Present : Garvin J. and Dalton J.

NARAYANAN CHETTY *v.* JAMES FINLAY & Co.

466—D. C. Matara, 2,133.

Trusts—Equitable interest in land—Assignment—Trusts created by operation of law—Ordinance No. 9 of 1917.

There is nothing in section 2 of Ordinance No. 7 of 1840 repugnant to the proof, by parol evidence, of the transfer of equitable interests in land arising out of a trust created by operation of law.

When the agent of a Chetty firm takes a deed in his name, with the vilasam or initials of the firm attached, the legal title is vested in the person whose name the deed bears.

Arunasalam Chetty v. Somasunderam Chetty [1] followed.

APPEAL from a judgment of the District Judge of Matara. The facts are stated in his judgment as follows: " This is a section 247 action. In D. C. Colombo, 16,531, the present defendant sued four sons of Somasunderam Chetty and obtained judgment on June 27, 1925, for Rs. 96,332 and seized the land now in dispute, which is a rubber estate at Warakapitiya. Plaintiff claimed the land. His claim was dismissed, and he has brought the present action to establish his title. The plaintiff admits that he was the attorney at Galle for A. R. A. R. S. M. Somasunderam Chetty, and in the course of his business lent on a mortgage of this land in 1915 a sum of Rs. 20,000. The bond was put in suit, the land sold, and the plaintiff became the purchaser, the amount due on the decree being set off against the purchase money, and a conveyance was executed in favour of A. R. A. R. S. M. Narayanan Chetty. The plaintiff's position is that the conveyance vested title in the plaintiff himself, subject to a trust to convey the property to Somasunderam Chetty . . . . This being so, the plaintiff alleges that by an agreement in India recorded upon an ola in 1920 Somasunderam Chetty divested himself of his beneficial title to this estate and to all other assets of his business in Galle and Matara Districts for a sum of Rs. 51,000, of which the plaintiff has up to date paid Rs. 48,000. Somasunderam Chetty died in 1923. His sons carried on his business, and the firm was adjudicated insolvent in the High Court of Madras and in the District Court of Colombo. Plaintiff now seeks to lead oral evidence of the agreement transferring to him the beneficial interest of Somasunderam Chetty in this land, of which he now claims to be the absolute owner. The defendant's position is that the conveyance vested absolute title in

[1] *21 N. L. R. 389.*

1927.

Narayanan Chetty v. JamesFinlay & Co.

the firm of Somasunderam Chetty without need of any further conveyance." The learned District Judge, holding that the oral agreement alleged by the plaintiff could not, in view of the terms of section 2 of Ordinance No. 7 of 1840, be proved, dismissed the plaintiff's action.

Hayley (with *Tisseverasinghe* and *H. V. Perera*), for plaintiff, appellant.—It may now be taken as settled law that legal title to land vests in the person whose name the deed bears. Legal title, therefore, in this case vests in the plaintiff without prejudice to the equities in favour of Somasunderam Chetty and his legal representatives, who may ask for a conveyance on conditions and subject to the provisions of the Trusts Ordinance, 1917. *Arunasalam Chetty v. Somasunderam Chetty,*[1] *Suppramaniam Chetty v. Kannu Wappu,*[2] *Somasunderam Chetty v. Annacham Chetty,*[3] *Sultan v. Sivanadian,*[4] section 58 of Ordinance No. 9 of 1917.

Somasunderam Chetty's interests in the land are equitable. Parol evidence is admissible to prove the transfer of those interests. Section 2 of Ordinance No. 7 of 1840 does not affect what is known in English law as " equitable estate." *Ibrahim Saibo v. Oriental Bank Corporation,*[5] *Rouchfoucold v. Boustead.*[6]

In England, before the Statute of Frauds (*29 Car. II. c. 3*) parol assignment of such interests could be proved. *Lewin on Trusts, 869, 908.*

It was section 8 of the Statute of Frauds which required a writing for such assignment. Section 8 as well as section 7, 9, and 10 of the Statute have not been embodied in Ordinance No. 7 of 1840, which has taken over and adopted with certain modifications the other sections of that Statute. The exclusion was intentional as " equitable estate " as that term was used prior to the Judicature Act, 1873, was unknown to the Roman-Dutch law. Berwick D.J. in his judgment in *3 N. L. R. 148* relies mainly on this omission in our Ordinance.

Under section 5 of Ordinance No. 9 of 1917 notarial writing is now necessary for the creation of a trust in respect of land, but not for its extinction.

Rescission of contract even if the contract was one coming within the Statute of Frauds can, as in the case of performance, be proved by oral evidence. *27 Hals. 64, ss. 108, 109.*

A lease, for instance, though required to be notarially executed can be orally surrendered. *Isohamy v. Appuhamy,*[7] *Soysa v. Soysa.*[8]

Equitable rights are exempt from section 92 of the Evidence Act. *Nadarajah v. Ramalingam.*[9]

[1] *21 N. L. R. 389 P. C.*
[2] *1 C. W. R. 155.*
[3] *17 N. L. R. 257.*
[4] *15 N. L. R. 135 at 137.*
[5] *3 N. L. R. 148.*
[6] *(1897) 1 Ch. 196 at 203.*
[7] *7 C. W. R. 290.*
[8] *26 N. L. R. 106.*
[9] *5 C. W. R. 304 at 307.*

The judgment debtors in 16,531, D. C. Colombo, are not the successors in title or interest, whatever it was, of Somasunderam Chetty or to the firm of A. R. A. R. S. M. They are only three of his heirs, of whom there are several, including his widow. Even if they were, they can only ask in appropriate proceedings for a conveyance subject to the settlement and payment of all amounts due to the plaintiff, and the defendants here cannot ask for more. *Sultan v. Vivanadian (supra)*, section 71 of Ordinance No. 9 of 1917, *Cavendish v. Geaves.*[1]

Bartholomeusz (with *H. E. Garvin*), for defendants, respondents—The deed in question conveys title to the firm of A. R. A. R. S. M. *Pettachie Chetty v. Mohamadu Yusuf,*[2] *Arunasalam Chetty v. Somasunderam Chetty (supra).*

A mortgage bond in the same terms as the deed in question was held to be in favour of the firm whose initials were prefixed, as in this case, to that of the mortgagee in *31,865, D. C. Kandy, S. C. M., March 3, 1926.*

Plaintiff admits he held the land in trust for Somasunderam Chetty. It is fraud on his part to claim a release from the trust and the land itself. *Gould v. Inasitamby.*[3]

Plaintiff cannot adduce oral evidence to prove a release from the trusts, as such releave affects an interest in land, see section 2 of Ordinance No. 7 of 1840. If the Court holds with us on this point, the action fails, and should be dismissed.

There is an alternative prayer in the answer for a declaration that the right, title, and interests of the judgment debtors, whatever they are, are liable to seizure and sale.

Hayley, in reply.

June 8, 1927. GARVIN J.—

This is an appeal by the plaintiff in an action under section 247 of the Civil Procedure Code. The subject-matter of the action is a rubber estate called Warakapitiya. The defendants obtained a judgment against the partners of a Chetty firm doing business as A. R. A. R. S. M. for the sum of Rs. 196,332 in case No. 16,531 of the District Court of Colombo, and in execution caused this rubber estate to be seized. The plaintiff claimed it as his property, but his claim was disallowed, and he was thus compelled to bring the present action to establish the right he claims to the property with a view to a declaration that it was not liable to seizure and sale in execution of the decree in D. C. Colombo, No. 16,531.

[1] *24 Beav. 163.*

[2] *4 Bal. 146.*

[3] *9 N. L. R. 177 at 183.*

1927.

GARVIN J.

Narayanan Chetty v. JamesFinlay & Co.

The premises in question were sold in pursuance of a hypothecary decree entered in case No. 16,534 of the District Court of Galle and were conveyed by the Commissioner appointed to carry out the sale to the plaintiff in this action, who is described in the deed as A. R. A. R. S. M. Narayanan Chetty. The plaintiff claims that the legal title is in him. He admits that the purchase was made with the moneys of the firm of Somasunderam Chetty, for whom he acted as attorney in Galle, but alleges that at the expiry of his engagement as agent of A. R. A. R. S. M. Somasunderam Chetty, and at the final settlement of accounts between him and his principal in 1920, when the Galle branch was closed, this estate and certain other property of the firm valued at Rs. 51,000 were taken over by him, and that he has from time to time paid to Somasunderam and his successors in the firm of A. R. A. R. S. M. various sums in liquidation of his debt, amounting in the aggregate to Rs. 48,000. By reason of these circumstances he claims to be the legal owner of this estate to the exclusion of Somasunderam and all others.

The defendants pleaded that the legal title passed by the deed referred to vested in A. R. A. R. S. M. Somasunderam Chetty. They denied several material averments made in the plaint, and prayed that the plaintiff's action be dismissed, or alternatively for a declaration that the plaintiff held the land in trust for the judgment debtors in D. C. Colombo, No. 16,531, and that the right, title, and interest of those judgment debtors be declared liable to seizure.

For the purposes of this appeal there is no need to consider certain other objections advanced by plaintiff to the seizure and sale of the premises.

At the trial certain of the issues proposed were rejected. This appeal relates partly to the order rejecting those issues.

The trial, however, proceeded. When the plaintiff sought to lead evidence to establish the settlement pleaded by him, and which by anticipation constituted his substantial defence to the defendant's prayer for a declaration that the premises were being held in trust for the judgment debtors, an objection was raised to the reception of evidence to establish this defence.

The grounds upon which this evidence was objected to were: first, that a note of the alleged settlement having admittedly been recorded in writing, parol evidence was not admissible; and secondly, that no evidence other than a notarially attested writing was admissible to pass what it is contended was in substance an assignment of Somasunderam's interests to the plaintiff.

The learned District Judge upheld the second of these objections, and assented to the submission of counsel for the defendants that a finding adverse to the plaintiff on this point concluded the case and dismissed the plaintiff's action.

The contention that the conveyance to A. R. A. R. S. M. Narayanan Chetty is in law a conveyance to A. R. A. R. S. M. Somasunderam Chetty is untenable. It was the plaintiff, Narayanan Chetty, who purchased the premises at the sale, and the conveyance is in terms a conveyance to him. Having regard to the well known practice, whereby an agent of a Chetty firm signifies that he is acting as agent of the firm by affixing the " vilasam " or initial of his principal to his name, it may be inferred that when Narayanan Chetty purchased these premises he did so in a fiduciary capacity. But this is an inference which may be rebutted. In this case the plaintiff does not deny that he purchased the premises as agent of A. R. A. R. S. M. That he purchased with the moneys of A. R. A. R. S. M., or rather by virtue of credit allowed to him for the amount of the judgment entered in D. C. Galle, No. 16,534, in which he sued to recover the moneys of Somasunderam lent by him as agent, is also admitted. The plaintiff does not suggest that Somasunderam Chetty intended that these moneys should be applied in a purchase of this land to be held by him (the plaintiff) as both legal and beneficial owner. These facts raise a resulting trust in favour of A. R. A. R. S. M. Somasunderam. It would be a constructive trust within the meaning of section 82 of the Trusts Ordinance, No. 9 of 1917, which does not perpetuate the distinction drawn in the law of England between constructive trusts and resulting trusts, and includes without discrimination all trusts raised by operation of law.

The conveyance of this land was made by a deed executed by the Commissioner appointed by the Court to sell and convey the property affected by the hypothecary decree in D. C. Galle, No. 16,534. It is impossible to ascribe to him any intention of creating or declaring a trust. The obvious explanation of the fact that the name of the transferee is set out in the deed as A. R. A. R. S. M. Narayanan Chetty is that the purchaser at the sale gave that as his name. In the sense that the deed affords some evidence in writing that the purchase was made in a fiduciary capacity this may possibly be refered to as an express trust. But the transferor presumably had no intention to create a trust, nor is this a declaration of trust in a writing signed by the trustee.

A resulting trust of immovable property may be established by parol, since the local Statute of Frauds—section 2 of Ordinance 7 of 1840—is concerned with interests in land created by the acts of parties, and not with obligations in the nature of trusts raised by operation of law. *Ibrahim Saibo v. Oriental Bank Corporation* (*supra*). The creation of express trusts of immovable property, at least in so far as a conveyance of property was involved, presumably had to be evidenced by a notarially attested document. Whether a declaration of trust made prior to Ordinance No. 9 of 1917 also

1927.

GARVIN J.

Narayanan Chetty v. James Finlay & Co.

needed to be evidenced by such a writing is a question which has never come up for consideration before our Courts. The whole subject of trusts as known to the English law is foreign to our Common law, and Ordinance No. 9 of 1917 may be said to have first introduced the law of trusts into our legal system. The dearth of judicial decisions on this subject is not therefore surprising. We are not, however, directly concerned with the question of the creation of trusts by act of parties or the proof of such trust. These matters are now regulated by Ordinance No. 9 of 1917. What we have to consider is whether the extinction or termination of the interests of the *cestui qui* trust or the waiver or assignment of his interests may not be proved otherwise than by a notarially attested writing where the trust relates to immovable property. It is said in effect that the interest of the *cestui qui* trust is an interest in land, and that no assignment of such an interest and no agreement or arrangement which has the effect of divesting him of that interest may be proved except by a notarially attested document. The provision of the law pleaded in support of this contention is section 2 of Ordinance No. 7 of 1840, which is as follows:—

> "No sale, purchase, transfer, assignment, or mortgage of land or other immovable property, and no promise, bargain, contract, or agreement for effecting any such object, or for establishing any security, interest, or incumbrance affecting land or other immovable property (other than a lease at will, or for any period not exceeding one month), nor any contract or agreement for the future sale or purchase of any land or other immovable property, shall be of force or avail in law unless the same shall be in writing and signed by the party making the same, or by some person lawfully authorized by him or her in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnesses."

A comparison of our Ordinance with the English Statute of Frauds (*29 Car. II c. 3*) indicates that section 2 of our Ordinance embodies, with the necessary adaptations and modifications, the first four sections of the Statute referred to in so far as they relate to land. If this examination be pursued, it will be observed that the other provisions of that Statute have been similarly embodied in the local Ordinance, with the exception of sections, 7, 8, 9, and 10, which relate to trusts. It is impossible to resist the conclusion that the exclusion of every provision of the English Act which related to trusts was intentional. Indeed, it is to be expected that a draftsman engaged in preparing an Ordinance for the

prevention of frauds and perjuries would, in taking over and adapting the provisions of a Statute of another country, exclude all such provisions as related to conceptions foreign to the system of law with which he is dealing. The law of trusts and the conception of an equitable estate as apart from the legal estate, so peculiarly a development of English equity, found no place in the law then in force in Ceylon. There is therefore every indication that section 2 of Ordinance No., 7 of 1840 was intended to deal with legal and not with equitable interests in land.

Nor is there in the language of section 2 of Ordinance No. 7 of 1840 any words which import a meaning inconsistent with this conclusion. What it does enact is that no conveyance of land or other immovable property and no contract or agreement whereby the legal estate in land is affected or intended to be affected shall be of any force or avail unless it shall be in writing and notarially attested.

It is interesting to note in this connection that under the English law it has been held that the Statute of Frauds does not require that a trust of land shall be created in writing. What is required by section 7 of the Statute—a section which has not been incorporated into the local Ordinance—is that a trust of land shall be manifested and proved by writing. *Foster v. Hale* [1] and *Smith v. Matthews.*[2] But for section 7, a trust might have been both created and proved by parol presumably for the reason that the creation of a trust does not necessarily affect the legal estate, with which alone section 4 of the Act is concerned.

The interest of a *cestui qui* trust varies with the terms of the trust. In the case of a simple trust such as this it consists of the righ to call for the legal estate and in the event of refusal to compel a conveyance by action. But in every case it consists in the right to compel the trustee by action to carry out the terms of the trust. In equity a trust gradually came to be treated on the footing of an actual estate, and as such was admitted to be assignable.

Prior to the Statute of Frauds the assignment of an equitable interest in land might have been made by parol. But section 9 of that Act requires that such assignments should be in writing signed by the party granting the same. It is evident that section 4 of that Act did not, and was not, intended to deal with equitable interests.

These considerations confirm me in the view I have already expressed that Ordinance No. 7 of 1840 must be read as limited to acts of parties which are directed to affect the legal estate; it is not concerned with equitable interests in regard to which it has made no provision.

[1] *3 Ves. 695.*

[2] *(1861) 30 L. J. Ch. 445.*

1927.

GARVIN J.

Narayanan Chetty v. James Finlay & Co.

I am therefore of the opinion that even if the evidence which has been excluded in this case can only be regarded as evidence of the assignment by a *cestui qui* trust of his equitable interests there is nothing in section 2 of Ordinance No. 7 of 1840 which excludes such evidence.

The judgment under appeal must in this view of the law be set aside and the case sent back for hearing. The argument before us was directed almost entirely to the point discussed in this judgment, and little or no attention was paid to the order rejecting certain issues. In view, however, of the fact that this case has already been partly heard by two Judges, I think it is in the best interests of the parties that there should be a trial *de novo* upon issues to be determined by the trial Judge. I trust that all those engaged in the new trial of this case will, in order to facilitate the decision of the many difficult points which arise in this case, avail themselves of this apportunity to place all the material facts on record. All proceedings taken on and after September 10, 1925, are set aside and the case sent back for a new trial.

The appellant is entitled to the costs of this appeal and of the proceedings in the Court below on October 29, 1926.

DALTON J.—

The plaintiff, Narayanan Chetty, instituted this action under section 247 of the Civil Procedure Code for a declaration of title to a rubber estate at Warakapitiya and that it be declared not liable to be sold in execution of a writ in case D. C. Colombo, No. 16,531. The defendant in this present action had obtained a decree on July 27, 1925, aganist the firm of A. R. A. R. S. M., the principal of which was Somasunderam Chetty in case No. 16,531 for a sum of Rs. 196,332 and interest and had caused the Fiscal to seize the property now claimed. Plaintiff preferred a claim which had been dismissed, and so he brought this action under section 247.

In his plaint he set up that the property in question was conveyed to him by deed of transfer No. 2,198 of December 20, 1919, duly attested (exhibit P 4). That deed was granted by the Commissioner appointed to sell in case No. 16,534, D. C. Galle, which had been instituted by the present plaintiff to enforce a right of sale under a mortgage. Plaintiff had been the agent and attorney of the firm A. R. A. R. S. M. at Galle for a considerable time up to the closing of the busines in 1920, and when the deed P 4 was drawn up the property was conveyed to " A. R. A. R. S. M. Narayanan Chetty."

When the case came on for trial it was admitted on behalf of the plaintiff that by the deed P 4 the property was vested in him

as trustee for the firm that is, that it was a document which conveyed the property as trust property although it declared no trust. He sought, however, in this action to prove that the trust had been extinguished subsequent to the deed by a settlement between him and Somasunderam Chetty. He pleaded that in 1920 accounts were gone into between them and it was arranged that he (plaintiff) retain the property in question and other properties at Galle at a valuation of Rs. 51,000. Of that sum, Rs. 48,000 he pleaded had been paid, although this is denied by the defendants, and that in terms of the settlement he now possessed the properties free of the trust, having taken the income from them and having expended money on their upkeep. The agreement is alleged to have been written on an ola and kept by the principal, who has since died.

Other questions arose between the parties, but it does not seem necessary to refer to them. The issues, accepted by the trial Judge, were as follows:—

A. (For *plaintiff*)—

(1) Was the plaintiff entitled to the lands described in the plaint under deed No. 2,198 of December 20, 1919 ?

(2) Did the plaintiff acquire title to the said lands and hold the same in trust for Somasunderam Chetty ?

(3) If so, were the said lands in 1920 or at any time before seizure under writ in case No. 16,531, D. C., Colombo, released from the said trust and did they become the absolute property of the plaintiff . . . .

B. (For defendant)—

(1) Did deed No. 2,198 dated December 20, 1919, convey title to the lands in question to plaintiff, or was the said deed a conveyance to the firm of A. R. A. R. S. M. or to the plaintiff as agent of the said firm and for and on behalf of the said firm ?

(2) Did A. R. A. R. S. M. Somasunderam Chetty transfer the said lands to the plaintiff ?

When the matter came on for trial evidence was led, and the position was accepted on behalf of the plaintiff that by P 4 the property was conveyed to him in trust for the firm. It was then sought to show by oral evidence that there had been an assignment of the beneficial interests of the firm and that the rights of the firm under the deed had now passed to plaintiff. Objection was taken to the admission of this evidence, and after the argument the District Judge reserved his order on this objection. Thereafter

he held the evidence was inadmissible, and, without hearing further evidence, dismissed plaintiff's claim. The latter now appeals.

The two points to be decided on the objection taken the learned Judge sets out as follows:—

(1) Did the conveyance of December 20, 1919, vest legal title in plaintiff himself or in the firm of Somasunderam Chetty?

(2) If the conveyance vested title in plaintiff subject to the beneficial interest in Somasunderam Chetty, is it open to plaintiff to prove an oral agreement by which Somasunderam Chetty divested himself of his interest?

Upon the first point it seems to me that the conveyance P 4 vested the legal title in the plaintiff. Although the facts in *Arunasalam Chetty v. Somasunderam Chetty* (*supra*) are not exactly on all fours with the facts here, it is a definite authority by the Privy Council for the proposition that when an agent for a Chetty firm takes a deed in his name with the vilasam or initials of the firm attached, the legal title is vested in the person whose name the deed bears. This, as de Sampayo J. points out in *Supperamaniam Chetty v. Kannu Wappu* (*supra*), was for some time an agitated question, and there are authorities on both sides, but the authoritative view now supported by the above-mentioned decision of the Privy Council appears to be as I have denoted.

The second question then has to be answered, and the learned Judge has answered it in the negative, that it is not open to plaintiff to lead oral evidence of an agreement by Somasunderam Chetty to divest himself of his beneficial interest. This decision is based upon the terms of section 2 of Ordinance No. 7 of 1840.

We may start, so far as this appeal is concerned, with the deed P 4 conveying the property to A. R., A. R. S. M. Narayanan Chetty. Upon the face of the deed no trust is expressed, nor is there anything to show that Narayanan Chetty may not in fact be the firm. In evidence, however, he admits that he is not the firm, but only an agent for the firm, and that the money lent on the original mortgage was Somasunderam's money. He further admits that he purchased the property aganist the amount of the judgment for which he was given credit. These facts, it seems to me, go to show that a resulting trust is created in favour of Somasunderam Chetty by operation of law under the provisions of Chapter IX. of the Trusts Ordinance. It is settled law that parol evidence may be led to prove such facts whence such trust would arise; might it not therefore reasonably be argued that it is equally open to the plaintiff to show that one of the essential elements of the constructive trust was based upon a condition which has lapsed, or which arose from

a set of circumstances which by act or conduct of the parties immediately concerned no longer exists? It seem to me difficult to answer that question in the negative.

On the facts as set out therefore the *dominium*, or as we may now say, the legal estate, is vested in Narayanan Chetty to hold the property for Somasunderam Chetty. This position creates no difficulty even in the hybrid condition, if I may use that term without any offence, of the law in Ceylon. As Innes C.J. has pointed out in *Estata Kemp and Others v. Mc. Donald's Trustee,*[1] it is quite possible under Roman-Dutch law to separate the legal ownership of property from the right to its beneficial enjoyment, and he cites a passage from the *Digest (33, 2, 16)*, which he describes as a perfect example of what in English law is called a trust. One then can ask oneself what was the nature of the right of Somasunderam Chetty under these circumstances, which right it is argued was either extinguished or passed to plaintiff on the agreement alleged to have been made in 1920.

Having due regard to the fact that one must guard aganist the danger of using the expression " fiduciary " and " fidei commissary " in too wide a sense for the purpose of this case, it may be noted that Innes C.J. in the case I have cited above, whilst not defining the nature of the rights of heirs in the case of a fidei commissary bequest conferring vested rights upon the remainderman transmissible to his heirs, points out that where the *dominium* of the subject-matter of the bequest is in the fiduciary, it would seem that there could only be personal rights against the latter to enforce the discharge of the testamentary trust, but that upon a certain event happening the *fidei commissum* might become purged of its condition and the right to enjoyment would vest. In such a case, of course, no question of any transfer or conveyance of the right arises.

It is not necessary, however, in my opinion to consider whether there has been any such extinguishment of the trust or purging of the condition upon which it is based, which is a difficult question as its arises in Ceylon, for this appeal can in my opinion be more easily determined from another aspect of the law. To ascertain the law in force in Ceylon at the present time, one must bear in mind that the Common law has been amplified by statutes based upon the principles of English law, and it is necessary to examine how far that amplification has gone. Prior to the Statute of Frauds an equitable interest in land in England could be transferred by parol, although the devise of an equitable interest in land, under the Statute of Wills (*32 H. VIII c. 15*), was held to be a devise of land (*Lewin on Trusts, 869, 908*). The sections of

[1] *(1915) A. D. 491.*

the Statute of Frauds which deal with the subject of trusts are the following:—

(7) All declarations or creations of trusts or confidences of any lands, tenements, or hereditaments shall be manifested and proved by writing signed by the party who is by law entitled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

(8) All grants and assignments of any trust or confidence shall likewise be in writing signed by the party granting or assigning the same or by such last will or divise.

(9) Where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this Act had not been made.

In England thereafter by section 8 the transfer of an equitable interest was required to be in writing. When, however, Ordinance No. 7 of 1840 was enacted in Ceylon no equivalent provisions such as those set out above were introduced and presumably for a very good reason, for there was no need to provide for any such interest in land as an "equitable estate," as that term was used prior to the Judicature Act, 1873, since the terms "legal estate" and "equitable estate" and all they connotate were unknown to the Common law. The provisions of that Ordinance cannot be taken to have any reference to an estate unknown to the law at the time it was enacted, whilst it does not seem unreasonable to presume from these circumstances that these provisions were intentionally omitted. Since 1871, however, there has been local legislation bringing the law more into conformity with the English law of trusts, culminating in 1917 in Ordinance No. 9 of 1917, which specially provides in section 118, after a long series of provisions based entirely on English law, for the application of English law in a matter for which no specific provision is made. Ordinance No. 7 of 1871 (the Property and Trustees Ordinance), Ordinance No. 22 of 1871 (Prescription Ordinance), and Ordinance No. 11 of 1876 (Entail and Settlement Ordinance) appear to be the first statutory enactments which imported into Ceylon the ideas and terms of English law. Section 5 of Ordinance No. 9 of 1917 may now be said to be more or less the equivalent of section 7 of the Statute of Frauds, but there has been no legislation, so far as I have been able to ascertain, on the lines of section 8 introducing the provisions of the Statute of Frauds with respect to the transfer of equitable interests in land. It would therefore appear that they are in the same position as they were in England prior to the Statute of Frauds.

The development of the law of trusts is referred to by Berwick D.J. in *Ibrahim Saibo and Others v. The Oriental Bank Corporation* (*supra*), a case decided in 1874. The same development took place in South Africa, and is specially dealt with by Sir William Solomon in *Estata Kemp and Others v. Mc. Donald's Trustee* (*supra*). No such statutory enactments, however, have been introduced there as we have them to-day in Ceylon. In the first mentioned case it was strongly urged that the doctrine of resulting trusts was no part of the law of Ceylon. The question was whether the English doctrine of resulting and constructive trust was contrary to the provisions of Ordinance No. 7 of 1840, which provided in effect that no interest in land can be created by sale, purchase, transfer, or agreement otherwise than in writing notarially executed. After referring to the distinction between " resulting " and " constructive " trusts, which, however, are both created by operation of law and not by parties, Berwick D.J. comes to the conclusion that section 2 of the Ordinance provides for trusts creating an interest in land only in so far as they are included in interests which are created by parties. He adds: " The very nature of the language used in the Ordinance requiring the contract to be signed by the party making the same shows this to have been the true intention, and that interests not made nor created by parties but by operation of law are not in its purview. "

This decision, that implied or resulting or constructive trusts may be established by parol evidence, goes beyond what it is necessary to decide in the case now under consideration, whilst the real difficulty as it presented itself to the trial Judge there whether an implied trust of land in English law does by Roman-Dutch law create an obligation in respect of land, also does not arise here. That difficulty is doubtless in great part now removed by the provisions of the Trust Ordinance of 1917. This decision does show, however, how the provisions of section 2 of Ordinance No 7 of 1840 are limited, and only has reference so far as the question raised in this case is concerned to trusts that create interests in land that are created by parties, and not to trusts created by operation of law. For the reasons I have set out I am also of opinion that there is nothing in section 2 repugnant to the proof of the transfer of equitable interests arising out of a trust created by operation of law by parol evidence.

The appeal is therefore allowed, with costs, and the judgment of the trial Judge set aside. I concur in the order proposed by my brother.

Appeal allowed.