1960 *Present :* **Basnayake, C.J., Sansoni, J., and H. N. G. Fernando, J.**

MUTTAMMAH, Appellant, *and* **THIYAGARAJAH**, Respondent

S. C. 145—D. C. Jaffna, 467/L

Trust—Gift of immovable property—No intention on part of transferor to dispose of beneficial interest—Parol evidence of "attendant circumstances"—Admissibility—Trusts Ordinance, ss. 2, 5 (3), 83—Evidence Ordinance, proviso (1) of s. 92—Prevention of Frauds Ordinance, s. 2.

In September 1941, P, who was entitled to the entirety of a land, donated to T, his son, an undivided half-share of the property. In October 1954, T donated the same half-share back to his father P to enable him, the more easily, to raise a loan of Rs. 20,000 on a mortgage of the entire land. No reservation was made in T's favour in the deed of gift of 1954, but by parol evidence T proved *inter alia* that he continued to remain in possession of his share of the land and that it was expressly understood between the parties that the share should be reconveyed to T after payment of the mortgage debt. The loan of Rs. 20,000 was never raised, and P died in March 1956. In the present action instituted by T against the executrix de son tort of P's estate, T claimed that the defendant held the half-share in trust for him.

Held, by SANSONI, J., and H. N. G. FERNANDO, J. (BASNAYAKE, C.J., dissenting), that the plaintiff was entitled under section 83 of the Trusts Ordinance to lead parol evidence of "attendant circumstances" at or about the time of the execution of the deed showing that although T transferred his half-share to P in 1954 by what was in form an absolute conveyance it was the intention of the parties that T should retain the beneficial interest in the property and that what was conveyed was only the nominal ownership to P.

APPEAL from a judgment of the District Court, Jaffna.

H. V. Perera, Q.C., with *A. Sambandan* and *A. Nagendra*, for 1st Defendant-Appellant.

C. Thiagalingam, Q.C., with *C. Ranganathan* and *R. R. Nalliah*, for Plaintiff-Respondent.

Cur. adv. vult.

October 20, 1960. BASNAYAKE, C.J.—

The only question for decision is whether it cannot reasonably be inferred consistently with the attendant circumstances that, when Ponnudurai Thiagarajah transferred by way of donation an undivided half share of the land described in the Schedule to deed No. 952/1817 attested by Manikkam Eliatamby on 10th October 1954 (P8) to Visvanathar Ponnudurai his father, he intended to dispose of the beneficial interest

therein. If it cannot, then by operation of section 83 of the Trusts Ordinance the transferee must hold such property for the benefit of the owner or his legal representative.

Shortly the facts are as follows :—Visavanathar Ponnudurai was an overseer in the Public Works Department. He married twice. By his first marriage he had 6 children of whom the plaintiff Ponnudurai Thiagarajah is the youngest. By deed No. 437 attested by Manikkam Eliatamby on 24th September 1941 (P1) Visvanathar Ponnudurai transferred by way of donation to the plaintiff an undivided half share of the immovable property described in the Schedule to that deed the whole of which he owned. The 1st defendant is his second wife by whom he had one child, a daughter named Ratnapoopathy who married in 1954. At the time of her marriage Ponnudurai and his wife the first defendant agreed by dowry deed No. 2952 of 5th February 1954 attested by Sinnathurai Kanthasamy, Notary Public, (P2) to give a dowry of Rs. 80,000 made up as follows :—

(*a*) Cash ..	..	Rs. 35,000
(*b*) Immovable property	..	,, 38,000
(*c*) Jewellery ..	..	,, 7,000
		80,000

The cash dowry consisted of—

Rs. 9,561	lying in deposit in Case No. 301G to Ratnapoopathy's credit
,, 2,000	invested in mortgages in her name
,, 2,500	value of mortgage bonds assigned to her
,, 20,939	paid in cash at the time of execution of the deed
35,000	

Ponnudurai died on 17th March 1956 leaving a last will dated 26th March 1947 attested by Velupillai Nagalingam, Notary Public, (P14) appointing the 1st defendant as his executrix. By this will special bequests were made to the daughters Ratnapoopathy and Ratnam wife of Kanapathipillai Sellathurai, and to the sons Thambirajah, Sinnatamby and Pathmanathan. The residue was left to Ratnapoopathy. The plaintiff and his brother Ambalavanarajah received nothing under the will. He alleges that, although the first defendant agreed after his father's death to convey to him the undivided half share he transferred to his father on deed P8, she has not done so, and this action has been instituted to assert his right to that share and compel her to transfer it to him as being property held by his deceased father in trust for him.

It is common ground that the plaintiff's father, who had donated the undivided share of the land in question in 1941, when the plaintiff was still engaged in his scholastic studies, had asked him in 1954 to reconvey it to him so that he may raise a loan on the entire land. The father was in debt at the time. The son was also badly in need of money as he was intending to go on a tour of Europe. Both parties sought to establish the circumstances under which the transfer was made by reference to correspondence between father and son before and after the transfer. The plaintiff produced five letters written by his father to him. The first of them P4 of 20th December 1953 does not have any bearing on the transfer. It merely conveys to the son the information regarding a marriage that had been arranged for his daughter the plaintiff's step-sister, the amount of cash dowry and particulars regarding the bridegroom. The next letter P5 of 1st June 1954 is written after the execution of the dowry deed and relates to a loan which was being negotiated and the settlement of the writer's debt. The third letter P6 of 1st October 1954 refers to the deed of gift in question and the plaintiff is told that he and his wife must both sign. It is suggested that the donation should be valued at Rs. 18,000 or Rs. 15,000 and that the plaintiff's father was intending to borrow Rs. 20,000. It shows that after paying Rs. 5,000 to the plaintiff his father hoped to settle his debts with the balance. In the fourth letter P7 of 12th October 1954 written two days after the execution of P8 the author says : " if this amount is obtained all debts will be cleared and your requirements also will be fulfilled. " In the last of the letters produced by the plaintiff P9 of 3rd March 1956 two weeks before the death of Ponnudurai and after the plaintiff had returned from his tour of Europe the author complains of his illness and expresses his regret and pain of mind at not being able to obtain a loan to pay his debts and requests the plaintiff to interest himself in the matter by seeing certain officials of the Bank. He adds " Therefore try and complete this help. There is a proverb that those who dip into honey will not wash the hand. You also will be benefited thereby. "

On behalf of the first defendant ten letters (D4-D13) written by the plaintiff were produced. The first of them was written on 22nd February 1955 and the last on 8th September 1955, all after the transfer in question. In the first of them D4 of 22nd February 1955 he informs his father that he expected to get a loan at 9% on his Paranthan land and that he wants to settle all his debts before he proceeds to Europe and expresses his gratitude to him for all his father was doing for him in connection with that land. In the next letter (D5) written on 2nd March 1955 he asks his father to make arrangements to send him Rs. 5,000 before the 26th of that month as he has to deposit his money before that date in the Bank. He also informs him of his failure to raise a loan on the Paranthan land and asks his father to sound the person who undertook to take a five year lease for 5,000. He added " I don't mind giving the land on lease for five years to him for Rs. 5,000 provided he gives me another Rs. 5,000 at 9% on mortgage. Please consider and let me know as early as possible. If I get Rs. 10,000 I could settle my debts and pay for the

new car on (*sic*) this end before I leave for England." The third letter (D6) is written on 22nd April 1955 on board the P. & O. Canton and describes the journey and informs his father that he has got his wife to write to her father to give them Rs. 7,000 for the purchase of a car and adds that he may require another Rs. 2,000. The fourth letter (D7) is from London and is written on 16th May 1955. He informs his father that he has booked a Hillman car and that he has to pay the sellers of the car before the 29th of that month and asks him to deposit Rs. 7,000 in his Bank to his credit before the 27th. He repeats that his wife has written to her father about it and asks him to intercede on their behalf and if the wife's father fails he asks his father to borrow the money on his behalf and to deposit the amount in the Bank. He offers to obtain a loan on his return and pay him. In the fifth letter (D8) also written from London on 13th June 1955 he acknowledges the receipt of a letter sent by his father. He shows concern about his father's illness and expresses his disappointment with his father-in-law who had failed to give him the money he required. He asks his father to deposit the money before 25th June. He asks his father to obtain as much as his father-in-law is able to give and supplement the balance himself. He offers to pay back within two months of his return to Ceylon. In the sixth letter (D9) written from London on 20th June 1955 the plaintiff informs his father of his trip to Europe and gives details of the tour and asks him to see that the sum of Rs. 7,000 is deposited in the Bank before 28th June. He asks him to raise a loan and deposit the money if his father-in-law has not given it. He implores his father to make the deposit promising not to ask any more money. The seventh letter (D10) is written on 7th July 1955 from Switzerland and describes the countries he has toured and inquires whether the money was deposited and offers to pay back the Rs. 7,000 if his father has deposited the entire sum without any contribution from his father-in-law. The eighth letter (D11) is written on 5th August 1955 from London. He apologises to his father for troubling him too much. He informs him that he has sold his car and settled the dealers. He also offers to write to the Bank to refund the Rs. 3,000 his father had paid to his Bank account so that he may return it to the person from whom he borrowed the money. He also expresses his gratitude to his father for doing his best to help him. The ninth letter (P12) is written on 19th August 1955 on the train to Southampton. In that letter he asks his father to deposit another Rs. 3,000 to the credit of his account offering to settle the full sum of Rs. 6,000 on arrival in Ceylon, before going to the estate on which he worked. The last of the letters, the tenth (D13) of 8th September 1955, is written from Wattala on his arrival in Ceylon. It informs his father that his brother-in-law has sent him Rs. 2,500 and that he would not require any more money and that he was trying to raise a loan to pay his father and his brother-in-law before the end of September.

Apart from the facts revealed in the correspondence referred to above there are certain other facts which deserve mention. The plaintiff's father was his attorney during this absence abroad by reason of the power

of attorney granted to him on 16th April 1955 (P 11). While the plaintiff's father was alive and before the plaintiff donated the half share of the land in dispute to his father his father had on three different occasions sold divided portions of this very land and the plaintiff though a co-owner had not joined in those deeds. The first of them in the order in which they were produced—(D1)—executed on 17th February 1945 (deed No. 2421 attested by Ramalingam Kanagaratnam, Notary Public) conveys 38 lachchams v.c. on the Southern side to Kathiran Kandiah of Nainativu for Rs. 5,000. In the deed the vendor says " I now have good right to sell and convey the said premises in manner aforesaid. " The second (D2) executed on 11th December 1944 (deed No. 2316 attested by Mailvaganam Ehamparanathan) conveys the South-Western extent of 15 lachchams v.c. to Aiyan Nagappan and Nagappan Kanthan of Nainativu for a sum of Rs. 1,800. In that deed the vendor says " I hereby declare that this property is in my possession as per transfer deed in my favour dated 11th May 1932 and attested by Y. Arumainayagam, Notary Public, under No. 400, that this property is free from all alienations, that I have full right and power to sell this in this manner . . . . " The third deed (D3) executed on 28th January 1952 (deed No. 1037 attested by Kanthappillai Vairamuttu Balasingham, Notary Public) conveys the South-Western divided extent of 10 lachchams v.c. to Sirinavan Eliyatamby for a sum of Rs. 3,000. The vendor states " I do hereby declare that that property is not in any way encumbered or alienated, and that I have full right and power to sell and transfer that now. " When asked to explain these sales the plaintiff stated that they were effected with his concurrence. But that evidence must be treated with reserve as it is not supported by the deeds, nor is there any evidence either direct or circumstantial to support his word. The relations between the father and son as shown by the evidence were cordial and the father and son appear to have freely corresponded with each other. In this state of the facts the inability of the plaintiff to produce a single letter from his father asking for his consent to the sales in question must be resolved against him. Besides when a fact was known to two persons one of whom is dead any assertion made by the survivor which is to his advantage and to the disadvantage of the deceased must be treated with extreme caution and should not as a rule be acted on unless supported by strong circumstantial or other evidence as the only person able to contradict him is dead. (See *Muththal Achy v. Murugappa Chettiar* [1] and the cases cited there. See also *Murugappa Chettiar v. Muththal Achy* [2] and *Borcherds v. Estate Naidoo* [3].) The evidence of Advocate Kanaganayagam who is a witness for the plaintiff does not support his claim that he did not intend to dispose of the beneficial interest in the land. He, who was a close friend of the deceased, says that the deceased wanted to settle the mortgages he had executed of certain lands at Sandilipay and Achchuvely as they were carrying a high rate of interest and that he therefore contemplated raising a loan from an institution which charged lower interest such as a Bank or

[1] *(1954) 57 N. L. R. 27.* [2] *(1956) 58 N. L. R. 25 (P.C.).*
[3] *(1955) 3 S. A. L. R. 78.*

the Agricultural Credit Co-operative Society. He says " For that purpose since he was entitled to a half share of the coconut estate at Nainativu he had asked his son, the plaintiff, to give him the other half share because his other son Dharmu had informed him (the deceased) that the Bank had refused to take an undivided share of the coconut estate as security. Thereafter the plaintiff donated his half share and Ponnudurai said that he would give a portion of the money so raised to his son. " The deed P3 (1623 attested by Ganthapillai Vairamuthu Balasingham, Notary Public) of 30th January 1954 which is a mortgage of lands in Achchuvely for Rs. 10,000 at 9% interest bears out this evidence. That the plaintiff was to get a share of the loan finds support in the evidence of Proctor Eliyatamby who executed deed P8. He says that he was told by the plaintiff and his brother " that the father was going to raise a loan on this property and as it was undivided between the father and the son it would be difficult to raise a loan and that the son was to donate the property to the father for the time being to enable the father to raise a loan and settle a part of the debt incurred by the father and to give a sum of Rs. 5,000 to the plaintiff to go to England. "

The way the deceased father dealt with the land as if it was entirely his own and the absence of any indication in the correspondence or any proof *aliunde* that the son derived any benefit from the undivided half share that was gifted to him by his father indicate clearly that the gift to the son was a nominal gift and that it was not acted on and that the donor continued to treat the entire land as his own the donation notwithstanding.

I shall now turn to section 83 of the Trusts Ordinance. That section provides :

> " When the owner of property transfers or bequeaths it, and it cannot reasonably be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative. "

The section is designed to prevent transfers of property which on the face of the instrument appear to be genuine transfers, but where an intention to dispose of the beneficial interest cannot reasonably be inferred consistently with the attendant circumstances. Neither the declaration of the transferor at the time of the execution of the instrument nor his secret intentions are attendant circumstances. Attendant circumstances are to my mind circumstances which precede or follow the transfer but are not too far removed in point of time to be regarded as attendant which expression in this context may be understood as " accompanying " or " connected with ". Whether a circumstance is attendant or not would depend on the facts of each case. In the instant case there is no evidence to show that the plaintiff did not intend to dispose of the beneficial interest. The indications are that he did for he

was quite content to transfer the share unconditionally to his father to enable him to raise a loan on a mortgage of the entire land. He was content to let his land be burdened with the debt with all the consequences that such a course entailed. His father had no legal right to hypothecate the share that was conveyed by P8 unless the beneficial interest passed thereunder. The plaintiff was in need of money for his travel abroad and to settle his debts. He hoped to get for his use a part of the loan his father expected to raise on the entire property. When that failed the plaintiff obtained Rs. 6,000 on a conditional transfer on 2nd April 1955 (P10—deed No: 125 attested by Ponniah Wijayaratnam, Notary Public) of land at Kunchi Paranthan to one Arumugam Kathirithamby Suppiah, the condition being that on repayment of that sum within five years from the date of sale the land was to be re-conveyed. The fact that the plaintiff's father was in need of this half share to enable him to raise a loan from a public money lending institution at a favourable rate of interest is no indication that the plaintiff did not intend to dispose of his beneficial interest. To my mind the very purpose of the transfer indicates that he did so intend for the father would have no right to hypothecate the land for his debt to the kind of lending institution he had in mind unless he had full *dominium*.

The failure of the plaintiff or the deceased to refer in the correspondence produced to the secret understanding between father and son in regard to the donation effected by P8 negatives the plaintiff's claim and supports the 1st defendant's claim that although the half share was donated on P1 to the plaintiff as far back as 1941 the entire land was regarded as the deceased's property and that the plaintiff was nominal owner of the half donated on P1. The deeds D1, D2, and D3 strongly support this claim. The plaintiff has not been able to satisfactorily explain these deeds. Section 83 of the Trusts Ordinance is not designed to enable a transferor of property who makes no reservation in his favour in the instrument he executed to denounce his own act by declaring that he did not intend to dispose of the beneficial interest therein. In this connexion it would not be out of place to quote the words of Tindal C. J. in *Shore v. Wilson* [1]—

> " But whilst evidence is admissible in these instances for the purpose of making the written instrument speak for itself, which without such evidence would be either a dead letter, or would use a doubtful tongue, or convey a false impression of the meaning of the party, I conceive the exception to be strictly limited to cases of the description above given, and to evidence of the nature above detailed ; and that in no case whatever is it permitted to explain the language of a deed by evidence of the private views, the secret intentions, or the known principles of the party to the instrument, whether religious, political, or otherwise, any more than by express parol declarations made by the party himself, which are universally excluded ; for the admitting of such evidence would let in all the uncertainty before adverted to ; it

[1] *(1842) 9 Cl. & F. 355 at 567.*

would be evidence which in most instances could not be met or countervailed by any of an opposite bearing or tendency, and would in effect cause the secret undeclared intention of the party to control and predominate over the open intention expressed in the deed."

In my opinion the plaintiff is not entitled to succeed and his action must be dismissed.

I allow the 1st defendant's appeal with costs both here and below.

SANSONI, J.—

The plaintiff is the son of Visuvanather Ponnuthurai by his first wife. The 1st defendant is the second wife of Ponnuthurai, and the 2nd defendant is the wife of the plaintiff. Ponnuthurai, who was entitled to the entirety of a land known as Nainativu Estate, donated an undivided half share worth Rs. 10,000 to the plaintiff in 1941. Shortly prior to February, 1954, Ponnuthurai and the 1st defendant arranged a marriage for their daughter Ratnapoopathy, and they agreed to give her, among other things, Rs. 35,000 in cash as dowry. Of this sum, Rs. 14,061 was paid out of money lying in court and by way of mortgages executed in her name, and the balance sum of Rs. 20,939 was paid to her by cheque at the time of execution of the dowry deed P2 on 5th February 1954. This sum had to be raised by Ponnuthurai on loans secured by mortgages, and apparently the mortgagees soon began to press Ponnuthurai for the return of the loans.

Ponnuthurai then made attempts to get the money to settle those mortgage debts. Letters written by him to the plaintiff from June, 1954, on this subject have been produced. They show that he wanted the plaintiff to help him either by paying the debts himself or by transferring his undivided half share of the Nainativu Estate to Ponnuthurai, in order that the latter might borrow money on the security of the entire estate. By letter P5 of 1st June 1954 he asks the plaintiff to send him the Nainativu deed in order that he might try to raise a loan from a priest.

Ponnuthurai later sent another son of his named Thambirajah to speak to the plaintiff. Thambirajah has said in evidence that his father wanted his assistance to raise a loan from the State Mortgage Bank ; as the Bank was not prepared to accept an undivided share as security, his father asked him to persuade the plaintiff to give his half share to his father on the express understanding that the share would be given back to the plaintiff. Thambirajah said that, after much persuasion, the plaintiff eventually agreed to do so. In his letter P16 dated 1st October 1954, Ponnuthurai writes to the plaintiff and refers to that interview ; he explains that the Bank would not accept an undivided share as security, and although it would be expensive to obtain a transfer in his name; he says it cannot be helped. He informs the plaintiff that both he and his

wife would have to sign the deed as the Bank required that to be done, and that the share should be valued at Rs. 15,000 in the deed in order to reduce the cost of the transfer. Rs. 20,000 was to be the amount of the loan, of which Rs. 5,000 was to be given to the plaintiff and Ponnuthurai's debts settled with the balance.

The deed of donation P8 in favour of Ponnuthurai was signed by the plaintiff and his wife on 10th October, 1954, while Ponnuthurai signed it as donee on 27th October, 1954. By his letter P7 of 12th October, 1954, Ponnuthurai thanks the plaintiff for having sent the deed to him and informs the plaintiff that if the loan is obtained all his debts will be cleared and the plaintiff's requirements also will be satisfied. Apart from the evidence of Thambirajah, who was not cross-examined at all, there is the evidence of Mr. Kanaganayagam, who said that Ponnuthurai was keen on raising a loan in order to pay off the mortgage debts which he had incurred in order to provide his daughter's dowry. He also said that, for this purpose, Ponnuthurai told him that he had asked the plaintiff to give him his half share because the Bank would not accept an undivided share as security. Mr. Eliathamby who attested the deed of gift P8 said that he was told by the plaintiff and Thambirajah, at the time of the execution of the deed, that the plaintiff was donating his half share to his father for the time being in order to enable his father to raise a loan to settle the debts incurred by him and to give the plaintiff Rs. 5,000 before he went to England ; also that the property would be reconveyed to the plaintiff. The plaintiff produced the correspondence he had with his father. He said in his evidence that he had no intention of parting with the beneficial interest in the land, and that the deed was executed merely to accommodate his father temporarily. He claimed that he remained in possession of his half share in spite of the donation, and paid income tax on the profit derived from the produce.

The plaintiff's case was that the deed P8 was executed in Ponnuthurai's favour at his request only to enable him to mortgage the entirety of Nainativu Estate, as he was anxious to raise money to clear his debts, and to give plaintiff a sum of Rs. 5,000. With regard to this sum of Rs. 5,000 the plaintiff said that, in connection with a trip he planned to make to Europe on holiday in April 1955, he intended to borrow a sum of Rs. 5,000 from the Eastern Bank and that he did not want a loan of this sum from his father. Ponnuthurai was, no doubt, aware of the plaintiff's intention, and he mentioned in his letters to the plaintiff more than once that if the loan of Rs. 20,000 could be obtained by mortgaging Nainativu Estate Rs. 5,000 of this sum could be taken by the plaintiff. I do not see that this matter, which was quite incidental to the purpose for which deed P8 was executed, affects the character of the transaction. The plaintiff in fact raised a loan of Rs. 6,000 by executing conditional transfer P10 on 2nd April, 1955, independently of Ponnuthurai.

The loan of Rs. 20,000 was never raised ; the plaintiff went to Europe and returned to Ceylon in September 1955, and Ponnuthurai died on 17th March, 1956. Just a fortnight before his death, he wrote letter P9 to the plaintiff's brother in which he said that, although he tried to make arrangements to raise a loan and pay his debts, he could not do so and he asked the plaintiff's brother to do what he could to help him in the matter. He was still trying to achieve the object for which P8 was executed.

After Ponnuthurai's death, the 1st defendant, according to the plaintiff, promised to reconvey the half share to him but subsequently changed her mind. He sent a letter of demand to her in November, 1956, but received no reply. He accordingly filed this action in June, 1957. In his plaint he sets out briefly the matters I have already referred to and in paragraph (7) he pleads that he never intended to dispose of the beneficial interest in his half share, and that the 1st defendant as executrix de son tort was holding that share in trust for him. The 1st defendant filed an answer and later amended it, but in both her answers the first defence taken up is that the original deed of gift of 1941 in the plaintiff's favour did not convey the beneficial interest to the plaintiff but was executed in trust. That defence was not, however, put forward at the trial. The other defences raised were (1) that the transfer by the plaintiff to Ponnuthurai was not in trust, (2) that in the absence of a notarially attested agreement to reconvey the half share to the plaintiff, the plaintiff could not claim either a reconveyance or prove a trust, and that no oral evidence could be led to vary the terms of the deed P8 in order to prove a trust, (3) that the deed P8 was executed by the plaintiff in consideration of his love and affection towards his father. These are the matters also which were put in issue at the trial.

The learned District Judge held in favour of the plaintiff's contention that the deed P8 was executed in trust and this appeal has been brought against that finding. One important admission which the 1st defendant's counsel made at the trial appears in the judgment : he accepted the plaintiff's version that Ponnuthurai wanted the plaintiff's half share of Nainativu Estate donated to him for the purpose of raising a loan, with the undertaking to reconvey it to the plaintiff. I think it is necessary that the plaintiff should also establish, before a trust can be found in this case, not merely that the deed P8 was executed in order to enable Ponnuthurai to raise a loan but (1) that it was executed only for that limited purpose and (2) that, subject to any mortgage that may be created by him, it was intended that the beneficial interest in the half share should continue to be vested in the plaintiff. If the plaintiff has established these matters, the undertaking to reconvey the half share may be considered a circumstance which lends support to the plaintiff's version of the agreement between him and his father.

The question for decision in this case, it appears to me, is whether, having regard to the attendant circumstances evidenced by the statements and conduct of the parties at or about the time of the execution of deed P8, it was their intention that the beneficial interest of the plaintiff in his half share should vest in Ponnuthurai, or whether the plaintiff retained that interest and conveyed only the nominal ownership to Ponnuthurai.

Mr. Perera urged that the question really was whether the attendant circumstances outside the deed P 8 negative what is stated in the deed ; and that if they do not, there is no constructive trust, while if they do, they are inconsistent with the terms of the deed and there is a constructive trust. I see no objection to the question being framed in this form, though it must be emphasised (1) that the intention of the parties at the relevant time is all-important, and (2) that the form and terms of the deed P 8 are by no means decisive. Undoubtedly the burden lay upon the plaintiff to prove the trust, and in order to do this, the plaintiff was entitled to lead parol evidence. Once it is established that, even though the deed is in terms an absolute transfer of the half share, the parties intended only that Ponnuthurai should be the nominal owner the 1st defendant is guilty of fraud in ignoring the trust and claiming the half share as part of Ponnuthurai's estate. For it is a fraud to set up the absolute character of a conveyance for the purpose of defeating the beneficial interest which was to belong to the plaintiff : see *Bannister v. Bannister* [1] and *Valliyammai Atchi v. Abdul Majeed* [2]. Fraud in this context is merely the violation, even innocently because of ignorance, of an obligation which the 1st defendant as the executrix de son tort of Ponnuthurai has imposed upon her by a Court of Equity, acting as it does as a Court of conscience.

This brings me also to Mr. Perera's argument that one of the attendant circumstances to be considered included the terms of the deed P8. It is by no means a decisive circumstance, although the form of the transaction cannot be ignored. But it must be remembered that a deed in those terms—transferring ownership of the half share to Ponnuthurai—was necessary to effectuate the purpose for which Ponnuthurai wanted the plaintiff's assistance.

The crucial issue, when the question is trust or no trust, is : What did the parties intend so far as their intention can be gathered from the surrounding circumstances ? One matter of debate before us was whether the plaintiff was seeking to prove an express or a constructive trust. I think the issues suggested by the plaintiff's counsel are wide enough to cover either form of trust, nor do I think it important to decide into which category the present case falls. The dividing line is extremely thin and there are many cases, and I think this is one, which fall into both categories. I am satisfied from the circumstances proved in evidence, which I have already referred to, that it was agreed between the plaintiff and Ponnuthurai that the plaintiff should continue to retain

[1] *(1948) 2 All E. R. 133.* [2] *(1947) 48 N. L. R. 289.*

the beneficial interest, even after the property had been donated by what is in form an absolute conveyance of all the plaintiff's rights. I think it follows that the legal effect of the bargain was to create both an express trust and a constructive trust. Keuneman, J. in *Valliyammai Atchi v. Abdul Majeed* [1] held that there was an express trust created orally and also that there was sufficient evidence to establish a constructive trust. I agree with the finding of the learned District Judge that the plaintiff did not intend to dispose of the beneficial interest to his father, and that the 1st defendant is holding the half-share in dispute in trust for the plaintiff.

I would dismiss the appeal with costs.

H. N. G. FERNANDO, J.—

The evidence which has been summarised by Sansoni, J. and which was not contradicted at the trial was, *if admissible*, ample to establish a constructive trust contemplated in Section 83 of the Trusts Ordinance ; for in my opinion the only reasonable construction of the intention of the parties was that, after the plaintiff's half of the land was transferred into the name of his father, his father would mortgage the entire land and when the mortgage was paid off restore to the plaintiff his half-share ; even if (as I do not think was the case) the promise to re-donate the half-share meant that the half-share would be restored burdened with the mortgage, yet the intention was that the transfer to the father was for the limited purpose of enabling him to mortgage the land.

An important item of the " attendant circumstances " was the promise made to the plaintiff, before the transfer, of a reconveyance to him by way of gift. The principal question which arises is whether the evidence of this oral promise was admissible. I am inclined to agree with the argument of the appellant that the express provision in Section 5 (3) of the Trusts Ordinance is of no avail to the plaintiff. That provision is in my view applicable only in cases where there was an actual intention to create a trust and the intention is carried out only orally and not in compliance with subsection 1 of Section 5. For example, in the case of *Valliyammai Atchi v. Abdul Majeed* [1] it was averred in the plaint and held at the trial that the intention was that the transferee of the lands should hold them in trust for the benefit of the transferor. But in the present case there was no such averment in the plaint, nor can it be reasonably supposed that the parties had contemplated the creation of an express trust.

Nevertheless the oral promise to reconvey, which undoubtedly was an " attendant circumstance " establishing that there was no intention to transfer the beneficial interest in the half-share to the plaintiff's father, could be proved by parol evidence for two reasons.

[1] *(1944) 45 N. L. R. 169.*

Firstly, Section 83 of the Trusts Ordinance creates by statutory provision an obligation in the nature of a trust which had long been recognised by the Courts of Equity in England, and I consider that Section 2 of our Trusts Ordinance is quite wide enough to enable us to determine " by the principles of equity for the time being in force in the High Court of Justice in England " that an obligation in the nature of a trust referred to in Section 83 arose in the circumstances of the present case. The particular principle which would be applicable is that the provisions of a statute should not be made the instrument of fraud.

Secondly, proviso (1) to Section 92 of the Evidence Ordinance permits "any fact to be proved . . . . which would entitle any person to any decree or order relating to any document . . . such as . . . . want of consideration." If as is often the case oral evidence that no consideration passed for a conveyance of land is admissible despite the fact that the written conveyance states that consideration was in fact paid, then equally I think oral evidence can be admitted to contradict a statement in a written conveyance to the effect that the conveyance was effected by way of a gift. In effect in the present case what the plaintiff says is that in fact there was no intention to make or receive a gift and that therefore for want of consideration the beneficial interest in his half-share did not pass to his father.

The plaintiff sought to prove the oral promise to reconvey not in order to enforce that promise but only to establish an " attendant circumstance " from which it could be inferred that the beneficial interest did not pass. Although that promise was of no force or avail in law by reason of Section 2 of the Prevention of Frauds Ordinance, it is nevertheless a fact from which an inference of the nature contemplated in Section 83 of the Trusts Ordinance properly arises. The Prevention of Frauds Ordinance does not prohibit the proof of such an act. If the arguments of counsel for the appellant based on the Prevention of Frauds Ordinance and on Section 92 of the Evidence Ordinance were to be accepted, then it will be found that not only Section 83, but also many of the other provisions in Chapter IX of the Trusts Ordinance will be nugatory. If for example " attendant circumstances " in Section 83 means only matters contained in an instrument of transfer of property it is difficult to see how a conveyance of property can be held in trust unless indeed its terms are such as to create an express trust.

Having had the benefit of reading the judgment proposed by my brother Sansoni it is unnecessary for me to state any further reason for agreeing with his conclusion that the judgment of the learned District Judge was correct and should be affirmed.

Appeal dismissed.