THE

NEW LAW REPORTS OF CEYLON

VOLUME XXVIII

Present: Garvin A.C.J. and Dalton J.

1926.

ARSECULERATNE *v.* PERERA.

321—D. C. Colombo, 7,472.

Agreement for establishing partnership in mines—Assignment of lease—Notarial writing—Part performance—Ordinance No. 7 of 1840, ss. 2, 21, 22.

By a written document signed by the plaintiff and the defendant it was agreed that the defendant, who had the lease of certain mines, which had yet to run for a period of years, should assign an interest therein to the plaintiff, and that they should become partners in the mines and work them for their mutual benefit. The management of the business was entrusted solely to the plaintiff.

Held, that the agreement was one that affected land, and was void for want of compliance with the requirements of section 2 of Ordinance No. 7 of 1840.

The dictum of Bertram C.J. in *Nanayakkara v. Andris* [1] respecting the application of the doctrine of part performance to Ceylon disapproved.

THE plaintiff sought to recover from the defendant the sum of Rs. 36,428·75 said to be the half share of losses incurred in a partnership entered into between them to carry on the business of digging for plumbago by working mines known as the Pattagoda Mines for a period of eight years. The agreement constituting the partnership was in writing, and was signed by the plaintiff and the defendant. The material portions of the agreement are as follows:—

(1) Mr. J. B. M. Perera will hereby give over his interest of the lease he has taken from the owners of the said land, which is yet to run for another eight years, to the said company.

[1] *(1921) 23 N. L. R. 193.*

1926.

Arseculeratne v. Perera

. . . . The sole owners of the Pattagoda Mining Company are Mr. J. B. M. Perera and Mr. John H. Arseculeratne, who will be entitled to the profits and losses in equal shares . . . .

(2) Mr. J. B. M. Perera hereby gives over the management of the mines to Mr. John H. Arseculeratne . . . .

(3) Mr. J. B. M. Perera and Mr. J. H. Arseculeratne hereby agree to contribute equally to the expenses to be incurred on the pit or pits.

The defendant pleaded that the agreement was invalid as it was not notarially executed, and that no action could be maintained upon it. The learned District Judge upheld the plea and dismissed the plaintiff's action.

Hayley (with *E. G. P. Jayatilleke* and *Navaratnam*).—This case may be viewed as follows:—

(*a*) No notarially executed document is necessary as no interest in land is claimed. The action is purely for the enforcement of a partnership agreement.

(*b*) If the agreement itself cannot be enforced the losing party is entitled to money which may be found to be due on an accounting.

(*c*) The document is good for the purpose of proving the partnership.

(*d*) The Statute of Frauds cannot be used to commit fraud.

For the proof of the partnership alone the document need not be notarially executed (*vide* section 21 (4) of Ordinance No. 7 of 1840).

This is not an action for a breach of contract, and could be differentiated from *Perera v. Amarasuriya*,[1] where the action was for damages for breach of agreement to dig plumbago, or *Eliyas v. Savunhamy*,[2] where the action was for the enforcement of an agreement on a planting contract. Also see *23 N. L. R. 193*.

In *Forster v. Hale* [3] one member of a firm of four bankers acquired an interest in a colliery along with three other persons, and the Court held that there was a resulting trust in favour of the other three bankers to a share of the one-fourth interest in the colliery, and the letters produced were sufficient to satisfy the Statute of Frauds.

In *Girigoris v. Tillekeratne* [4] it was held that money paid on a verbal agreement for lease can be recovered by action.

In the case of *Watson v. Spratley* [5] it was held that a contract to pass shares in an unincorporated company was not an interest in land. Also see *5 Vesey 313*.

[1] *12 N. L. R. 87.*
[2] *(191 18 N. L. R. 82.*
[3] *(1798) 3 Ves. Jun. 696.*
[4] *2 C. L. R. 191.*
[5] *(1854) 10 Ex. 222.*

An action on an agreement to share in the profits of the purchase of a land was permitted in *Dale v. Hamilton*.[1]

Counsel also cited *2 C. D. (1900) 410* and *3 B. & C. 357*.

Drieberg, K.C. (with *Canakeratne* and *H. V. Perera*).—This is an interest in the land because the ownership of the mine before the partnership was in the defendant.

In *Dale v. Hamilton* (*supra*), and *Forster v. Hale* (*supra*) the interests were acquired during the partnership.

Proprietorship is not necessary to create an interest in the land. Right, title, and interest would be sufficient. Interest is used in the widest sense. It may include possessory rights.

"J. B. M. Perera hereby gives over his interest." If it was notarial it would be a transfer.

Forster v. Hale (*supra*). Where one partner acquires property during the partnership in his own name, no document need be present to evidence the fact that it was an acquisition in trust for the other partners. The acquisition being during the partnership, it would not be permissible to plead the Statute of Frauds to perpetrate a fraud. This case is different; being the owner of a land, he transfers it to himself and another.

The old rule, by which although one cannot sue on the contract as it is of no force or avail in law but one can sue for anything arising or flowing from the contract, was abolished by *Pate v. Pate*.[2]

In *Adaicappa Chetty v. Caruppen Chetty* [3] the Court held that our section is more stringent than the Statute of Frauds.

In *Edwards v. Edwards* [4] the Court held that if anything is "null and void" the Courts of Equity would under no condition consider it valid in particular cases. A similar conclusion was arrived at in *Wilken v. Kohler*,[5] where the words were "force or effect." The words of our Ordinance are almost similar.

Counsel also referred to *17 N. L. R. 97, 14 N. L. R. 489, (1909) 1 K. B. 357, 34 L. J. Eq. 106, 7 C. L. R. 35*.

Hayley, in reply.

Cur. adv. vult.

July 29, 1926. GARVIN A.C.J.—

This is an appeal from the dismissal of an action for the recovery of a sum of money, being the estimated losses incurred in an alleged mining partnership, or in the alternative, for such sum as may be found due upon the taking of an account between the partners. The agreement between the parties, on which the plaintiff relies, is set out in the memorandum P1 dated December 21, 1915, and is signed by both parties. It was successfully contended before the Court of trial that the agreement was one which affected land, and was for that

[1] *(1846) 5 Hare 369.*
[2] *(1915) 18 N. L. R. 289.*
[3] *(1921) 22 N. L. R. 417.*
[4] *(1913) S. A. L. R. (App.) Div. 141.*
[5] *(1875) 2 C. D. 291.*

1926.

GARVIN A.C.J.

Arseculeratne v. Perera

reason of no force or avail in law for want of compliance with the requirements of section 2 of Ordinance No. 7 of 1840 as to the manner in which such agreements should be attested.

The document P1 is as follows:—

Colombo, December 21, 1915.

This is an agreement between Mr. J. B. M. Perera on one part and Mr. John H. Arsecularatne on the other to prospect for plumbago at Pattagoda Mines under the name of the Pattagoda Mining Company.

1. Mr. J. B. M. Perera will hereby give over his interest of the lease he has taken from the owners of the said land (which is yet to run for another eight years) to the said company.

According to the agreement the Pattagoda Mining Company undertake to give the ground shares to the owners.

The sole owners of the Pattagoda Mining Company are Mr. J. B. M. Perera and Mr. John H. Arseculeratne, who will be entitled to the profits and liable for losses in equal shares.

The former owner hereby agrees to give over all the machinery which is now lying at Pattagoda Mines to Mr. John H. Arseculeratne to enable him to commence mining operations for a period of eight years and whatever expenses may be incurred to improve the machinery will be charged to the joint account.

2. Mr. J. B. M. Perera hereby gives over all the management of the said mines to Mr. John H. Arseculeratne, and he agrees to pay a commission of 2½ per cent. exclusive of stamps on all the transactions made regarding this mine by Mr. John H. Arseculeratne, and this commission is to be paid by the Pattagoda Mining Company.

3. All the output of plumbago of the said mines will be sold at the market rates, and Mr. John H. Arseculeratne is to be given the preference of purchasing it at each sale.

4. Mr. J. B. M. Perera and Mr. John H. Arseculeratne hereby agree to contribute equally to the expenses to be incurred on the pit or pits.

(Signed) J. B. M. PERERA.
(Signed) JOHN H. ARSECULERATNE.

In terms of section 44 of Ordinance No. 22 of 1909 I certify that a sum of Rs. 20 only was paid by Mr. J. H. Arseculeratne of Colombo for deficiency of stamp duty Rs. 10 and penalty Rs. 10 leviable in respect of this instrument and was credited to revenue on October 16, 1922.

Stamp Office,
Colombo, October 16, 1922.

(Signed) H. E. BEVEN,
for Commissioner of Stamps.

Mr. John H. Arseculeratne is the plaintiff in this action, and Mr. J. B. M. Perera the defendant.

The agreement in substance is this. The defendant, who held a lease of the Pattagoda Mines, which had yet to run for a period of eight years, agreed to assign an interest therein to the plaintiff, to the end that they should become partners in the mine and work it for their mutual benefit—the management being entrusted solely to the plaintiff.

It was urged by Counsel for the appellant that this was not an agreement, which by section 2 of Ordinance No. 7 of 1840 is required to be in a writing signed by the parties in the presence of a licensed notary public and two witnesses, his submission being that this was a partnership for the purpose of sharing the profits and losses which may arise from the working of a mine and not for affecting any interest in the mine. It was sought to draw a parallel between the position of the plaintiff and that of a shareholder in a cost book mining company. In the case of *Watson v. Spratley* (*supra*) the question for decision was whether the transfer of a share in a mining company conducted on the cost book principle was the transfer of an interest in land and as such had to be evidenced by a writing to satisfy the 4th section of the Statute of Frauds. The judgments of the learned Judges who decided that case contain a minute examination of the constitution of that mining company and proceeds upon the similarity of the interests of a shareholder in such a company with that of the interest of a shareholder in an incorporated company. "It is true," observes Martin B., "the legal interest in such real property is generally vested in the corporation, and not in the individual partner or partners; but the interest of the shareholder in the great incorporated companies and in the smallest mine conducted upon the cost book principle is in its essential nature and quality, identical." The mine was vested in Mr. York, a shareholder. The judgment is based upon the finding that the nature and constitution of the company was such that the interest of a shareholder was an interest in the proportionate share of the profits of the adventure and not an interest in the land.

The questions for decision in such cases are stated by Parke B. as follows:—

> "If the purser of the mine, who had himself the let or grant of the mine had the mine and the machines and plant vested in him, in trust to employ the machinery in working the mine and making the most profit of it for the benefit of the co-adventurers, who were to share the profit only, such interest was transferable by parol, and might be bargained by parol."
>
> "If he held the mine in trust for himself and the co-adventurers present and future in proportion to their number of shares, then there was a direct trust in the realty, for the right to get the minerals was a real right, and could not be granted without deed, nor a trust in it transferred without note in writing, nor a bargain be made for a share of that direct trust without note in writing.

We are not concerned here with the case of an unincorporated joint stock company. What we have to determine is the true nature of the agreement between the parties to this action. It is expressed

1926.

GARVIN A.C.J.

Arseculeratne v. Perera

by them to be an agreement to prospect for plumbago in the Pattagoda Mines, of which the defendant was from a date anterior to the agreement the lessee. The defendant gives over his interest in the lease to the partnership thus formed and styled the Pattagoda Mining Company. The mining operations are to be conducted by the plaintiff. The agreement purports to give the plaintiff an interest in the lease, an interest in the mine and the minerals, the right to enter upon the premises and commence and conduct the mining operations, and a commission on certain transactions. The defendant, who was the former holder of the lease, retains an interest as to a half share. The losses, if any, were to be borne in equal shares.

In no sense is the position of the plaintiff under this agreement similar to that of a shareholder in such an unincorporated mining company as was the subject of consideration in *Watson v. Spratley* (*supra*).

The facts and circumstances of this case approximate more closely to that of *Caddick v. Skidmore*,[1] which was a bill for an account of the profits of an alleged mining partnership. The parol evidence was thought to have established an agreement to the effect that the plaintiff and defendant were to become partners in a colliery of which the defendant had previously acquired the lease for the purpose of demising it upon royalties which were to be divided between them. Such an agreement, observes Lord Cranworth, "would be an agreement not capable of being enforced, unless proved by such evidence as is required by the Statute of Frauds."

The cases of *Forster v. Hale* (*supra*) and *Dale v. Hamilton* (*supra*) were cited as instances in which the English Courts had admitted parol evidence in proof of partnerships which affected land. The material facts of *Forster v. Hale* (*supra*) are as follows:—Joseph Forster, Robert Rankin, William Kent, and John Burdon carried on business in partnership as bankers. During the subsistence of this relationship a lease of a colliery called Hebburn was granted to John Burdon and three others for a term of thirty-one years. Burdon died. The bill was filed by Forster and Rankin against the executors of Burdon to have it declared that Burdon took and held the fourth part of this colliery on account of himself and the plaintiffs and Kent respectively in equal shares; and that the defendants be decreed to assign the same accordingly. It was held by the Master of the Rolls that the letters and other documents tendered in evidence raised a trust by implication and constituted sufficient evidence in writing of the trust to satisfy the Statute of Frauds. Thus far there is no question of the proof of a partnership affecting land, the decision is founded on the existence of a trust evidenced by writing sufficient to satisfy the requirements of the Statute of Frauds. Upon appeal (*(1800) 5 Vesey 308*) the judgment was sustained, both on the ground upon which the Master of the Roll

[1] *(1857) 9 De G. & J. 52.*

rested it and upon the additional ground that there was evidence of a partnership to carry on the business of the colliery which came into existence three months before the lease in favour of Burdon was granted, and that under the circumstances there was a resulting trust for the partnership of the share of the lease thus obtained in Burdon's name. "The case," says the Lord Chancellor, "is merely a case of agreement to share profits and loss in the trade of a colliery; which does not at all affect the ownership of the land; which is often carried on for a great number of years without any estate in the land given to those who are to share the profits."

The case appears to me to proceed, not on the ground that the agreement for a partnership which necessarily involves the creation of an interest in land in favour of the partners may be proved by parol, but that a partnership in a colliery business where the agreement does not at all affect the ownership of the land and give no estate therein to the partners having been proved, the Statute of Frauds is no bar to its enforcement so as to affect land subsequently acquired for the purposes of the partnership.

The Vice-Chancellor (Sir James Wigram), who rests his judgment in *Dale v. Hamilton* (*supra*), to some extent on *Forster v. Hale* (*supra*), states with reference to that case, "Lord Rosslyn founded himself entirely upon the proposition that the existence of the partnership drew with it the right to have the stock of the partnership, whether land or other stock, ascertained." But the partnership with which Lord Rosslyn was dealing was "merely a case of agreement to share profit and loss in the trade of a colliery; which does not at all affect the ownership of land."

There can, however, be little doubt that the Vice-Chancellor did in fact found his judgment in *Dale v. Hamilton* (*supra*) on the ground that the partnership did affect land but nevertheless might be established by parol, as a supposed exception to the Statute of Frauds established by *Forster v. Hale* (*supra*) and certain other cases referred to by him. In the result the Court directed the trial of two issues: first, as to whether the agreement between Dale and McAdam was as pleaded by Dale; and secondly, if such an agreement was proved, whether it was a term in it that Dale should have no authority in determining when the land was to be re-sold. The defendant appealed, and a cross appeal was entered by the plaintiff. What occurred at the appeal ((*1847*) *2 Phillips Rep. 266*) is stated in the judgment of the Land Chancellor: "This case became embarrassed in the Court below by an attempt, on the part of the plaintiff, to get what appeared to be more beneficial than what I think he is clearly entitled to, and the obtaining of which was attended with a certain degree of difficulty from the want of an agreement in writing at the commencement of the plaintiff's connection with Mr. McAdam. The Court directed issues to try the fact of partnership, which, if

1926.

GARVIN A.C.J.

Arseculeratne v. Perera

they were to be tried, might, I think, leave the parties in further embarrassment and without the means of coming to a conclusion as to their respective rights.

"I need not, however, advert further to that part of the case: because the Court below not having made any declaration in favour of the plaintiff, but having merely directed an issue for the purpose of ascertaining the right, the plaintiff is not satisfied with that decree, and has presented a petition of appeal, which came on for hearing together with the appeal on the part of the defendant, in which it was contended that there was no case made, and that the bill, of course, ought to have been dismissed. The plaintiff, therefore, by appealing, and by what is stated by his Counsel at the bar, is now willing to take such relief as I may consider him entitled to, founded on the memorandum of October 27, 1843; and I cannot but think that if the case had rested on that memorandum in the Court below, all that embarrassment which was felt in disposing of the case would have been entirely saved; because the case, upon that memorandum, appears to me to be a perfectly plain and straightforward one."

The Lord Chancellor proceeded to discuss that aspect of the case and held that a trust was sufficiently manifested by the memorandum. Though he has not dealt specifically with the ground on which the judgment under appeal was founded, there are indications in the Lord Chancellor's judgment which at least justify the observation that it was open to question.

There are these features common to both cases—the partnership, whatever its purpose may have been, was in existence before the land which was later applied for the purposes of the partnership was acquired, and in each case the claim related to and arose out of this subsequent acquisition. The result arrived at by Lord Rosslyn in *Forster v. Hale* (*supra*) and Vice-Chancellor Wigram in *Dale v. Hamilton* (*supra*) seems to be in accordance with the rule of equity stated thus in *Storey's Equity Jurisprudence*, *s. 1207*:—

> "In cases, therefore, when real estate is purchased for partnership purposes and on partnership account, it is wholly immaterial, in the view of a Court of Equity, in whose name the purchase is made and the conveyance taken; whether in the name of one partner or of a stranger jointly with one partner. In all these cases, let the legal title be vested in whom it may, it is in equity deemed partnership property not subject to survivorship, and the partners are deemed the *cestui qui* trust thereof."

What further proposition do these two judgments establish? It is said that they settled the law in the sense that proof may be given by parol of agreements of partnership affecting land notwithstanding the Statute of Frauds. In his work on the law of partnership Lord Lindley refers to the decision of Wigram V.C. as "an authority for

the proposition that the Statute of Frauds does not preclude a person from establishing by parol an agreement to form a partnership for the purpose of buying and selling land at a profit."

I have endeavoured to show that in *Forster v. Hale* (*supra*) Lord Rosslyn states specifically that the agreement which he admitted to proof by parol was an agreement of partnership " which did not in any way affect land." There remains the judgment of Wigram V.C., who has undoubtedly applied the principle of *Forster v. Hale* (*supra*) to the case of an agreement of partnership intended to deal with land exclusively.

Kekewich J. in his judgment in *Nicols v. Curlier*,[1] when dealing with *Dale v. Hamilton* (*supra*), says:—

> " It is settled that there may be an agreement of partnership by parol, notwithstanding that the partnership is intended to deal with land, and that to an action to enforce the agreement the plea of the Statute of Frauds is of no avail."

In each of these cases it appears to have been contended that each was an action to charge persons upon a sale of land or an interest therein, and was not therefore maintainable without a memorandum of such sale signed by the party to be charged. The answer in each case appears to have been that the interest in land was not created by the agreement of partnership but arose indirectly and as a consequence of that relationship when the land or the interest therein was subsequently acquired in the name of one or more of the partners for the purposes of the partnership and on partnership account. The effect of the decisions seems to be that a contract of partnership for the purpose of dealing in land does not directly and of itself create an interest in the land; it often does so indirectly by operation of the rule that land subsequently acquired on partnership account is held for the purposes of the partnership despite the absence of a memorandum signed by the partners in whom the title is vested.

This is the exception to the Statute of Frauds recognized by the English Courts in the case of *Dale v. Hamilton* (*supra*). It is an exception which Lord Lindley observes goes a long way to repeal the Statute of Frauds. If the appellant is to be given the benefit of this exception he must bring himself strictly within its limits. His case is different in essentials. The interest in this mine was vested in the defendant long anterior to the alleged partnership, and the agreement which he seeks to establish is one by which he was given an interest in the mine for the purpose that they should in partnership prospect for plumbago.

It is difficult to see how this exception or the principals of equity on which it rests can help the plaintiff to claim as partner an interest in a mine which belonged to his partner before the formation of the partnership. If that right was given to him it was because it was

[1] *(1900) 2 Ch. D. 410.*

1926.

GARVIN A.C.J.

Peculeratne v. Perera

created by the very agreement he seeks to prove. The case is in substance that of *Caddick v. Skidmore* (*supra*), where the agreement creates a direct interest in land, with the difference that here the plaintiff was in addition to have the right of sole management and control of the mining operations and the disposal of the plumbago won from the mine. The case of *Caddick v. Skidmore* (*supra*) was followed in *Isaacs v. Evans*.[1] The plaintiff alleged that he and the defendant were partners in several joint adventures relating to gold mines, and that in pursuance of an agreement to acquire another mine he and the defendant arranged with the owner for the grant of a lease to the defendant. He alleged that the defendant thereafter worked the mine and refused to recognize his interests therein and prayed for a declaration that the defendant was a trustee for him of one moiety of the property. The defendant denied the existence of a partnership and pleaded the Statute of Frauds. Farwell J. said "that not to allow the plea of the Statute of Frauds would be to go too far. Before parol evidence could be admitted of the contract it was necessary to show that a partnership existed. It was not enough merely to plead a partnership to get rid of the Statute . . . . Here there could be no trust unless the partnership were proved."

To this examination of the English cases I need only add the observation that the plaintiff has not brought himself within the principle of *Dale v. Hamilton* (*supra*).

The difference between the law of England and the law of Ceylon as to the proof of a partnership is this. Generally speaking, under the English law a partnership may be proved by parol evidence; in Ceylon section 21 of Ordinance No. 7 of 1840 declares that "no promise, contract, or bargain, unless it be in writing and signed by the party making the same . . . shall be of any force or avail in law . . . . for establishing a partnership where the capital exceeds one hundred pounds." There is no question here that the capital does exceed a hundred pounds, *i.e.*, Rs. 1,000. This section is expressly made subject to section 22, which is as follows:—

> "Provided always that nothing in the preceding clause shall be construed to exempt any deed or instrument in any manner affecting land or other immovable property from being required for that purpose to be executed and attested in manner declared by the second clause of this Ordinance."

The second section states that—

> "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 interest therein . . . . shall be of any force or avail."

[1] (*1899*) *Weekly Notes 261.*

The law is clear. An agreement to establish a partnership must be in writing, and if it effects a sale or assignment of or establishes an interest in land as well or is in effect an agreement for effecting any such object, it must in addition be notarially attested. It was argued that the document P1 was admissible as evidence of a partnership to share profits and losses in the business of mining for plumbago which did not affect the right to the land or any interest therein, so that the plaintiff might claim an account on that basis. This would be to make a new agreement for the parties different in essentials. Their agreement is set out in the document signed by them and discloses an agreement of a very different character. The interest of the plaintiff was not merely that of a person whose rights were limited to a share in the profits. The partnership grew out of the agreement creating in the partners as such an interest in the mine and is inseparable from it and create rights of possession and enjoyment therein. It is no doubt true that if a promise is divisible so that in effect there are two distinct agreements, one of which is and one of which is not within section 2 of Ordinance No. 7 of 1840, the portion of the promise which is not within the section may be enforced though not notarially attested. *Lushington v. Carolis*[1] is an instance of the application of this rule to the case of a security bond hypothecating immovable property, the personal obligation to pay money was held to be severable from the hypothecation and enforceable though the bond was not notarially attested.

The agreement between the parties to this case is one. It is an agreement to become partners in a mine upon a specified basis and upon the prescribed terms. How is this divisible into two distinct agreements ? Counsel's suggestion involves the alteration of the whole basis of the agreement. It is a sufficient answer that the agreement affects land and is one and indivisible. If and when it is sought to prove a partnership for the purpose of buying and selling land or for the purpose of sharing in the profits and losses of a particular land, it will become necessary to consider whether the express provision of Ordinance No. 7 of 1840 admits of such an exception as was recognized in *Dale v. Hamilton* (*supra*). But it must not be supposed that all the incidents of partnership in so far as they affect land or other immovable property and every principle relating thereto applies in all respects in Ceylon. The law of partnership administered in England has been introduced into this Colony by Ordinance No. 22 of 1866, but subject to the proviso that no part of the law of England relating to the tenure, conveyance, or assurance of or succession to any land or other immovable property or any estate, right, or interest therein shall be taken to have been introduced into this Colony. In *Madar Saibo v. Sirajudeen*,[2] Pereira J. referring to the contention that under the English law land bought by a partner in his own name out of firm's assets is deemed to be the

[1] *(1911) 14 N. L. R. 488*

[2] *(1913) 17 N. L. R. 97.*

1926.

GARVIN A.C.J.

Arseculeratne v. Perera

property of the firm, observed " However that may be, it is clear from our Ordinance introducing the English law as to partnership into this country that the law as to the conveyance of land and rights in land is still the law of the country and not the English law."

The Legislature has in this enactment shown no disposition to admit any of the principles of the English law into the law in force in Ceylon, of which Ordinance No. 7 of 1840 is an important, essential, and vital part. If the agreement sought to be established in proof of a partnership is obnoxious to Ordinance No. 7 of 1840 the circumstance that the English law of partnership has been introduced into this Colony is not a sufficient ground for admitting evidence of a partnership which the Ordinance forbid. The Courts in Ceylon have with hardly any exception rigidly applied and enforced the provisions of Ordinance No. 7 of 1840. An agreement to cultivate the land of another for a share of the crop is an agreement affecting land. *Saytoo v. Kalinguwa.*[1] This effect of the Ordinance on the customary form of cultivation known as *anda* cultivation was not fully realized, and as a result a special Ordinance, No. 21 of 1887, was enacted to exempt from the operation of Ordinance No. 7 of 1840 contracts or agreements for the cultivation for a share of the crop of paddy fields or chena lands for any period not exceeding twelve months. In *Eliyas v. Savunhamy* (*supra*) we have an instance of an agreement between the plaintiff and the defendant to cultivate the defendant's land and to share the produce in the proportion of three-eighths to the plaintiff and five-eighths to the defendant. The partnership had in fact been in existence for several years. It was held that the agreement created an interest in land, and as such was obnoxious to Ordinance No. 7 of 1840. In all essentials the facts are similar to those of the case under consideration.

An agreement whereby a land was sublet for a share of the gems which may be found or their value was held to be of no force or avail in law under section 2 of Ordinance No. 7 of 1840 (*vide Nanayakkara v. Andris* (*supra*).

The only seeming exceptions to the provisions of the Ordinance are to be found in the cases of *Ibrahim Saibo v. The Oriental Bank Corporation*,[2] *Gould v. Innasitamby*,[3] and *Ohlmus v. Ohlmus*.[4] They are all instances of obligations in the nature of trusts arising or resulting by implication or construction of law. The effect of the rulings is that parol evidence may be given in such cases, as it was thought that section 2 of Ordinance No. 7 of 1840 only refers to interests in land created by the parties as opposed to those arising by operation of law. To this extent alone will there I think be found in the reports of local cases any exception, whether real or only apparent, to the Ordinance No. 7 of 1840. But in the case of

[1] *(1887) 8 S. C. C. 67.*
[2] *(1874) 3 N. L. R. 148.*
[3] *(1904) 9 N. L. R. 177.*
[4] *(1906) 9 N. L. R. 183.*

Nanayakkara v. Andris (*supra*), Sir Anton Bertram set down what he conceived to be the extent to which and the principles in accordance with which our Courts are " entitled to go behind the express words of our local Statute of Frauds, Ordinance No. 7 of 1840. " With the exception of a few observations made with reference to the action of " use and occupation " this summary is wholly *obiter*, and was set down, as the learned Judge himself observes, for the assistance of outstation Judges. It is a summary of the English law, the principles of which it was thought might be applied by the Courts in Ceylon.

With all respect to the learned Chief Justice. I cannot agree that the difference between the language of Ordinance No. 7 of 1840 and that of the English Statute of Frauds is a mere matter of phraseology. Nor do I think that there can be any justification for going behind the express words of this legislative enactment:—

> " Whenever the law enacts that the truth shall be proved by one form of testimony only, and not by all admissible and available forms, there is peril of doing particular injustice for the sake of some general good, and even of enabling some rogue to cloak his fraud by taking advantage of a statutory prescription the policy of which was the prevention of fraud. This the Legislature must be taken to have weighed before enacting the Ordinance. All that remains for judicial determination is its true meaning. "—Lord Sumner in *Pate v. Pate* (*supra*).

There is surely a substantial difference between section 4 of the English Statute of Frauds, which enacts that " No action shall be brought " upon the contract, and section 2 of Ordinance No. 7 of 1840, which declares that no such contract or agreement shall be of " any force or avail in law." " This section," observes Lord Atkinson in *Adaicappa Chetty v. Caruppen Chetty* (*supra*), " is much more drastic than the fourth section of the Statute of Frauds."

His Lordship briefly indicates certain differences in the application of the two enactments and concludes as follows:—

> " Evidence tendered by a party litigant relying upon an agreement as valid and enforceable, which, if admitted, would establish that the agreement was of no force or avail, is inadmissible. It would be a travesty of judicial procedure to admit it."

The attention of the learned Chief Justice does not appear to have been called to the above case or to the case of *Wilken v. Kohler* (*supra*), in which a Bench of five Judges of the highest eminence considered a South African enactment, where the material words were " no contract . . . . shall be of any force or effect unless it be

1926.

GARVIN A.C.J.

rascuderatne v. Perera

in writing and signed by the parties." The Court held that the contract was void. Innes J. in his judgment states:—

> "Now, a contract which is of no force and effect is void. No emphatic adjectives and no redundant repetition could express a conclusion of nullity more effectually than do the simple words which the Legislature has employed."

It is interesting to note that the Court considered and found itself unable to apply the doctrine of part performance known to the English law to contracts governed by the South African Act referred to. The position is exactly the same here. The Legislature has enacted that no contracts or agreements affecting land, shall be of any force or avail unless they are in writing signed by the parties and notarially attested. Its meaning is clear and free from ambiguity. All that remains is to apply it. I have not lost sight of the fact that in 1917 the Legislature passed a Trusts Ordinance. Whether for the purposes of that Ordinance and within its four corners the Legislature has enacted any exceptions to Ordinance No. 7 of 1840 will be considered when the point arises. The submission that in this case the doctrine of part performance may be invoked to admit parol evidence has been sufficiently answered. But I might add that in my judgment Counsel has wholly failed to bring this case within the limits of that doctrine as it is known and applied in England.

There remains the submission of Counsel that inasmuch as the partnership is now concluded by agreement and is no longer subsisting he is entitled to the account he claims as he is not seeking to enforce the agreement. But the account can only be taken on the basis of a partnership the proof of which is essential if the claim is to be allowed. This case is in these respects similar to *Pate v. Pate* (*supra*). In each case no relief can be granted except upon the basis of the existence of a partnership of which the evidence required by law is not available.

The appeal is dismissed, with costs.

DALTON J.—

The plaintiff sought to recover from the defendant the sum of Rs. 36,428.57 said to be the half share of losses incurred in a partnership between the two parties. The partnership is stated by him to have been formed on December 21, 1915, to carry on the business of digging plumbago by working mines known as the Pattagoda Mines for a period of eight years. The agreement constituting the partnership was in writing. Defendant pleaded that this document, marked as exhibit P1, was invalid in law and that therefore

the action could not be maintained. Various issues were framed, but the trial Judge only dealt with the first, which was as follows:—

(1) Is the document containing the agreement between plaintiff and defendant invalid in law inasmuch as it has not been notarially executed and has not been stamped.

He held that the agreement created an interest in land, and inasmuch as it had not been notarially executed it was invalid in law. It was therefore not necessary to deal with the further issues.

As it will be necessary to compare the provisions of Ordinance No. 7 of 1840 with the equivalent provisions of the Statute of Frauds, and to consider the numerous English decisions which have been cited in the course of the argument, I set out here the sections of the Ordinance and Statute which are relevant:—

Ordinance No. 7 of 1840.

2. 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 establishng 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.

21. No promise, contract, bargain, or agreement unless it be in writing and signed by the party making the same, or by some person thereto lawfully authorized by him or her, shall be of force or avail in law for any of the following purposes:—

(1) ——.
(2) ——.
(3) ——.

Statute of Frauds.

4. No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

1926.

DALTON J.

Arseculeratne v. Perera

(4) For establishing a partnership where the capital exceeds one hundred pounds: Provided that this shall not be construed to prevent third parties from suing partners, or persons acting as such, and offering in evidence circumstances to prove a partnership existing between such persons, or to exclude parol testimony concerning transactions by or the settlement of any account between partners.

22. Provided always that nothing in the preceding clause shall be construed to exempt any deed or instrument in any manner affecting land or other immovable property from being required for that purpose to be executed and attested in manner declared by the second clause of this Ordinance.

It would appear that the only evidence of the partnership which was offered in the trial court was the document P1. Upon that being put in, Counsel were heard on the first issue. It is therefore necessary to set out the agreement in full:—

Colombo, December 21, 1915.

This is an agreement between Mr. J. B. M. Perera on one part and Mr. John H. Arseculeratne on the other to prospect for plumbago at Pattagoda Mines under the name of the Pattagoda Mining Company.

1. Mr. J. B. M. Perera will hereby give over his interest of the lease he has taken from the owners of the said land (which is yet to run for another eight years) to the said company.

According to the agreement the Pattagoda Mining Company undertakes to give the ground shares to the owners.

The sole owners of the Pattagoda Mining Company are Mr. J. B. M. Perera and Mr. John H. Arseculerathe, who will be entitled to the profits and losses in equal shares.

The former owner hereby agrees to give over all the machinery which is now lying at Pattagoda Mine to John H. Arseculeratne to enable him to commence mining operations for a period of eight years, and whatever expenses may be incurred to improve the machinery will be charged to the joint account.

2. Mr. J. B. M. Perera hereby gives over the management of the mines to Mr. John H. Arseculeratne, and he agrees to pay a commission of 2½ per cent. exclusive of stamps on all the transactions made regarding this mine by Mr. John H. Arseculeratne, and this commission is to be paid to the Pattagoda Mining Company.

3. All the output of plumbago of the said mines will be sold at the market rates, and Mr. John H. Arseculeratne is to be given the preference of purchasing it at each sale.

4. Mr. J. B. M. Perera and Mr. John H. Arseculeratne hereby agree to contribute equally to the expenses to be incurred on the pit or pits.

(Signed) J. B. M. PERERA.
(Signed) JOHN H. ARSECULERATNE.

It will be seen, therefore, that this agreement purported to constitute a partnership between the plaintiff and defendant under the name of the Pattagoda Mining Company for the purpose of plumbago mining. The plaintiff conveys to the company his interest in the lease of plumbago mines at Pattagoda together with existing machinery, the defendant being appointed manager of the company, to be paid a commission and with a preferent right of purchase at market rates of the output of the company. It is expressly declared that the sole owners of the company thus formed are the plaintiff and defendant, who are to contribute equally to the expenses and are entitled to the profits and losses in equal shares. It is stated that subsequently by mutual agreement the partnership was terminated on January 15, 1918.

In support of his contention, that the plaintiff is in no way debarred from bringing this action, Mr. Hayley has referred to numerous English decisions. He relies for the most part on *Forster v. Hale* (*supra*) and *Dale v. Hamilton* (*supra*).

The facts in *Forster v. Hale* (*supra*) very shortly were that in 1790 Forster, Rankin, Kent, and Burdon carried on the business of bankers under the title of "The Commercial Bank of Newcastle." In 1791 a lease of a colliery was granted by one Ellison to Burdon and three others for a term of thirty-one years as tenants in common in equal fourth shares. Burdon died in 1792. Forster and Rankin filed a bill against Burdon's executors, praying that it might be declared that Burdon took and held the said fourth part of the colliery on account of himself, the plaintiffs, and Kent in equal shares. The defendants set up that the partners in the bank were not interested with Burdon in the colliery, and that he was sole and absolute owner of his fourth share.

The question that arose on the trial (see *3 Vesey 696*) was as to whether a trust was raised by implication from letters, and a paper referred to in the letters and in the handwriting of the party (Burdon) though not signed and dated, and also by operation of law from advances of money. The Master of the Rolls sets out the question to be answered in the following way:—

> "The question, therefore, is whether sufficient appears to prove that Burdon did admit and acknowledge himself a trustee; and whether the terms and conditions upon which he was a trustee sufficiently appear. I do not admit with the

1926.

DALTON J.

Arseculeratne v. Perera

defendants that it is absolutely necessary that he should have been a trustee from the first. It is not required by the Statute (of Frauds) that a trust shall be created in writing; and the words of the Statute are very particular in the clause (section 7) respecting declarations of trust. It does not by any means require that all trusts shall be created only by writing, but that they shall be manifested and proved by writing; plainly meaning that there should be evidence in writing proving that there was such a trust. Therefore, unquestionably it is not necessarily to be created by writing; but it must be evidenced by writing and then the Statute is complied with.

After a detailed consideration of the correspondence, an unsigned and undated memorandum, entries in bankers books, and a balance sheet, he concludes that Burdon was trustee and that the case was within the Statute.

Upon appeal the Lord Chancellor affirmed the decree upon the points decided by the Master of the Rolls, but went further.

In the course of the argument it was stated that the question was whether there was a declaration of trust within the Statute of Frauds. Upon this the Lord Chancellor made the following observation:—

"That was not the question; it was whether there was a partnership; the subject being an agreement for land the question then is whether there was a resulting trust for that partnership by operation of law. The question of partnership must be tried as a fact and as if there was an issue upon it. If by facts and circumstances it is established as a fact that these persons were partners in the colliery in which land was necessary to carry on the trade the lease goes as an incident. The partnership being established by evidence upon which a partnership may be found, the premises necessary for the purposes of that partnership are by operation of law held for the purposes of that partnership."

As appears from the surrounding circumstances he would seem to be here laying down a general rule, a view which has been taken by later authorities to which I refer. He does not deal with this question further, but in his judgment considers the case from another aspect. He says:—

"It was treated at the Rolls as a case in which the whole question would arise upon the operation of the Statute of Frauds. . . . . The case appeared to me in rather a different point of view. From the nature of it it seems to me there was no occasion to affect the estate in the land, nor has the decree done so. It has not transferred the legal interest in the share of the colliery to the plaintiffs. The case is merely a case of agreement to share profit and loss in the

trade of a colliery, which does not at all affect the ownership of the land which is often carried on for a great number of years without any estate in the land given to those who are to share the profits. Nothing is more common than, where a man is tenant in fee of land where there is a coal work, he partly sharing the rent and the profit carries it on by mere licence with other persons concerned in the business of the colliery. It is therefore merely the case of an agreement which may or may not be within the fourth section of the Statute. But this particular case is not even within the fourth section because it was to be executed immediately."

Finally he adds:—

"My view of the case, therefore, though it does not exactly take the course of the argument at the Rolls, leads me perfectly to agree with the decree. I think they had no occasion, but undertaking to establish a trust within the strict line of the Statute, the seventh section, I think they have done it."

In *Dale v. Hamilton* (*supra*) the proposition has been set out in the following terms. A partnership agreement between A and B that they shall be jointly interested in a speculation for buying, improving for sale, and selling lands may be proved without being evidence by any writing signed by or by the authority of the party to be charged therewith, within the Statute of Frauds, and such an agreement being proved, A or B may establish his interest in land the subject of the partnership without such interest being evidenced by any such writing.

The defence to the plaintiff's claim was based on the Statute of Frauds, plaintiff admitting that he had only oral evidence of the joint adventure. He urged, however, that the case did not come within the Statute on the ground that where a partnership or an agreement in the nature of a partnership exists between two parties and land is acquired by the partnership as a *substratum* for such partnership, the land is in the nature of the stock-in-trade of the partnership, and that the partnership being proved as an independent fact, the Court, without regarding the Statute of Frauds, will inquire of what the partnership stock consisted, whether it be of land or of property of any other nature. In setting out this claim advanced for the plaintiff, the Vice-Chancellor points out that at first this argument would appear virtually to almost repeal the Statute of Frauds, but after a detailed examination of other cases, and especially *Forster v. Hale* (*supra*), he concludes the plaintiff was entitled to succeed. It is true he points out that the principle upon which *Forster v. Hale* (*supra*) proceeded was in part the jurisdiction of the Court to relieve against the fraud of a partner, who should

1926.

DALTON J.

Arseculeratne v. Perera

avail himself of his legal rights in violation of his partnership contract, but he states it is clear that the Lord Chancellor whilst referring to other considerations founded himself entirely upon the proposition that the existence of the partnership drew with it the right to have the stock of the partnership, whether land or stock, ascertained.

There was an appeal from the Vice-Chancellor's order, and here, as in *Forster v. Hale* (*supra*), the Lord Chancellor took a different view from that of the lower Court, coming to the same conclusion but on different grounds. The Lord Chancellor states (reported at 2 *Phil. 266*):—

> " This case became embarrassed in the Court below by an attempt on the part of the plaintiff to get what appeared to be more beneficial than what I think he is clearly entitled to, and the obtaining of what was attended with a certain degree of difficulty from the want of an agreement in writing at the commencement of the plaintiff's connection with Mr. McAdam. The Court directed issues to try the fact of partnership, which, if they were to be tried, might I think leave the parties in further embarrassment and without a means of coming to a conclusion as to their respective rights."

He thereupon proceeds to examine the evidence, including a memorandum signed by McAdam and the defendant, Hamilton. That memorandum stated there had been a purchase of land by McAdam, and divided between him and Hamilton, each of them to have one-third share, the land to be sold, and the profits divided between McAdam, Hamilton, and the plaintiff, Dale. This he held to be a declaration of trust on the part of the defendants, a declaration recognizing a past transaction, that is, the purchase of the land. He then proceeds:—

> " Now it would be the strangest thing in the world, if the Statute being satisfied which it is, by finding this writing signed by the parties, the Court could not give relief to the party whom that document declared entitled to it. It is nothing that the plaintiff is no party to this declaration of trust; that is not required. A declaration of trust may acknowledge a right in another party, if it is signed by the party declaring that he is a trustee for the other."

He thereupon held that plaintiff was entitled to the one-third he claimed.

These two cases, *Forster v. Hale* (*supra*) and *Dale v. Hamilton* (*supra*) were discussed at length by Counsel on both sides, and it is for this reason I have set out the extracts above. Although I have had some difficulty in appreciating the niceties of the distinction sought to be drawn, both between these cases and between these cases and the

case now before us, it would at any rate seem that the Lord Chancellor in *Forster v. Hale* (*supra*) was of opinion that the plaintiffs in that case were entitled to succeed on any of three grounds: first the ground of express trust in accordance with the finding of the Vice-Chancellor, secondly that on the facts no estate in land was affected at all, and thirdly that the question of partnership must be tried as a fact, and thereupon the subject being an agreement for land the question was whether there was a resulting trust for the partnership by operation of law. The grounds upon which the Vice-Chancellor proceeded in *Dale v. Hamilton* (*supra*) cannot be so succinctly stated, but he undoubtedly adopted and applied in the earlier part of his judgment the rule stated by the Lord Chancellor in the third ground I have mentioned. As I have already stated, it does seem to me that the latter lays down a rule for general application in the observation he made which I have set out above. That observation, be it noted, was made in the course of a ruling on an objection taken by the defendants to the admission of certain evidence. The view that a general rule was laid down and that the law in England must be taken as settled was given effect to in *In re Nicols* (*supra*), where Kekewich J. says:—

> "It is settled that there may be an agreement of partnership by parol, notwithstanding that the partnership is intended to deal with land, and that to an action to enforce such agreement the plea of the Statute of Frauds will not avail. In such an action, therefore, the rights of the parties to the land, their respective interests in it, and their mutual obligations respecting it, may and must be determined and enforced notwithstanding there has been no compliance with the statutory provision."

After alluding to Lord Lindley's opinion, to which I refer later, he continues:—

> "Nevertheless the reasoning of the Lord Chancellor in *Forster v. Hale* (*supra*) seems to me to show that he intended to lay down a general rule which may be applied without extension to the case in hand. This was the view of Wigram V.C. in *Dale v. Hamilton* (*supra*), and also, as it seems to me, of Lord Lindley, who cites the passage from the Lord Chancellor's judgement in *Forster v. Hale* (*supra*) which supports it. The Lord Chancellor held that the question whether there was a partnership or not must be tried as a fact, and if it were established by evidence that there was a partnership, then the premises necessary for the purposes of that partnership would by operation of law be held for the purposes of that partnership."

This view has been criticised by Lord Lindley in his *Law of Partnership*. At page 96 (7th edition) in a chapter dealing with the

1926.

DALTON J.

Arseculeratne v. Perera

evidence by which a partnership may be proved, he expresses the opinion that the Vice-Chancellor's decision in *Dale v. Hamilton* (*supra*) is difficult to reconcile with sound principle or with a more recent decision, *Caddick v. Skidmore* (*supra*). In this latter case no partnership was proved, and there was no agreement for partnership as distinguished from the agreement to share the profits of the colliery. Lord Cottenham L.C. there held that the terms of the agreement not being in writing and being in dispute the Statute of Frauds was a defence to the action. This decision Farwell J. held to be binding upon him in *Isaacs v. Evans* (*supra*). However that may be, Lord Lindley, after considering the cases, sums up the position as follows: "In the absence, however, of any decision of the Court of Appeal to the contrary, the law on the point now under discussion must be taken to have been correctly stated in *Forster v. Hale* (*supra*) and *Dale v. Hamilton* (*supra*), which have been treated as binding authorities in the most recent cases." In the result on this point, therefore, in view of this authority, it would seem that the law is settled in England, and if the law in Ceylon is the same as that in England, I am unable to see that the general rule to which expression is given in *Forster v. Hale* (*supra*) does not apply to the case before us.

That brings me to a consideration of the provisions of Ordinance No. 7 of 1840 as compared with the Statute of Frauds. On the basis that the question of partnership must be tried as a question of fact and as if there was an issue upon it, what are the requirements of the law with regard to the proof of such a fact? I have already set out the relevant sections of the Ordinance and Statute. When set side by side it will readily be seen how materially the latter differs from the sections of the Ordinance. Whereas section 2 of the Ordinance enacts that deeds affecting immovable property shall be of no force or avail unless executed before a notary and witnesses, section 4 of the Statute merely provides that no action shall be brought to charge any person upon any contract or sale of lands or any interest therein unless it be in writing or unless there is some memorandum of it in writing signed by the party to be charged. In the latter case, therefore, the contract or agreement may be verbal, provided there is written evidence to comply with the Statute. Under the Ordinance, however, the contract itself must comply with the provisions as regards execution to be of any force or avail.

It is interesting to trace the history of the legislation on this matter in Ceylon to see how the provisions of the law have become more stringent with each enactment. The first enactment would appear to be Regulation No. 4 of 1817. It is a very short Act, purporting to enact "fixed rules of law respecting the force of unwritten promises." It then provides, *inter alia*, that certain contracts or agreements shall not be of force or avail in law,

" unless the same shall be in writing and signed by the party making the same." Amongst the contracts mentioned are those for the sale, purchase, lease, or assignment thereof of immovable property, or for establishing a partnership where the capital is over 1,000 Rix dollars. In 1824 it became necessary to require further security in respect of transactions relating to land and by Regulation No. 20 of that year it was for the first time required that deeds relating to land should be invariably passed before notaries public. That regulation, however, only applied to the maritime provinces of the Island. Then in 1834 the law was amended and consolidated and made to apply to the whole Island. Regulations Nos. 4 of 1817 and 20 of 1824 and a proclamation in force in the Kandyan provinces were repealed and re-enacted together in Ordinance No. 7 of 1834, sections 2 and 10 thereof being in great part similar to sections 2 and 21 of Ordinance No. 7 of 1840. Finally, by Ordinance No. 7 of 1840 the law was further amended and strengthened and a new section, the present section 22, was for the first time brought in, making it clear that any deed of partnership coming within section 21, which in any manner affected land or other immovable property, had to be executed and attested as required by section 2. It will be seen then that whilst the original enactment that the class of agreement referred to should in no case be of force or avail in law remained throughout, the provisions for execution became more stringent with each enactment, and the method of proof of the existence of the contract or agreement has become simplified. This was in accordance with the purport of the Ordinance set out in the preamble.

The difference between section 2 of Ordinance No. 7 of 1840 and section 4 of the Statute of Frauds is self-evident. The former has been described by Lord Atkinson in *Adaicappa Chetty v. Caruppen Chetty* (*supra*) as " much more drastic " than the fourth section of the Statute, making an agreement of or concerning land not executed in conformity with the requirements of the Ordinance invalid. And Lord Sumner in *Pate v. Pate* (*supra*), when the Privy Council over-ruled a decision of the local Courts with regard to the proof of partnership in a claim for accounting which had been followed in Ceylon for forty-one years, refers to the very definite provisions of the Ordinance. He points out that—" If parties choose to disregard so ordinary and so simple a formality as the Ordinance requires, there is no hardship in leaving them to take the consequences, nor is it in any case sound to misconstrue a statute for fear that in particular instances some hardship may result. That is a matter for the Legislature, not for the Courts. Whenever the law enacts that the truth shall be proved by one form of testimony only, and not by all admissible and available forms, there is peril of doing particular injustice for the sake of some general good, and even of enabling some rogue to cloak his

1926.

DALTON J.

Arseculeratne v. Perera

fraud by taking advantage of a statutory prescription, the policy of which was the prevention of fraud. This the Legislature must be taken to have weighed before enacting the Ordinance. All that remains for judicial determination is its true meaning." I cite this extract because, although here there is no suggestion of any fraud, yet it fully answers one aspect of the appeal as put before the Court by Counsel for the appellant.

The South African case cited in the course of the argument, *Wilken v. Kohler* (*supra*), shows what effect has been given there to the words " No contract shall be of any force or effect," which are almost the same as the words of our Ordinance, " No sale . . . . shall be of force or avail in law." By the Free State Ordinance 12 of 1906, section 49, it is provided that " No contract of sale of fixed property shall be of any force or effect unless it be in writing and signed by the parties thereto or by their agents duly authorized in writing." There is a marked similarity between the terms of this Free State Ordinance and Regulation No. 4 of 1817 which I have cited. As many of the Free State Ordinances were adopted from the earlier Ordinances of Cape Colony, it is quite possible that the earliest Ceylon enactment and the Free State Ordinance can be traced to the same source. In *Wilken v. Kohler* (*supra*), as here, an argument was addressed to the Court that the contract under consideration cannot be said to be of no force or effect when it had been carried into effect by the parties. Further it was urged that verbal contracts, such as those dealt with by the Ordinance, were voidable and not void *ab initio*, and that by performance the contract was confirmed. The Court unanimously held that the contract in question was, under the section, null and void. Innes J. says: " The language of the section is perfectly plain; no unwritten contract of the kind referred to is to be of any force and effect. Now a contract which is to be of no force and effect is void. No emphatic adjectives and no redundant repetition could express a conclusion of nullity more effectually than do the simple words which the Legislature has employed." He then refers to the law in the Transvaal respecting mineral contracts, and says: " By Volksraad Besluit of the 12th August, 1866, it was enacted in the Transvaal that mineral contracts, unless notarially executed, should be *ab initio* void, and should confer no rights of action whatever . . . . The wording of the Besluit may at first sight appear stronger than that of the Statute with which we are now concerned. But in reality it is not. A transaction which has no force and effect is necessarily void *ab initio*, and can under no circumstances confer any right of action." And on the doctrine of part performance he says: " This agreement being of no force and effect in law, cannot, it seems to me, be validated by reason of the fact that it has been partly carried through." . . . . " It was held in *Jolly v. Herman's Executors* [1] that

[1] (*1903*) *T. S. p. 515.*

the English doctrine of part performance can have no application to cases arising under the Transvaal Besluit already referred to, because that doctrine was based upon the assumption that the Statute of Frauds did not nullify contracts for the sale of land entered into in disregard of its provisions; it made them voidable only. Whereas the Transvaal law, like the present Free State Ordinance, went further." And Solomon J. sums up his opinion in the following words: " Section 49, as I have already pointed out, provides that a verbal contract for the sale of land shall be of no force or effect, or in other words, shall be null and void. Nothing can be clearer or more precise than these words, and in my opinion they mean exactly the same as the words in the Besluit. For if a verbal contract for the sale of land is void, it follows, as of course, that it is void *ab initio*, and that no action could be brought upon it. If then the Court in the case of *Jolly v. Herman's Executors* (*supra*) was right in holding that the doctrine of part performance had no application to contracts governed by the Volksraad Besluit, it follows that it can have no application to contracts governed by section 49 of Ordinance No. 12, 1906. In my opinion the decision in that case was perfectly right and should now be adopted by this Court." In this conclusion the rest of the Court, including Lord de Villiers, concurred. In *Jolly v. Herman's Executor* (*supra*) Innes C.J. there pointed out that the plaintiff's contention could not be upheld unless the Court was able and willing to apply to contracts under the Besluit a " doctrine similar to that applied by English Equity Courts to certain contracts falling within the Statute of Frauds." He points out that the cases under the Statute of Frauds were all decided on the basis that that Statute, while barring any legal remedy upon certain parol agreements did not render the agreement itself null, and he cites the words of Cotton L.J. in *Britain v. Rossiter*,[1] " If such contracts (*i.e.*, contracts covered by the Statute of Frauds) had been rendered void by the Legislature, Courts of Equity would not have enforced them; but their doctrine was that the Statute did not render the contracts void, but required written evidence, and they dispensed with that written evidence in certain cases." The reasoning on this question in *Wilken v. Kohler* (*supra*) appears to me to be the same as that of Wendt J. in *Perera v. Amarasooriya*,[2] where the Court held that the doctrine of part performance has not been recognized in Ceylon to the extent to which it prevails in English Courts of Equity. Attention is drawn to the different terms of the provisions of the local Ordinance and the Statute of Frauds, and the principle was applied that the Court must refuse to admit the doctrine where the contract was of no avail owing to the omission of the express requirements of the law. The Court had in view the earlier decision of *Perera v. Fernando*,[3] the limitations of which decision are referred to by each

[1] *11 Q. B. D. at p. 130.*

[2] *12 N. L. R. at p. 91.*

[3] *(1864) Ram. 83.*

1926.

DALTON J.

Arseculeratne v. Perera

of the three Judges. In *Nanayakkara v. Andris*,[1] in commenting upon *Perera v. Amarasooriya* (*supra*) Bertram C.J. expressed the opinion that, should occasion arise, he can see nothing to prevent the adoption of this doctrine as part of the legal system of this Colony. If he means, as I take it he does mean, in the present state of the law, with all due respect to the opinion he expresses, I am quite unable to agree. So far as transactions governed by section 2 of Ordinance No. 7 of 1840 are concerned, I am entirely satisfied that the doctrine can have no application.

On this last point, therefore, I am satisfied that the law as laid down in *Forster v. Hale* (*supra*) and *Dale v. Hamilton* (*supra*) on the subject of the proof of partnership has no application in Ceylon, and for the reasons I have stated, in my opinion this appeal must fail.

The appeal must therefore be dismissed, with costs.

Appeal dismissed.