WILHELMINA A. BRYANT, **ELIZABETH H. BRYANT-DIGGS**, by and through her Husband, **J. WINFRED DIGGS**, and **JAMES J. BRYANT**, Heirs of WILLIAM A. BRYANT, Deceased, Appellants, v. **EMMET HARMON**, a Son and Heir of, and substituting for H. LAFAYETTE HARMON, Deceased, and OOST AFRIKAANSCHE COMPAGNIE, a Dutch Firm doing Mercantile Business in Liberia, by and through its General Agent, **J. D. KOPPELAAR**, Appellees.

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

Argued April 19, 23, 24, 25, 1956. Decided June 29, 1956.

1. An action to redeem the equity of a mortgagor upon foreclosure of a mortgage of real property is subject to a twenty-year statute of limitations.

2. The statute of limitations constitutes an affirmative defense which must be pleaded affirmatively and cannot be pleaded hypothetically.

3. The defense of !aches will not be sustained with respect to a period of time wherein the plaintiff was justifiably ignorant of facts constituting the gravamen of the suit.

4. Where real property was conveyed for consideration corresponding to a loan and incommensurate with the value of the property, the transaction is presumed to have been in the nature of a mortgage rather than a sale.

5. A mortgage of real property is distinguished from a conditional sale by the fact that the former is merely security for the payment of a debt, or for the performance of some other condition, while the latter is a purchase of the land for a price paid or to be paid, to become absolute on the occurrence of a particular event, or is a purchase of the property accompanied by an agreement to resell to the grantor in a given time, and for a stipulated price.

6. Whether a deed of land executed with an agreement to reconvey on stipulated terms shall be construed as a sale or as a mortgage depends on the actual intention of the parties at the time, and this intention is to be gathered from the facts and circumstances attending such transaction and the situation of the parties, as well as from the written evidences of the contract between them.

Appellants sued in the court below for enforcement of a right to redeem an equitable interest in real property allegedly acquired by one of the appellees as security for a loan to another appellee. Appellees raised the statute of limitations, and laches, as defenses. Dismissal of these defenses by the court below was affirmed by this Court, which also, on the merits, granted appellants the right of equity of redemption and ordered the deed under which appellees held the property cancelled.

Momolu S. Cooper for appellants. *R. F. D. Smallwood* and *Richard Henries* for respondents.

MR. JUSTICE PIERRE delivered the opinion of the Court.

Those whose duty it is to burrow into voluminous records, and who sift the testimony of numerous witnesses in search of facts, and who apply established principles of law and equity to those facts in an effort to bring order out of confusion : those men by their labor and toil serve the best ends of justice. Those men serve the nation and litigants in peculiar respects—they at once right the wrongs of parties, and at the same time guarantee to them the enjoyment of constitutional and other legal rights and benefits.

Here is a case which for almost ten years has been equalled in importance by very few other civil cases handled by our courts. It has travelled from the Circuit Court of the Sixth Judicial Circuit, Montserrado County, to this tribunal of highest resort, upon appeals taken from rulings and decisions given by judges in the court below. It has occupied a place of interest on the docket, as well as on the motion calendar of the Supreme Court, since the March, 1949, term. Its hearings have covered hundreds of pages of records, and involved thousands of words, spoken and written.

H. Lafayette Harmon, one of the appellees in this case, died in October, 1952, before this final hearing could be had. Counsel representing the appellants, desiring to have the case heard and determined during the present term of Court, prepared and filed a petition, in which they prayed for the appointment of someone to be named to substitute the said late appellee, H. Lafayette Harmon. A copy of this petition having been served on the appellees, Emmet Harmon, a son and one of the heirs of the aforesaid appellee, made the following record in the minutes during the hearing before us :

"Emmet Harmon as surviving senior heir of the late H. Lafayette Harmon, and by virtue of the fact that I now serve as special administrator of the said H. Lafayette Harmon's estate, which appointment grew out of a petition filed in the Probate

Court in 1953 by the legal heirs of the said H. Lafayette Harmon, I have no objection to being substituted for the late H. Lafayette Harmon, co-appellee in these proceedings."

The Court so ruled, and he was appointed, and is now substituting for appellee H. Lafayette Harmon in the final determination of this case.

According to the records, the late Counsellor William A. Bryant bought of one Titus Potter, in March, 1934, one-fourth of an acre of land in two parcels, each containing one-eighth of an acre, situated in the City of Monrovia, and bearing the number 50. Purchase price or consideration for the property is shown to have been $1,500, or $750 for each of the said two parcels according to deeds for same probated on July 31, 1934, and registered on pages 589-90 in Volume 48 of the Public Records of Montserrado County.

The records show that Mr. Bryant, desiring to make some renovations on the old building standing on the property at the time of purchase, approached the then agent of the Oost Afrikaansche Compagnie, a Dutch firm operating in Monrovia, for a loan of another $750. The loan was granted, and Mr. Bryant is supposed to have used this money to purchase material for the renovation.

Later in this opinion we will quote a letter wherein reference is made to building material found on the property.

On October 7, 1935, Bryant having failed to repay the loan, Counsellor H. Lafayette Harmon, who had been retained by Oost Afrikaansche Compagnie, wrote Mr. Bryant the following letter :

"DEAR MR. BRYANT,
"I have had a talk with Mr. Boss, Agent for the Oost Afrikaansche Compagnie, concerning the matter of your indebtedness, and I explained to him your desire to give the company a lien on your property here in Monrovia for the amount owed in order to avoid a law suit for the time being.

"I have been instructed to enter into negotiations with you for the necessary mortgage, in which case I am to withdraw the action tomorrow. Will you therefore please call at my office this afternoon at two o'clock with the necessary title deed, in order that we may conclude the matter.

"Yours faithfully
"[Sgd.] H. LAFAYETTE HARMON."

Three days after this letter was written to Mr. Bryant, that is to say on October io, 1935, another letter, this time written by the company's General Agent, was sent to Mr. Bryant in connection with the aforesaid loan. That letter reads as follows:

"HON. WILLIAM A. BRYANT,
"MONROVIA.

"DEAR SIR,
"We beg to inform you, that we have requested and authorized Mr. H. L. Harmon of this City to accept the property, Lot Number 50 in Monrovia, offered by you as security for the amount of $750 advanced you, and that upon payment of same by you to us, within the time specified in the agreement, we guarantee that Mr. Harmon will re-convey to you, your heirs, administrators or executors, the aforesaid property which has been transferred to him.

"Yours faithfully,
"Oost Afrikaansche Compagnie
"[Sgd.] K. J. Boss."

Up to this point, as can be clearly seen from the above related facts and circumstances culled from the records certified to this Court, there isn't the shadow of a doubt as to the mutual understanding and known intentions of the parties on both sides respecting the conditions upon which the loan was to be retired by Mr. Bryant. But let us go a step further and see what we shall find.

In agreement with everything that had been done up to that point, and also in harmony with the letters received by Mr. Bryant from the company's lawyer and their General Agent, an agreement was drawn up and signed by the parties on both sides. We would like to mention right here in passing that both sides at this time understood that this agreement was to secure the payment of the loan within one calendar year of its execution. We think it necessary for the purpose of this opinion, to quote the agreement word for word as follows :

"AGREEMENT.
"This AGREEMENT made and entered into on October To, 1935, between William A. Bryant, presently residing in Monrovia, in the County of Montserrado, Republic

of Liberia, of the one part, hereinafter referred to as the Grantor, and H. Lafayette Harmon, a Solicitor and Counsellor at Law, of the City, County and Republic aforesaid, of the other part, hereinafter referred to as the Grantee, hereby

"WITNESSETH :
"That, whereas the said Grantor has this loth day of October, 1935, executed to the Grantee a Warranty Transfer Deed for Lot Number so, situated in the City of Monrovia, in the County and Republic aforesaid, for value received ; and

"Whereas it is the desire of the Grantee to afford the Grantor an opportunity to repurchase the said lot of land within a certain given period should he so desire :

"IT IS HEREBY MUTUALLY AGREED:

"1 . That should the said Grantor pay or cause to be paid to Messrs. the Oost Afrikaansche Compagnie, foreign merchants of Holland, transacting business in Monrovia, the full sum of £156.5.0 (One Hundred and Fifty-six Pounds Five Shillings and no Pence) , being equal to $750, within twelve calendar months from date hereof, that is to say on or before the 10th day of October, 1936, then and in that case, the Grantee hereby promises and agrees to re-convey the said property to the Grantor without any further consideration.

"2. Nevertheless, should the said Grantor fail to pay the amount above stipulated, or any portion thereof, within the time herein specified, then and in that case, the right to purchase and reconveyance shall become quieted in said Grantee without the intervention of any court, and Grantor hereby waives all rights under this agreement on and after the said loth day of October, 1936, as aforesaid.

"In witness whereof the parties hereto have signed and sealed this agreement on the day and date first above written.

"[Sgd.] WM. A. BRYANT
"Of the one part, Grantor

"[Sgd.] H. LAFAYETTE HARMON
"Of the other part, Grantee."

"Signed, sealed and delivered in the presence of us Witnesses : "[Sgd.] JAMES A. RAILEY, "To the signature of William A. Bryant.

"[Sgd.] R. A. BREWER,

"To the signature of
H. Lafayette Harmon."

In consonance with the provisions of the agreement quoted above, Mr. Bryant, on October 12, 1935, executed the necessary transfer deed to H. Lafayette Harmon. It is to be noted that this deed was executed two days after the signing of the agreement. In this connection we would like to call attention, at this point, to what appears to be very peculiar. In his brief, H. Lafayette Harmon alleged that, after the agreement had been signed between Bryant and himself, the transaction came to an end, since no deed in keeping with the terms of the agreement was issued on that day; and that, "subsequently, after matured consideration of the transaction by William A. Bryant, an experienced business man and a lawyer of no mean repute," he, Bryant, decided to make an outright sale of the property; hence the transfer deed was executed two days after the date of the agreement. He also contended that, based upon a long-standing friendship, he and Bryant had entered into a verbal gentleman's agreement for Bryant to repurchase the property within one year of the execution date of the deed. We have wondered why was it necessary for a verbal agreement to replace the written one.

According to this reasoning, and if it is true that Mr. Bryant was an experienced business man as is alleged, then it is very strange that he would have parted with fee simple title to a piece of property for exactly one half its cash value at the time of the sale, his only alleged reason for doing so being the supposed long-standing friendship between himself and Harmon. Incidentally he was parting with title to the premises for the exact sum he owed the Oost Afrikaansche Compagnie, and to secure the payment of which the company had agreed to accept his mortgage of Lot Number 50. How very coincidental ! But if it is also true, as alleged in the appellee's brief, that Mr. Bryant was a lawyer of no mean repute, then it is also strange that he would have signed an agreement to redeem a piece of property within twelve months from the date of signatures, only to make a verbal agreement two days later, the terms of which said verbal agreement were in sharp contradiction to the understanding reached between the agent of the company, the company's lawyer, and himself. It is to be remembered that this understanding between them actuated the preparation and signing of the existing written agreement. Of course there is nothing in the records to support this strange behavior of an alleged lawyer, so we have only mentioned it in passing. The one year within which Mr. Bryant should have redeemed the property expired, and Mr. Harmon wrote him the following letter on October 14,

1936:

"DEAR MR. BRYANT,
"In accordance with Warranty Transfer Deed executed to me by you on the 12th of October last year for Lot Number so, situated on Carey Street, Monrovia, I have been over and formally taken over the premises. "I note that you have a few pieces of sawed timber on the premises ; if you desire to sell them I will buy them, if not, please send and have them removed.

"Yours faithfully,
"[Sgd.] H. LAFAYETTE HARMON."

Just here, there seems to be a document missing; since, on October 22, 1936, nine days after the above letter to Bryant, appellee Harmon wrote another letter, this time to Mr. Bryant's lawyers. It is quoted word for word as follows:

"MESSRS. S. DAVID COLEMAN AND ANTHONY BARCLAY COUNSELLORS AT LAW FOR WILLIAM A. BRYANT, MONROVIA.

"GENTLEMEN,
"I have for acknowledgement your letter of the 19th instant and nothing is more surprising to me than the contents and tenor of same.

"Your client, Mr. Bryant, has misled you if your letter is predicated upon his representation of the facts in connection with this transaction for Lot Number so, situated on Carey Street, Monrovia.

"Your client voluntarily assigned his right, title and interest in said property over to me more than a year ago, by means of a Warranty Transfer Deed in fee simple, in consideration of certain cash payment of an amount in full settlement of an account which he owed the Oost Afrikaansche Compagnie. Your client made no mortgage of the property to the company nor to the writer. I advanced the cash to pay his account with the company, and he sold me the property in consideration thereof, and the transaction was closed at that time. Your client would have had the opportunity of repurchasing the property from me within a certain period had he been prepared and wished to do so ; that period has now expired.

"This is therefore to advise you, that the property in question is mine, *bona fide,* by title deed voluntarily executed by your client himself. I shall therefore ignore your said

letter forbidding my entrance upon my own premises.

"Yours faithfully,
"[Sgd.] H. LAFAYETTE HARMON."

Why would a reputable lawyer, such as Mr. Bryant was alleged to be, make an outright sale of a piece of property, and then some time later forbid the purchaser to enter upon the said property? We think it is safe to say that it is clear, from the tenor of this letter, that Mr. Bryant's lawyers acting upon his instructions, must have reminded Counsellor Harmon that the property in question was the security for the payment of Oost Afrikaansche Compagnie's debt, their long-standing friendship notwithstanding. In the light of this last letter we have wondered why wasn't the receipt produced, showing payment of the amount borrowed by Bryant. But then, in that connection, and in view of the General Agent's letter accepting a lien on Lot Number so to secure payment of the $750, why and how did Bryant's loan account completely disappear from the company's books?

Thus matters stood when, in July of 1937, William A. Bryant passed into the great beyond, leaving matters in respect to the agreement he had signed with Counsellor H. Lafayette Harmon unchanged ; in fact leaving his attitude toward it which Mr. Harmon's letter of October 22, quoted above, indicated also unchanged. So, up to Mr. Bryant's death, the agreement signed for Lot Number so, together with all of the documents connected with it, remained uncancelled, unchanged, and therefore enforceable upon a basis of the original understanding between the parties.

After the death of Mr. Bryant, his heirs, petitioners in the court below, inquired of the Oost Afrikaansche Compagnie as to the status of their late father's loan. The then agent of the company wrote the following letter, in answer to their said queries :

"COUNSELLOR NETE SIE BROWNELL,
ATTORNEY FOR HEIRS OF WM. A. BRYANT,
LAW OFFICE, MONROVIA.

"DEAR SIR :
"According to your request at the interview we had on last Thursday, we have made an extensive search through the records of our office and we find no account of the late Mr. William A. Bryant with our Company, nor is there any trace whatever of any mortgage from Mr. Bryant to the O. A. Cie. A further interview on this subject is therefore unnecessary unless you have some writing in connection with the matter

which would give us better light on the information you desire.

"Yours faithfully, Oost Afrikaansche Compagnie
"[Sgd.] J. D. KOPPELAAR."

We have wondered : Why the crude "brush-off" on the part of appellee company's General Agent, just because inquiries were made touching the loan made to Mr. Bryant, and the suggestion was made that there might have been a mortgage. It would seem that the word, "mortgage," had begun to become very obnoxious in certain quarters. What writing did the General Agent want from an outsider to enlighten him on a transaction which should have been recorded in his books? We wish to call attention to the fact that, although the General Agent had, less than ten years before, written a letter to Mr. Bryant accepting Lot Number so as security against the payment of the amount the Company had lent him, yet, just nine years later, such a big business house of outstanding respect and reputation could not find any trace of such a large and important financial transaction on its books; nor could they even find traces of any correspondence in connection with the said transaction. The strange and unusual things which abound in this case are too numerous to mention; and significantly, the stranger the happenings, the more peculiarly do those happenings coincide with unusual circumstances appearing in the records. However, it was at this stage that the appellants filed a petition in the Circuit Court of the Sixth Judicial Circuit, Montserrado County, for the right of equity of redemption in the foreclosure of the mortgage for Lot Number so, the subject of these proceedings.

Appellees, respondents below, appeared and filed an answer in which they raised several points ; the most important, and those which we deem necessary to the proper determination of this case being, in substance, as follows:

1. That if petitioners had any right of action the same is barred by the statutes of limitations, since respondent H. Lafayette Harmon had taken possession, occupied and improved said property over a period of ten years previous to the institution of the suit ; with full knowledge of the petitioners. The suit which they brought in 194.6 should therefore have been brought ten years earlier, that is to say in 1936. And since they had waited for ten years to elapse before filing the said suit they were guilty of laches and were forever barred.

2. That the deed which the late Mr. Bryant executed to the late H. Lafayette Harmon had no relation to the agreement which he had signed with Mr. Bryant because the said deed was executed two days after the signing of the said agreement. The

transaction of the execution of the warranty deed by Mr. Bryant therefore constituted an outright sale of the aforesaid Lot Number so; and for this reason the suit should be dismissed for want of equitable foundation.

These two points constitute the strength of the respondents' contention, and they stand against the one point on the other side, which in substance is that:

"The loan of $750 made by the Oost Afrikaansche Compagnie to the late Mr. Bryant, the payment of which Lot Number so in Monrovia was given to secure, in keeping with the understanding had with the Company and their lawyer, as is evidenced by the agreement signed by Bryant and Harmon, who was acting upon authority of the Company, evidenced by his letter, and that of the General Agent, written to Mr. Bryant; the Company's acceptance of Lot Number so as security for the payment of the debt within one year; and their guarantee to Mr. Bryant that his property would be returned within the time specified, conditioned upon the payment of the loan which the said property secured : these transactions and documents, when taken together in the light of the existing circumstances, amounted to a mortgage of the aforesaid Lot Number 50; and therefore Harmon had no right to take possession of the property without first foreclosing the mortgage and affording them opportunity to redeem."

The entire case may be said to be embodied in the above points. In other words it is a question of whether the circumstances related hereinabove in respect to the loan and its relationship to Lot Number so and the several documents connected therewith amount to a mortgage or to an outright sale of the said Lot Number so. But before we proceed to this main point in the case we would like to pass upon the question of laches, as raised in the first count of respondents' answer.

It is to be observed that the respondents filed a motion to dismiss the petition which the present appellants had filed in the court below for want of legal jurisdiction; and the main issue raised in the said motion was the question of laches; and it was raised as fully in the motion as it had been raised in the answer before. A resistance to the motion was filed by the petitioners, and the trial Judge handed down a ruling, disposing of the issues. Because we are in such complete agreement with the position taken by the trial Judge on the points raised we quote his ruling word for word and allow it to control the disposition of the question of laches raised again in the brief before us. The ruling is as follows:

"The respondents in Count `1' of their motion to dismiss for want of legal

jurisdiction charge the petitioners with laches in that, if they had a right and cause of action, it should have been exercised within three years from the year 1936, and they having failed to do so without any legal disability are guilty of laches and are forever barred by the statute of limitations, one of the respondents, H. Lafayette Harmon aforesaid, having taken possession, occupied and improved said property, the subject of this suit, more than ten years ago, with full knowledge and acquiescence of the petitioners and their privy, William A. Bryant. 1841 Digest, pt. II, tit. II, ch. I, sec. 18; 2 Hub. 1526.

"Petitoners, in Count `1' of their resistance to said motion, attack Count `I' of respondents' motion to dismiss as being fatally defective and bad because of it being hypothetical, and submit that the statute of limitations is an affirmative plea which, when hypothetically pleaded, as in this case, is defective and subject to dismissal. Count '2' of the resistance, further attacking Count `1' of respondents' motion to dismiss, sets up that the statute of limitations is not applicable to equities flowing from or analogous to real actions, and quote Bouvier under limitations:

`The general if not universal limitation of the right to bring an action or to make entry, is to twenty or twenty-one years after the right to enter or to bring the action accrues, *i.e.,* to twenty or twenty-one years after the cause of action accrues.'

"In Count '3' of the resistance, and with reference to Count `1' and Count '2' of respondents' motion to dismiss for want of jurisdiction, petitioners set up that, besides the absence of Wilhelmina A. Bryant-Jones, one of the petitioners, from the Republic of Liberia, attending school in the City of Freetown, Sierra Leone, from April, 1935, to July, 1944, she and the other petitioners were ignorant of what had transpired in relation to their father's property ; and that laches cannot in good conscience be equitably imputed to them.

"Petitioners further in their resistance to said motion of respondents to dismiss for want of jurisdiction, maintain that laches could not be imputed to them, because their ignorance of material facts supporting their claims, even after the return to Liberia of copetitioner Wilhelmina Bryant-Jones, was considerably due to the well designed fraud practiced by the respondents in their frantic effort to conceal and destroy and suppress most of the available clues and indexfacts and documents, until, in the month of June, 1946, when they came across the letter of K. J. Boss to petitioners' father ; in Count '5' of petitioners' resistance, which said count further attacks Count of the motion to dismiss, petitioners maintain that equity will hold the right of the equity of redemption barred only after the lapse of the period during which suits may

be brought to recover land.

"Respondents, in arguing their motion to dismiss, contended that the statute of limitations, when pleaded, is not an affirmative plea which must be specially and not hypothetically pleaded in order to bar an action.

`If a bill states a good cause of action, and the defendant finds that he cannot safely rely on the certainty of disproving its allegations, his only re-course is to set up an affirmative defense ; and it is when he is confronted by this necessity that the problem of framing the answer as a pleading assumes its greatest importance. Among the affirmative defenses available to a defendant when specially set forth in the answer are such as these : fraud, account stated, payment, release, reward, statute of limitations, rescission, innocent purchaser, usury, infancy and former judgment. These and all other affirmative defenses *must be specially pleased* in the answer. Otherwise the defendant cannot usually take proof in reference to them or, if the proof is taken, he cannot have the benefit of it. It is not an uncommon thing for a defendant to suffer from his failure to set forth in his answer facts constituting an affirmative defense. One who finds himself in this predicament must, at the hearing, if not sooner, get leave to file a supplemental or amended answer, and this concession will of course be granted only on the payment of costs.' 10 R.C.L. 44.6-47 *Equity* § 211.

"The statute of limitations being an affirmative plea, which when specially pleaded and proved bars an action, must admit that the allegations sought to be avoided are true, and then state Other facts, sufficient, if true, to defeat the action.

"Count `1' of the respondents' motion to dismiss for want of jurisdiction, without admitting the allegations in petitioners' petition, seeks to avoid the same. This is not permissible because the fundamental principle upon which all complaints, answers or replies are to be constructed, is that of giving notice to the other party of all facts which it is intended to prove, whether they are consistent with facts already stated to the court, or being inconsistent with the present existence of such facts, admit or imply their former existence, or show that, existing, they can have no legal effect.

"Count '2' of petitioners' resistance to respondents' motion to dismiss, submits that the statute of limitations is not applicable to equities flowing from or analogous to real actions. This Court is of the opinion, on this score, that, since the action or suit out of which this motion has grown is a petition for the right of equity of redemption in the foreclosure of a mortgage for Lot Number so, Monrovia, which is

real property, and since, in keeping with law, the equity of redemption is inseparably connected with a mortgage, the statute of limitations which applies to real property should apply to the right of equity of redemption.

"Count '3' of petitioners' resistance sets up as excuse for not bringing their suit before the year 1946 that, besides the minority and absence of Wilhelmina A. Bryant-Jones from the Republic, attending school in the City of Freetown from the year 1935 to 1944, she, together with the other petitioners, were, until June, 1946, wholly ignorant of what had transpired in relation to their father's property, and hence laches could not in good conscience be equitably imputed to them.

"We quote hereunder the following from *Ruling Case Law:*

`Since laches is an equitable. defense, it will not bar a recovery where there is a reasonable excuse for the nonaction of a party in making inquiry as to his rights or in asserting them. In the first place it may be stated that a person cannot be said to have been guilty of laches prior to the establishment of his right to sue. And on similar grounds the lapse of time may be excused where the plaintiff was unable, under obscurity of the transaction, to obtain full information in regard to his rights.' to R.C.L. 402 *Equity* ∫ 149.

`Laches signifies not only an undue lapse of time, but also negligence in failing to act more promptly. It is therefore of the essence of laches that the party whose delay is in question shall have been blamable therefor in the contemplation of equity, and accordingly it must appear that he had knowledge, actual or imputable, of the facts, which should have prompted a choice either diligently to seek equitable relief, or thereafter to be content with such remedies as a court of law might afford; or, if there was actual ignorance, that it must have been without just excuse. Laches cannot be imputed to one who is innocently ignorant of his rights.' to R.C.L. 405 *Equity* ∫ 153. "Count `4' of the petitioners' resistance being a repetition of Count `3,' the law quoted above is also applicable thereto.

"Count '5' of the petitioners' resistance attacking Count ' of the respondents' motion to dismiss, maintains that equity will hold the right of equity of redemption barred only 'after the lapse of the period during which suits may be brought to recover land. But the applicable principle has been stated as follows :

`By analogy to the statute of limitations at law barring an action for the recovery of lands after the lapse of a specified period from the accrual of the right of action, the

lapse of the same period is unusually a bar in equity to the recovery of an equitable estate, or for the enforcement of a right cognizable only in equity.' 25 CYc. 1024-25 *Limitations of Actions.*

"That time, in keeping with our law, is twenty (20) years. And further, in Liberia the rule still obtains that in case of default an action of foreclosure must be first prosecuted, and the court must decree the equity of redemption barred.

"The motion of respondents to dismiss the petition of the petitioners for the right of equity of redemption in the foreclosure of a mortgage for Lot Number 50, Monrovia, for want of legal jurisdiction is therefore denied. And it is so ordered."

Having settled the first of three important points in the case we come now to consider the main issue; that is to say, whether the transactions in connection with Lot Number so, as they relate to the lien granted by Oost Afrikaansche Compagnie to Mr. Bryant, and appellee Harmon's connection therewith, could be regarded as an outright sale, or should it be construed as a mortgage; and, if it is a mortgage, whether the right to redeem should be extended.

Trial of the cause was had during the December, 1948 term, and a final decree was given by the Resident Judge of the Circuit Court of the Sixth Judicial Circuit. We do not think it necessary to the fair and impartial administration of justice in this case that we make any comments on the said decree. It is sufficient for us to state that exceptions were taken and appeals perfected by the parties on both sides, an anomaly very rare, if it has ever before occurred, in the judicial trial of causes. It is upon these appeals perfected by the parties that this case is now before us for final determination.

This case is similar to two others already decided by this court. In *Saunders v. Gant,* 3 L.L.R. 152 (1930) , Mr. Chief Justice Johnson in speaking for this Court held, as summarized in Syllabus "t," that:

"Whenever a conveyance, assignment or other instrument transferring an estate is originally intended between the parties as a security for money, whether this intention appears from the same instrument or any other, it is held as a mortgage and consequently is redeemable upon performance of the conditions." This principle was upheld by Mr. Chief Justice Grimes in *Brown v. Settro,* 8 L.L.R. 284 (1944). In both of those cases, as in this, a conveyance of property was made to secure the payment of a debt within a specified time ; in both of those cases, as in this, agreements were

drawn in which the grantees stipulated to re-convey the assigned property upon performance of the condition stipulated. In *Saunders v. Gant, supra,* as in this case, the period within which to perform the condition was stipulated at one year. In *Brown v. Settro, supra,* it was four months. In both of those cases, as in this, the grantees, after the expiration of the time specified in the agreements, proceeded to assume valid and titled ownership of the premises in litigation without first barring the redemption by foreclosure proceedings.

The agreement signed by Bryant and Harmon, predicated upon the acceptance by Oost Afrikaansche Compagnie through their General Agent, and their lawyer, of the property as security for the payment of the debt, would seem to be sufficient proof of the original intentions of the parties insofar as the execution of the deed was concerned. We are of opinion that, inasmuch as either or both of the contracting parties decided later to abandon the original intentions contained in the documents quoted, *supra,* some measure should have been taken, or some indication made in the proper manner of such subsequent intentions. The weight of oral testimony cannot, in our opinion, overbalance or outweigh positive undertakings or obligations contained in written documents.

"The English courts of equity begin at an early day to look with great disfavor upon the strict common law doctrine of the absolute forfeiture of the estate upon non-payment of the mortgage debt. Accordingly they established the rule that in equity the debtor should still have a right to redeem after breach of the condition at law. This right to save the estate in equity after the forfeiture at law was called the equity of redemption, and the same designation came to be applied to the interest or estate retained by the debtor after conveying the legal title to the mortgagee by the mortgage deed. In equity a mortgage of lands is regarded as a mere lien or security for a debt, the debt being considered as the principal thing and the mortgage as accessory thereto. Until foreclosure the mortgagor continues to be the real owner of the fee. His equity of redemption may be granted, devised, taken in execution, or give rise to estates in dower or by the curtesy; and it is therefore regarded as the real and beneficial estate tantamount to the fee at law." 27 CYC. 958-59 *Mortgages.*

"It may be accepted as axiomatic that a conveyance cannot be a mortgage unless given to secure the performance of an obligation. Conversely, if intended to secure an obligation, it will be construed in equity as a mortgage and as nothing else. It follows that the form or letter of an instrument of conveyance is not conclusive of its character when the question is raised whether it is enforceable as a mortgage. On the contrary, its purpose is the decisive factor ; and if that be security, then the

instrument, irrespective of its form, must be construed to be a mortgage. The question is one of intention to be decided from a consideration of the whole transaction and not from any particular feature of it. On this ground, therefore, the characterization of the transaction by the parties in the instrument may be fairly disregarded, and in some instances it has been by statute especially so provided. The rule here laid down is embodied in the maxim of equity once a mortgage, always a mortgage, by which is meant in this connection that the character of a transaction involving the conveyance of property is fixed at its inception, and if at that time the conveyance is intended to operate by way of security and as a mortgage, a mortgage it must remain with all the incidents thereof despite express stipulations to the contrary in the instrument of conveyance looking to the abrogation of the mortgagor's equity of redemption. This is a doctrine from which a court of equity never deviates ; for its maintenance is deemed essential to the protection of the debtor, who, under pressing necessities, will submit to ruinous conditions, waiving the equity of redemption allowed him on breach of his obligation, in the expectation and hope of repaying the loan at the stipulated time and thus preventing forfeiture." 19 R.C.L. 244 *Mortgages* § 7.

We have already called attention to the fact, that the consideration in the deed which Mr. Bryant executed to secure the payment of the debt, was so percent lower than the amount for which the property had been purchased by him. In applying such a circumstance to the question of whether the transaction amounted to a mortgage, this is the common-law view on the point :

"If the grantor was severely pressed for money at the time of the transfer, so as not to be able to exercise a perfectly free choice as to the disposition of his property, and raised the sum needed by conveying the property in fee with a right of repurchase, his necessitous condition, especially in connection with the inadequacy of the price, will go far to show that a mortgage was intended." 41 C.J. 288-89 *Mortgages* § 24.

There have been strong and heated contentions on both sides as to whether the transaction in connection with the execution of the warranty deed to Harmon, was a sale or a mortgage. We have cited different authorities, including opinions of this Court, to support the position we have taken in this case; but just before we conclude this opinion we will read some law on the distinction between a mortgage and a conditional sale.

"As regards their legal incidents, there is all the difference in the world between a mortgage and a sale with a right of repurchase. If the contract is one of the former

description, the right of redemption subsists until it has been cut off by a foreclosure sale. If of the latter description, there is no right of redemption in the transferor after the expiration of the time fixed for the payment of the stipulated price. But in practice the line of demarcation between the two is shadowy, and it is frequently a matter of great difficulty to determine to which category a given transaction belongs. However, there is a test generally accepted as decisive, and this is the mutuality and reciprocity of the remedies of the parties—that is to say, if the grantee enjoys a right, reciprocal to that of the grantor to demand reconveyance, personally to compel the latter to pay the consideration named in the stipulation for reconveyance, the transaction is a mortgage; while if he has no such right to compel payment, the transaction is a conditional sale." 19 R.C.L. 266 *Mortgages § 35*.

"A mortgage of real property is distinguished from a conditional sale by the fact that the former is merely security for the payment of a debt, or for the performance of some other condition, while the latter is a purchase of the land for a price paid or to be paid, to become absolute on the occurrence of a particular event, or is a purchase of the property accompanied by an agreement to resell to the grantor in a given time, and for a stipulated price.

"Whether a deed of land executed with an agreement to reconvey on stipulated terms shall be construed as a sale or as a mortgage depends on the actual intention of the parties at the time, and this intention is to be gathered from the facts and circumstances attending such transaction and the situation of the parties, as well as from the written evidences of the contract between them." 41 C.J. 286 *Mortgages §§* 18, 19.

In view of the facts appearing in the records in this case and the circumstances surrounding those facts, and also in view of the law cited and quoted herein, we are of the considered opinion that transfer of Lot number so by the warranty deed executed by Mr. Bryant was intended by him to secure the payment of the debt he owed Oost Afrikaansche Compagnie, and that the transaction was a mortgage. That being so, under the law controlling he was entitled to assert the equity right to redeem the property upon satisfaction of the condition provided by the agreement.

It is therefore the opinion of this Court that the judgment upon which this case was appealed be and the same is hereby ordered set aside and the petitioners in the court below granted the right of equity of redemption. The warranty deed executed by Mr. Bryant to respondent H. Lafayette Harmon, as security for the payment of the loan of $750 from the Oost Afrikaansche Compagnie is ordered cancelled, and the

petitioners will pay, or cause to be paid to the respondents, the aforesaid sum loaned by Oost Afrikaansche Compagnie to the late William A. Bryant. The respondents are ruled to pay all costs of these proceedings. And it is so ordered.

Reversed.