1914.

Present: De Sampayo A.J.

ELIYAS *v.* SAVUNHAMY.

178—C. R. Tangalla, 7,387.

Agreement to cultivate land and share the produce—Fructus industriales—*Must agreement be notarial ?*

The plaintiff and defendant entered into a mutual agreement to cultivate the defendant's land, whereby the plaintiff was to receive 3-8ths share of the produce and the defendant 5-8ths share of the produce which may be derived therefrom by their joint labour and industry. The plaintiff alleged that plaintiff and defendant jointly cultivated the land in terms of the agreement since 1907 with citronella, pinepple, &c., and that they took their respective shares till January, 1914, when defendant unlawfully appropriated the whole crop.

Held, that the agreement created an interest in land, and that the action was not maintainable in the absence of a notarial agreement.

De Jong, for plaintiff, appellant.

Samarawickreme, for defendant, respondent.

Cur. adv. vult.

June 24, 1914. DE SAMPAYO A.J.—

The question for consideration is whether the agreement on which the plaintiff sues involves an interest in land so as to require a notarial instrument under Ordinance No. 7 of 1840. The plaint states that " in 1907 the plaintiff and the defendant entered into a mutual agreement to cultivate the defendant's land Rukattanagahahena . . . . . ., whereby the plaintiff was to receive 3-8ths share

of the produce and the defendant 5-8ths share of the produce which may be derived therefrom by their joint labour and industry." It is further stated that under the agreement the plaintiff and defendant jointly cultivated the land with citronella, pineapple, sweet potatoes, myokka, and arrowroot, and proceeded to allege as a cause of action that the plaintiff and defendant took their respective shares and continued in the enjoyment of the land until January, 1914, when the defendant unlawfully appropriated the whole of the crop and refused to give the plaintiff his share of the same.

The defendant took the objection that the agreement not being embodied in a notarial instrument was not enforceable at law, and the Commissioner decided the issue stated on this point against the plaintiff and dismissed the action.

Counsel for the plaintiff-appellant submitted that an agreement relating to *fructus industriales*, such as those mentioned in the plaint, did not require to be in writing notarially executed, and cited *De Silva v. Wasanahami* [1] and *Perera v. Ponnatchi*. [2] In the first of these cases it appears that the party was in actual possession of a chena which the Crown claimed, and the Court decided that the growing *fructus industriales* were presumably the property of the possessor who had raised them, and that the sale of the land by the Crown did not pass to the purchaser the right to the standing crops. The second case related to the sale of a single tobacco crop, which it was held might be effected without a notarial writing. I do not think that either of these decisions applies to the circumstances of the present case. As a matter of fact, the agreement between the plaintiff and the defendant was constituted by a non-notarial writing, which was produced by the plaintiff for the purposes of the argument in the Court below; and it is clear from the averments in the plaint as well as the document that the agreement between the parties did not relate merely to a single growing crop or even a single season, but extended to an indefinite period of future cultivation, and that it established in effect a kind of partnership in land. The plaint even shows that this partnership, as a matter of fact, continued for seven years previous to this action. In my opinion the agreement created an interest in land and required notarial execution. In *Perera v. Mudalihamy* [3] it was even held that the sale of coffee growing on trees required a notarial writing, and an agreement to cultivate a paddy field in *anda* was similarly regarded in *Saytto v. Kalinguwa* [4] which led to the enactment of the amending Ordinance, No. 21 of 1887.

The judgment appealed from is right, and I dismiss the appeal with costs.

Appeal dismissed.

[1] *(1880) 3 S. C. C. 80.*
[2] *(1897) 3 N. L. R. 56.*
[3] *3 Lor. 12.*
[4] *(1887) 83 S. C. C. 67.*