, such person knowing the true owner had not parted with it. I have, therefore, come to the conclusion that the oral evidence was properly admitted.

With regard to the other contentions put forward by Mr. Perera, I am of opinion that the learned Judge having come to the conclusion that the defendant held the properties as a trustee, was right in holding that in view of section 111 of the Trusts Ordinance the claim of the plaintiff was not barred by prescription. If the transaction is regarded as the creation of a security for money advanced with a right to retransfer, the cause of action would not arise until there was a refusal to retransfer. Regarded from this point of view, therefore, the plaintiff's claim was not prescribed.

With regard to ground (*g*), I am of opinion that it was not established that any creditors of the plaintiff were defrauded or their claims delayed by reason of the transfer of properties in favour of the defendant. In these circumstances, the principles laid down in *Sauramma v. Mohamadu Lebbe*[1] are not applicable.

With regard to ground (*h*), I am of opinion that the learned Judge was right in holding that Ramanathan Chettiar's promise was endorsed by Natchiappa Chettiar and hence the latter is liable. As I have already indicated, the learned Judge's other findings of fact must be accepted and, in these circumstances, the plaintiff's claim is established. The appeal is, therefore, dismissed with costs.

KEUNEMAN J.—

In his plaint, the plaintiff alleged that in March, 1930, he owned and possessed, *inter alia*, movable property being stock-in-trade of the value of Rs. 250,000, and certain specified immovable property of the value of Rs. 460,115, in addition to other immovable property of the value of Rs. 200,000.

At the same period he had debts, viz:—

	Rs.
(*a*) unsecured debts to third parties	225,857
(*b*) secured debts to Natchiappa Chetty, the testator, now represented by defendant as executrix	185,031
(*c*) unsecured debts to the same person as in (*b*)	5,280
(*d*) secured debts to a third party	1,515
(*e*) rates and taxes due	1,430
(*f*) other debts of about	120,000

[1] *44 N. L. R. 397.*

Plaintiff alleged that in February, 1930, when he was in bad health and in financial embarrassment owing to lack of liquid cash, the said Natchiappa Chetty, by his servant and agent Ramanathan Chetty, promised to act as the trustee of the plaintiff and suggested to the plaintiff that he should give over the entire management of the plaintiff's affairs to Natchiappa Chetty. Thereafter, the plaintiff alleged that an agreement was entered into between the plaintiff and Natchiappa Chetty by his agent, Ramanathan Chetty, as set out in paragraph 7 of the plaint. In pursuance of the agreement plaintiff executed the deed of transfer 1604 of March 3, 1930 (P 21 or D 1). The plaintiff alleged that Natchiappa Chetty died on December 30, 1938, and that about January, 1940, the defendant fraudulently and in breach of the trust claimed that the estate of Natchiappa Chetty was entitled to the premises in question. The plaintiff stated that all amounts due to Natchiappa Chetty had been liquidated before his death, and that Natchiappa Chetty held the remaining properties in trust for the plaintiff.

In his very careful judgment, the District Judge held that the following facts were established, and I accept that finding as correct. The plaintiff who was possessed of several immovable properties carried on a business as a hardware merchant. At first the business was successful, but the plaintiff who was indebted to Natchiappa Chetty and others decided to raise a loan of Rs. 300,000 at a moderate rate of interest in order to pay off the debts which carried a much higher rate of interest. Negotiations for the raising of the loan were opened with the Loan Board. Meanwhile a complication arose, in consequence of two overseas creditors, who were unsecured, suing the plaintiff for Rs. 25,000 and Rs. 32,000 odd. Plaintiff then went to a firm of proctors to assist him in the raising of the necessary loan.

Mr. Beling, retired Assessor of the Colombo Municipality, was commissioned to make a valuation of the plaintiff's properties for this purpose. The valuation was made, and according to this the value of the properties transferred to Natchiappa Chetty by the deed 1604 was Rs. 460,115. The District Judge definitely accepts the correctness of this valuation, which was made at that very time, and the point is of importance. While the negotiations for the loan were in progress, Natchiappa Chetty's agent in Ceylon, Ramanathan Chetty, who was a trusted friend of the plaintiff, approached the plaintiff with a proposal that the plaintiff should transfer the lands already mortgaged to Natchiappa Chetty for the ostensible consideration of Rs. 203,300 on the promise that the transferee would hold the lands in trust for the plaintiff subject to an obligation to retransfer the lands, or such of them as remained unsold, to the plaintiff.

The plaintiff consulted Proctor Canagarayer, who advised him against the suggestion and said that a deed setting out all the conditions agreed upon was desirable. In spite of this, however, the plaintiff persisted in going on with the suggestion of Ramanathan Chetty. It seems fairly clear that the object which the plaintiff had in mind was to prevent the unsecured creditors from seizing the valuable immovable properties. At the same time it suited Natchiappa's plans to have the whole of these valuable properties in his own name, and not merely under mortgage.

At this time the plaintiff had an extensive stock of hardware, and even Mr. Wilson, who was acting for two of the unsecured creditors, was satisfied that the stock was sufficient to meet the claims of the unsecured creditors. The plaintiff told Mr. Wilson that he had transferred the immovable properties to Natchiappa Chetty in trust. Mr. Wilson insisted on further security being given to the unsecured creditors, and a mortgage of Rs. 15,000 was promptly given. In the result the sale of the stock resulted in a small shortfall, but the mortgage was more than sufficient to meet the claims of the unsecured creditors. I have dealt with this aspect of the matter out of its order, because I think the evidence disposes of the argument addressed to us that the plaintiff acted in fraud of his creditors, and that the fraud was actually carried out. I am of opinion that no creditor was either defrauded or even delayed as a result of the plaintiff's action.

The District Judge accepted the evidence of Proctor Canagarayer that a final arrangement was arrived at in the house of one Abdul Rahman, who was dead at the date of trial. Ramanathan Chetty and the plaintiff arrived at the agreement. It was decided that the properties which were under mortgage to Natchiappa Chetty should be transferred to him in trust. This was to be done in order to prevent any creditors proceeding to seize those properties in execution, and Ramanathan Chetty asserted that he was coming forward to help the plaintiff to save some of his properties from the creditors. At the same time the unsecured creditors were to be given all the stock-in-trade, which it was believed was more than sufficient to satisfy their claims. Another Chetty was to have transferred to him the properties mortgaged to him. This was Arumogam Chetty, who in fact received by deed No. 120 of April 15, 1930, the transfer of certain immovable property for a sum of Rs. 61,000. As regards the properties transferred to him, Natchiappa Chetty was to manage them and take the income and give credit to the plaintiff for what he collected. The plaintiff could sell any of the property he liked, and Natchiappa Chetty was to take the proceeds and give credit to the plaintiff. Finally these persons were to look into accounts and adjust matters and there was to be a retransfer of the properties, if any remained. All these terms were agreed upon between Ramanathan Chetty and the plaintiff about February, 1930. Secrecy as to the arrangement was insisted upon by Ramanathan Chetty.

The District Judge has held that the agreement set out in paragraph 7 of the plaint was established. In that paragraph, it is said that the agreement included a term whereby the plaintiff should remain in possession as true owner of two of the premises transferred to Natchiappa Chetty, Nos. 81 and 78, Messenger street. The evidence conclusively shows that plaintiff continued to reside in one and his mother-in-law in the other of these premises, without payment of any rent, and they are still in occupation of these premises. Ramanathan Chetty actually paid rates and taxes on these premises till 1935, and thereafter the plaintiff has paid them. Ramanathan Chetty in cross-examination gave this explanation. "There are two houses; in one Majeed (plaintiff) was living and in the other his mother lived . . . . I asked him for rent for some time, he did not pay the rent . . . . I paid the

taxes for a little over two or three years, after that I did not pay. I am not claiming those two properties now. I told my Mudalali . . . . I would have to litigate, and that Majeed had been dealing with us for some time and he is down in life, and I appealed to the Mudalali to give those lands to him. It is because there was no trust in his favour that we gave up those two lands.'' This discloses a degree of generosity on the part of the Chetty which it is difficult to credit. The explanation given by the plaintiff is more realistic, and I think this circumstance vividly shows that the transaction between the plaintiff and Natchiappa Chetty was not a mere business transaction of transfer.

On March 3, 1930, plaintiff executed the deed of transfer P 21 or D 1 in favour of Natchiappa Chetty. In that deed the consideration is set out as Rs. 203,300. The consideration is as follows: Rs. 188,950 represented the mortgage debt due to Natchiappa Chetty, plus a further sum of Rs. 6,081.66 in respect of interest thereon. Rs. 5,200 plus Rs. 80 was principal and interest due to Natchiappa Chetty on three promissory notes made by plaintiff. Rs. 1,430 was for arrears of assessment rates on the premises. Rs. 1,515 was paid by cheque to Mr. Nagalingam to clear off an outstanding mortgage on one of the properties. Rs. 44.34 was added in order to make a round figure. The items of Rs. 1,430 and Rs. 1,515 were paid at the time of the execution of the deed. The cheque for Rs. 43.34 was drawn and handed to the plaintiff, but admittedly it has never been cashed. Plaintiff stated that he handed it back to Ramanathan Chetty.

The transfer covered a large number of premises, all but one of which had already been mortgaged to Natchiappa Chetty.

There is no evidence to show that Natchiappa Chetty was aware of the secret arrangement made by his agent at the time of the execution of the deed P 21 or D 1. But there is clear evidence that Natchiappa Chetty came to Ceylon a few weeks after the execution and adopted and ratified the arrangement made by his agent Ramanathan Chetty. At a later date also Natchiappa Chetty intervened, when the question of commission claimed by Ramanathan Chetty arose, and reaffirmed his willingness to carry out the terms of the agreement upon which the transfer was made.

Natchiappa Chetty through his agent entered into possession of the bulk of the premises transferred, and collected the rents and profits, paid rates and taxes, and sold a number of the premises transferred. The District Judge has held that in the vast majority of these sales the purchasers were introduced by the plaintiff, and there is strong evidence to support the finding that the plaintiff played an active part in arranging the sales.

In this connection the purchase by Haniffa of 79, Messenger street, is of interest. Haniffa lent plaintiff Rs. 4,700 without written security, and was allowed to occupy the premises mentioned in lieu of interest, although the premises were in the name of the Chetty. Eventually when the premises were sold to Haniffa the amount lent to the plaintiff was deducted from the consideration agreed on. The real consideration

was Rs. 10,500, but in the deed the consideration was stated to be Rs. 6,000, *i.e.*, the real amount less the debt then due from the plaintiff to Haniffa.

No accounts were, however, rendered to the plaintiff, and when he asked for them he was put off. This was mainly because Natchiappa Chetty visited Ceylon very rarely. According to the plaintiff about 1935 Natchiappa Chetty finally promised that the trust properties would be retransferred in March, 1940, and the accounts settled between the parties. Before that latter date Natchiappa Chetty died, and the defendant was appointed executrix of his estate.

The learned District Judge has subjected the evidence in this case to very careful examination, and although his findings of fact have been challenged, no real ground has been shown to me why these findings should not be accepted. I am satisfied that the findings of fact are justified and are strongly supported by the evidence.

There have been, however, certain matters of law which have been argued, and certain inferences drawn by the District Judge on the evidence have been disputed.

The first point raised is that the evidence does not establish a trust, but only some form of security, which cannot be supported because of the absence of a notarial deed to establish it.

Counsel for the appellant referred us to the case of *Adaicappa Chetty v. Caruppen Chetty*[1]. The facts alleged in this case were as follows:— The added defendant, being desirous of purchasing the land in question, applied to a Chetty firm for the moneys required for the purpose. The firm agreed to lend the moneys, on condition that the same should be repaid with interest at 10 per cent. and that the deeds for the land purchased be taken in the name of the 1st defendant, one of the partners of the firm. The added defendant purchased the land with Rs. 10,000 borrowed from the firm, and took the transfer in the name of the 1st defendant. Later a new arrangement was arrived at. The firm requested the added defendant to let them have absolutely for their benefit a half share of the land for the actual costs of that share, and agreed to forego all claims for interest on the moneys advanced by the firm in consideration of the trouble of the added defendant in purchasing and planting the property. As regards the first agreement Lord Atkinson said: "The object of the agreement was . . . . to create something much more resembling a mortgage or pledge than a trust. The arrangement differed absolutely in nature and essence from that entered into, where one man with his own proper moneys buys landed property and gets the conveyance of that property made to another."

Lord Atkinson added: "The second parol agreement is . . . . as invalid as the first. It was clearly a contract or agreement for effecting the sale, transfer, or assignment of land, and for the establishment of a security or incumbrance affecting land." Lord Atkinson held that "The parol evidence . . . . was properly held to have been inadmissible, for the simple reason that the agreement, if proved by it, must, under Ordinance No. 7 of 1840, sub-section (2), have been held not to be of any force or avail in law. This section is much more

[1] *22 N. L. R. 417.*

drastic than the fourth section of the Statute of Frauds''. He points out that the latter section does not render the parol agreement invalid, but merely unenforceable.

Counsel for the appellant also relied on the case of *Saminathan Chetty v. Vander Poorten*[1]. In this case there were two deeds, No. 471 which was an absolute transfer by the " Syndicate " to the defendant and No. 472 by the defendant and the members of the Syndicate, the material terms of which are set out in the judgment. It is to be noted that in this case there was no question of the Ordinance 7 of 1840 not being complied with.

Lord Tomlin said . . . . . "The first question is as to the construction and effect of the deeds Nos. 471 and 472.

" Having regard to the circumstances leading up to and surrounding their execution and to the language employed therein, these deeds . . . . . clearly do not operate to vest in the respondent an absolute interest in the property conveyed.

"It cannot be overlooked that the Syndicate had expended about Rs. 200,000 on the property before they got into conflict with the Crown, and that they provided Rs. 64,000 towards the total sum which had to be deposited under the decree made in the Crown's favour They could, therefore, have had no interest in entering into an arrangement by which in effect the whole property passed absolutely to the respondent and their expenditure was wholly lost.

" But the language of deed No. 472 is . . . . . inconsistent with any such conclusion. By the terms of the documents (1) the respondent cannot sell below a certain price without the consent of the original members of the Syndicate; (2) if he does sell he has imposed upon him an obligation to deal with the proceeds in a specified manner; (3) the distribution of the proceeds of sale includes payment to the respondent . . . . . for moneys advanced to the Crown . . . . . ; (4) the ultimate balance of the proceeds of sale is to be distributed *pro rata* according to their interests amongst (the members of the Syndicate); and (5) the purchaser is relieved of any obligation to see to the application of the purchase money.

" In these circumstances and upon this language their Lordships conclude without hesitation that the transaction effected by deeds Nos. 471 and 472 was the creation of a security for money advanced, which in certain events imposed upon the respondent, who was the creditor, duties and obligations in the nature of trusts.''

It is to be noted in this case that the respondent had not sold the premises or any part thereof. Their Lordships considered this aspect of the matter, and came to the conclusion that, as long as the property remained unsold, the arrangement was in the nature of a mortgage, and that the members of the Syndicate had a right to redeem. Their Lordships did not uphold the finding of the trial Judge that a trust had been created.

With respect I think the facts in the present case can be differentiated from each of the cases cited.

[1] *34 N. L. 287.*

In this case the following facts are of importance:—

(1) Prior to the transfer P 21 or D 1, Natchiappa Chetty was already the holder of a valid mortgage security over the premises transferred which was more than sufficient to cover his claim. It is difficult to understand how the transfer can be said to create a security. According to the defendant, the transfer was in discharge of the debts due to Natchiappa Chetty. If the plaintiff's story be true, it was a transfer of the legal title, which was to be held by Natchiappa Chetty according to the terms of the agreement.

(2) The avowed object of the transfer was to put these immovable properties beyond the reach of the unsecured creditors, who had already begun to press the plaintiff. I have dealt with this matter earlier, and need only add that no fraud was actually perpetrated on the unsecured creditors, because the other assets of the plaintiff were more than sufficient to meet the claims of the unsecured creditors, and in fact none of those creditors was either defrauded or delayed.

(3) The surrounding circumstances, in my opinion, point strongly to a trust, in particular, the gross inadequacy of the consideration, the intimate relationship between the plaintiff and Ramanathan Chetty, the fact that it was part of the arrangement that the plaintiff should be allowed to remain in possession without payment of rent of the premises occupied by him and by his mother-in-law, and that he did remain in such possession, and the fact that the plaintiff was to be permitted to play an active part in the disposal of the premises transferred, and that he did in fact arrange the bulk of the sales.

(4) In this case the plaintiff alleges that the proceeds of the sales already effected and of the rents and profits received were more than sufficient to satisfy the claims of Natchiappa Chetty; in other words that the event has happened which imposes on the defendant "obligations and duties in the nature of trusts"—to use the language of Lord Tomlin.

In my opinion, the cases cited do not prevent me from holding that the decision of the District Judge that a trust has been established is correct. The case of *Ranasinghe v. Fernando*[1] is very much in point. In that case the judgment of Lord Atkinson in *Adaicappa Chetty v. Caruppen Chetty* (*supra*) was considered. See also *Theevanapillai v. Sinnapillai*[2] and *Carthelis v. Perera*[3]. These are decisions of our Courts and, with respect, I do not think they conflict with the decisions of the Privy Council, in the cases I have cited.

If this decision is right, there is evidence on which it can be held that there was an express trust created orally. I think at the same time that there is sufficient evidence to hold that there is a constructive trust established. If the matter is to be treated as a constructive trust, then I think no question of a notarial deed being needed arises. If, however, we are to regard this as an express trust, then section 5 of the Trusts Ordinance has to be considered. Under this section—

> "5 (1)—Subject to the provisions of section 107, no trust in relation to immovable property is valid unless declared by the last will of the

[1] *24 N. L. R. 170.* [2] *22 N. L. R. 316.*
[3] *32 N. L. R. 19.*

author of the trust or of the trustee, or by a non-testamentary instrument in writing signed by the author of the trust or the trustee, and notarially executed.

" (3) These rules do not apply where they would operate to effectuate a fraud."

In this connection I may mention the case of *Rochefoucauld v. Boustead*[1] in which Lindley L.J. said—

" It is further established by a series of cases, the propriety of which cannot now be questioned, that the Statute of Frauds does not prevent the proof of a fraud; and that it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance and the statute, in order to keep the land himself."

See also *In re Duke of Marlborough, Davis v. Whitehead*[2].

In this case the Duchess, in consideration of natural love and affection, assigned to her husband, the Duke, a leasehold house belonging to her. The deed was in form an absolute assignment. Evidence was permitted on the part of the Duchess to show that she assigned the house to the Duke, solely to enable him to mortgage it in his own name, and that it was part of the arrangement between them that he should re-assign to her.

I think this last case also disposes of another point taken by the appellant, viz., that there is no evidence that Natchiappa Chetty himself repudiated the oral agreement, and no evidence that the defendant, his executrix, was aware of the arrangement. In the Duke of Marlborough's case Stirling J. said—

"If the late Duke of Marlborough had in his lifetime refused to convey the equity of redemption at the request of the Duchess, I think he could not have set up the statute. Nothing of the kind ever happened; on the contrary, the evidence appears to me to show that he was willing and intended to reconvey, though, unhappily, he put off carrying his expressed intention into effect until it was too late. In my opinion the plaintiff, as claiming under him, is in no better position." (The plaintiff in this case represented the Duke's creditors.)

In the present case I think the defendant, the executrix of Natchiappa Chetty, is in no better position than her testator, and that a repudiation of the trust, which would have been a fraud on the part of the testator, must be deemed a fraud if caused by the executrix who claims under him.

In this case I am of opinion that to permit the defendant to set up section 5 (1) of the Trusts Ordinance would operate to effectuate a fraud.

[1] *L. R. (1897) 1 Ch. 196, at p. 206.*

[2] *L. R. (1894) 2 Ch. 133.*

One further argument has been strongly pressed by Counsel for the appellant, viz., that the admission of oral evidence of the alleged agreement is obnoxious to section 92 of the Evidence Ordinance. Counsel relied upon the decision in the case of *Balkishen Das v. Legge*[1]. In this case a deed of sale of land for value was accompanied by a deed of agreement between the parties for purchase back by the vendor of the land on payment by him of money to the vendee on a future date fixed. The deeds were followed by transfer of possession to the vendee, and his receipt of the profits. The vendor did not exercise his right of repurchase; but after many years gave notice of his intention to redeem, and brought suit to enforce his right of redemption as upon a mortgage by conditional sale. In the Privy Council Lord Davey dealt with the admission of oral evidence to prove the intention of the parties.

> "Their Lordships do not think that oral evidence of intention was admissible for the purpose of construing the deeds, or ascertaining the intention of the parties. By section 92 of the Evidence Act (Act 1 of 1872) no evidence of any oral agreement or statement can be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, or adding to, or subtracting from, its terms, subject to the exceptions contained in the several provisos. It was conceded that this case could not be brought within any of them. The cases in the English Court of Chancery which were referred to by the learned Judges of the High Court have not, in the opinion of their Lordships, any application to the law of India, as laid down in the Acts of the Indian Legislature. 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 show in what manner the language of the document is related to existing facts."

In this case it was held that the deeds themselves contained indications that the parties intended to effect a mortgage by conditional sale.

In *Maung Kyin v. Ma Shwe La*[2] this matter came up once again for consideration before the Privy Council. This also was a case where a deed which in form was an absolute sale was alleged to be a mortgage. Lord Shaw cited a number of Indian cases where the Judges applied the equity doctrine as expressed in *Lincoln v. Wright*[3]—see the judgment of Lord Justice Turner:—

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

In commenting on this case Lord Shaw said—

> "The principles of equity which are universal forbid a person to deal with an estate which he knows that he holds in security as if

[1] *I. L. R 22 All. 149.* [2] *I. L. R. 45 Cal. 320.*
[3] *(1859) 4 De Gex & Jones 16.*

he held it in property. But, to apply the principles, you must be placed in possession of the facts, and facts must be proved according to the law of evidence prevailing in the particular jurisdiction. In England the laws of evidence, for the reasons set forth in *Lincoln v. Wright* and other cases, permit such facts to be established by a proof at large, the general view being that, unless this were done, the Statute of Frauds would be used as a protection or vehicle for frauds. But in India the matter of evidence is regulated by section 92 of the Indian Evidence Act, and it accordingly remains to be asked, what is the evidence which under that statute may be competently adduced?''

In the result, Lord Shaw held that in this case section 92 did not apply, because the evidence, the admissibility of which was in question, was evidence going to show what were the rights of a third party. The language of the section applied only as between the parties to the instrument and their representatives in interest.

It has been pointed out that both these decisions may be regarded as *obiter dicta*, but even so, I do not think that it is open to us to minimize the weight of these pronouncements. It is, however, I think, competent for me to point out that in neither of these cases was the question whether parol evidence was admissible to prove a *trust* considered. With respect, I suggest that *Lincoln v. Wright* was an extension of the principle of equitable fraud to the case of mortgages, and that their Lordships declared that this was not permissible in India in consequence of section 92 of the Indian Evidence Act.

In the later case of *Dhanarajagirji v. Parthasaradhi*[1] their Lordships of the Privy Council once more considered this matter. In this case the transaction as phrased in the documents was ostensibly a sale with a right of repurchase in the vendor and the appearance was laboriously maintained. Their Lordships, however, came to the conclusion that it was a mortgage by conditional sale.

Their Lordships disposed of the case without reference to any oral evidence other than that of surrounding circumstances, in accordance with the case of *Balkishen Das v. Legge* (*supra*). Lord Blanesburgh, however, added these words—

> '' They would only observe before parting with it that, as at present advised, they must not be taken to subscribe to the view that there has been introduced into the law of India such a radical change in the laws of evidence, as suggested by the learned Chief Justice, a change which would have the effect of excluding from the class of mortgages by conditional sale many transactions which before the Evidence Act would have been held to have been within that class.''

It is interesting to note that one of the surrounding circumstances taken into account was the fact that six lakhs was an absurd purchase price.

In *Baijnath v. Valley Mohamed*[2] the position was whether a transfer of certain shares was by way of security or sale with a clause for repurchase. The facts that the amount paid by the transferee had no relation to the market price of the shares, but was merely the amount advanced and

[1] *A. I. R. (1924) P. C. 226.*

[2] *A. I. R. (1925) P. C. 75.*

interest as well as a debt already due to the transferor, and that the transferor's claim to the dividends in the shares was recognized together with other circumstances, were held to indicate that the transaction was a mortgage and not a sale with a clause for repurchase.

In dealing with this matter Sir Lawrence Jenkins said—

> " Section 92 merely prescribed a rule of evidence; it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances."

What is the principle to be deduced from these decisions of the Privy Council? The first point is that it is permissible to examine " the surrounding circumstances ", whatever that phrase may include. I am doubtful whether the agreement itself can be considered as one of the surrounding circumstances, but clearly facts such as gross inadequacy of consideration, and, I think, the transferor's relationship to the property after the transfer may be taken into account.

Next, do these decisions apply to a case where the evidence establishes a *trust* and not merely a security. On this point I may refer to the language of Lord Westbury in *McCormick v. Crogan*[1].

> " The Court of Equity has, from a very early period, decided that even an Act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an Act of Parliament intervenes, the Court of Equity, it is true, does not set aside the Act of Parliament, but it fastens on the individual who gets a title under that Act and imposes on him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud. In this way the Court of Equity has dealt with the Statute of Frauds, and in this manner, also, it deals with the Statute of Wills." It is incumbent, however, " to show most clearly and distinctly that the person you wish to convert into a trustee acted *malo animo* ".

I do not myself see why a Court of Equity should not act in the same manner when the Evidence Ordinance intervenes.

In this connection I think it is necessary to consider the effect of section 2 of our Trusts Ordinance (Cap. 72) (This appeared as section 118 in our original Trusts Ordinance, No. 9 of 1917.)

> " All matters with reference to any trust, or with reference to any obligation in the nature of a trust arising or resulting by the implication or construction of law, for which no specific provision is made in this or any other Ordinance, still be determined by the principles of equity for the time being in force in the High Court of Justice in England."

It has been argued before us that this has no application to a rule of evidence, but I do not agree with this contention. I think in this case a " matter with reference to a trust " has arisen. There is no specific provision that the principle enunciated by Lord Westbury, namely that a Court of Equity can act *in personam* as against an individual who obtains a title under an Act of Parliament, should not be applicable in the case of a trust under the law of Ceylon. In my opinion we are entitled to import " the principles of equity " into this case.

[1] *L. R. (1869) 4 H. L. 82 at p. 97.*

I think it follows from the *Duke of Marlborough's* case and other cases that evidence of an oral agreement can be admitted in England to establish a trust in respect of a transaction which is embodied in a deed. In my opinion the same principle should be applied in Ceylon, and, in view of the fact that to uphold the defendant's plea would operate to effectuate a fraud, our Courts without overriding section 92 of the Evidence Ordinance can fasten on the defendant a personal obligation to carry out the terms of the trust.

I may add that, even if section 92 of the Evidence Ordinance has to be applied in full rigour, it is permissible for the plaintiff under proviso (1) to prove " fraud " such as arises in the circumstances of this case.

Counsel for the appellant has also pressed the issue of prescription. But here section III (1) (*a*) of the Trusts Ordinance is applicable, and prescription does not run. Further, I am of opinion that no cause of action accrued to the plaintiff until the defendant repudiated the trust—see *Daniel Appuhamy v. Arnolis Appu*[1] and that took place less than three years before action brought.

The appeal is dismissed with costs.

Appeal dismissed.