1944 *Present:* **Howard C.J. and Keuneman J.**

DEONIS, Appellant, *and* KLEYN, Respondent.

77—D.C. Colombo, 12,342.

Partnership—Agreement in writing—Three partners—Retirement of one—No termination of partnership.

Where, by an agreement in writing, three persons enter into a partnership, the retirement of one and the assignment of his share to the other two do not terminate the partnership.

APPEAL from a judgment of the District Judge of Colombo.

The facts appear from the argument.

H. V. Perera, K.C. (with him *H. W. Jayewardene*), for the defendant, appellant.—The plaintiff has sued the defendant for an accounting on the basis that they are the partners in a business known as Standard Motor Stores. By an agreement in writing dated March 5, 1927, the partners were the plaintiff, the defendant and one Fonseka. In 1930, Fonseka retired and the business was carried on by the plaintiff and defendant, the latter two having bought off Fonseka's rights. There is, however, no agreement in writing in respect of the second partnership, as required by section 18 (*c*) of the Prevention of Frauds Ordinance (Cap. 57). The present action was brought in 1940.

It is submitted that a new partnership came into being when Fonseka retired in 1930. The District Judge has erred in holding that the old partnership continued, with the number of partners diminished by one. The real position in law is that the retirement of a partner from a partnership operates as its dissolution. The recent case of *Abbott v. Abbott*[1] strongly supports this view. See also *Raman Chetty v. Vyraven Chetty*[2]. In the absence, therefore, of an agreement in writing the plaintiff in the present case cannot lead evidence of the second partnership. He may have had a cause of action against the defendant in 1930 under the original partnership, but it is now prescribed.

N. Nadarajah, K. C. (with him *Dodwell Gunawardana*) for the plaintiff, respondent.—There was no dissolution of the partnership in 1930. What happened was that Fonseka assigned his rights to the other two partners. Such assignment cannot be said to have dissolved the partnership. See Lindley on Partnership (8th ed.) p. 661; Pollock on Partnership (13th ed.) p. 85; *Sturgeon Brothers v. Salmon*[3]. No writing is necessary for the assignment of a partner's share—*Mohamed v. Warind*[4]. Even assuming that there was a dissolution of the original partnership, section 42 of the Partnership Act would be applicable—*Omer v. Anthony*[5].

H. V. Perera, K.C., in reply—The passages in Lindley (*supra*) and Pollock (*supra*) deal with assignments to third parties and not between partners *inter se*. The law applicable to the facts of the present case is stated unambiguously in *Abbott v. Abbott* (*supra*).

[1] *(1936) 3 A. E. R. 823 at 826.*
[2] *(1916) 2 C. W. R. 81.*
[3] *(1906) 22 T. L. R. 584.*
[4] *(1919) 21 N. L. R. 225.*
[5] *(1916) 2 C. W. R. 122.*

[HOWARD, C.J. referred to *Emmanuel et al v. Symon.*[1]]

The remarks relevant to this case which appear in the judgments in *Sturgeon Brothers v. Salmon* (*supra*) were made *obiter*.

Cur. adv. vult.

February 17, 1944. HOWARD C.J.—

The defendant in this case appeals from a judgment of the District Judge, Colombo, ordering him to render to the plaintiff, the respondent, a full and true account of the business known as the Standard Motor Stores carried on at Fourth Cross street, Pettah, Colombo, including the stock in trade thereof and to pay the balance half share of the profits to the plaintiff. In the alternative it was ordered that in the event of the defendant failing to render an account he should pay the plaintiff a sum of Rs. 10,446.78 as profits up to May, 1939, together with further profits from June, 1939, till payment in full. The plaintiff alleged that by virtue of an agreement in writing dated March 5, 1927, the defendant, himself and one M. W. Fonseka became partners in the business known as the Standard Motor Stores of which the defendant was the working and managing partner on whom devolved the responsibility of keeping proper and correct books of account. The plaintiff further alleged that the business was carried on until 1930 when M. W. Fonseka ceased to be a partner and the business was thereafter carried on by the plaintiff and defendant, the remaining partners, each being entitled to a half-share of the profits. In the year 1939 the defendant, so the plaintiff alleges, failed to render to him a true and proper account of the profits of the said business. In the District Court it was contended on behalf of the defendant that the latter was the sole proprietor of the said business, that the document dated March 5, 1927, is of no force or avail to create a partnership between the parties and does not constitute the writing required by law for the establishment of such a partnership and that the claim, if any, of the plaintiff is prescribed. In finding in favour of the plaintiff the learned District Judge has held that (1) there was a partnership between the plaintiff, defendant and Fonseka and the defendant was liable to render accounts and pay the plaintiff a one-third share of the profits, (2) after 1930 the business was carried on by the plaintiff and defendant, (3) the document of March 5, 1927, was sufficient to create a partnership, and (4) the defendant broke the partnership agreement in 1939 and hence the plaintiff's claim is not prescribed.

The only findings of the lower Court that have been really challenged in this Court are (3) and (4). Mr. H. V. Perera, on behalf of the defendant, has maintained that the retirement of Fonseka from the partnership in 1930 operated in law as a dissolution of the partnership. Hence the action can only be maintained by the plaintiff on the basis of a new partnership agreement concluded between him and the defendant. The capital of the partnership exceeding one thousand rupees, section 18 (c) of the Prevention of Frauds Ordinance (Cap. 57) required that the agreement establishing such partnership should be in writing. Mr. Perera, in these circumstances, contended that any cause of action

[1] *L. R. (1907) 1 K. B. 235 at 242.*

under the original partnership arose in 1930 and was, therefore, barred by prescription and that there was no evidence to establish a fresh partnership.

The only question that requires decision is whether the retirement of Fonseka from the partnership operated in law as a dissolution of the partnership or whether the partnership continued under the agreement of March 5, 1927, as between the plaintiff and the defendant ? In 1929, Fonseka commenced proceedings against the defendant claiming his share of the profits under the agreement. Fonseka did not ask for a dissolution of the partnership. This case, according to the plaintiff's evidence, was settled on the footing that the plaintiff and defendant bought up Fonseka's rights for Rs. 3,000. The plaintiff apparently with difficulty liquidated his share of this sum by driblets. The matter is of course governed by the Partnership Act (1890) (53 and 54 Vict. c. 39) which is in force in Ceylon by virtue of section 3 of the Civil Law Ordinance (Cap. 66). Sections 32 and 33 of the Act prescribe in what manner a partnership is dissolved. Retirement of a partner is not formulated as operating in law to produce a dissolution. On the other hand, section 46 of the Act is worded as follows:—

> " The rules of equity and of common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of this Act. "

It would seem that prior to the enactment of the Partnership Act, 1890, a partnership at common law would be dissolved by the retirement of a partner. Can it be said that the rule of common law is inconsistent with the provisions of Sections 32 & 33 of the Act ? Mr. Perera in support of his contention that the partnership was dissolved relies on the case of *Abbott v. Abbott*[1]. In this case clause 2 of the partnership deed stated that the death or retirement of any partner shall not terminate the partnership. In his judgment Clauson J., at page 826, states as follows:—

> " The matter came before the Court of Appeal in the case of *Moss v. Elphick*[2] and it is authoritatively stated in the judgments in that case—I refer to the judgment of Farwell L.J., in particular, which I adopt fully—that the statement contained in Lindley on Partnership (7th Ed., p. 142) is correct. That statement is that—
>
> ' the result of a contract of partnership is a partnership at will unless some agreement to the contrary can be proved.'
>
> This being an agreement for a partnership, it is an agreement which each partner has a right to bring to an end at any moment, if he so desires, unless I am satisfied that there is some other agreement. The first point is that on reading cl. 2 it is clear that a partner who says ' I want to go out of the partnership ' does not determine the partnership by doing that. If this were a partnership at will and one partner said, ' I am determined to go out of this partnership ' the effect would be that the partnership would come to an end as between all the partners, although the others might form some new partnership amongst themselves if they so desired. "

[1] *(1936) 3 A. E. R. 823.*

[2] *(1910) 1 K. B. 846.*

This passage is, therefore, some authority for Mr. Perera's contention that a partnership at will, unless there is some other provision to the contrary in the partnership agreement, is determined if one partner goes out of the partnership. In *Abbott v. Abbott* (*supra*) there was such a provision in the agreement. Hence the opinion of Clauson J. is *obiter*. Reference has also been made to the case of *Sturgeon Brothers v. Salmon*[1]. The following passage from the judgment of Ridley J. merits attention:—

> " Section 46 of the Partnership Act, 1890, has been referred to, which provides that the rules of equity and common law should be applicable except where inconsistent with the express provisions of the Act; but section 32 and the following sections of the Act give the modes in which a partnership can be dissolved, and it would be inconsistent with these sections to say that a mere assignment would operate as a dissolution. That was the opinion of the learned editors of 'Lindley on Partnership ', but it is not necessary for me to determine the question, because according to this agreement there was no such assignment as would constitute a dissolution of the partnership."

On the other hand it would appear that the other Judge, Darling J. in this case took a different view as will appear from the following passage:—

> " I think there is a great deal to be said for Mr. Wild's contention that prior to the Partnership Act an assignment, in the case of a partnership at will, would have operated as a dissolution, and there is distinct authority for that proposition in the 5th edition of ' Lindley on Partnership '. He gives as an authority the case of *Heath v. Sansom* and I am not sure that I agree with my brother Ridley as to the effect of *Heath v. Sansom*. The passage from Lord Lindley's book is very distinct. If the matter had remained there I am not so sure that we could have upheld the County Court Judge's decision. Since the 5th edition, the Partnership Act, 1890, has been passed, containing several provisions—section 32 *et seq.*—which have led the learned editors of Lord Lindley's book to qualify the opinion previously expressed, and they use words to this effect (His Lordship read the passage at page 621 of the 7th edition). They maintain the former opinion, but consider the Act may have altered the law. I do not think they took notice of section 46. Speaking for myself, I should have thought it doubtful, if it were correct to say that in a partnership at will an assignment by one of the partners would work a dissolution, that this would be inconsistent with the provisions of sections 32 and 33 within the meaning of section 46."

The opinions of both Judges on the question at issue were *obiter*.

The case of *Sturgeon Brothers v. Salmon* (*supra*) was considered by Channell J. in *Emmanuel v. Symon*[2]. At pages 241-242 the learned Judge stated as follows:—

> " It is stated at p. 583 of the 5th edition of Lindley on Partnership, which was published before the Partnership Act, 1890, that in the case of a partnership at will the assignment by a member of an ordinary

[1] *22 T. L. R. 584.*

[2] *(1907) 1 K. B. 23.*

firm of his share in it operated as a dissolution of the partnership; but in the editions published since the Act the editors indicate that it is their opinion that the Act has made a difference in this respect, because the Act mentioned certain specific cases in which a partnership is to be considered to be dissolved, and the assignment of partnership shares is not included amongst them. I was referred to a case of *Sturgeon v. Salmon*, in which it was suggested that the point had been decided by Ridley and Darling JJ. in the Divisional Court, but when that case is examined it will be found that the point was not decided, the decision of the Court having proceeded on the special terms of the particular agreement between the parties. There seems to be no real authority on the question where there are more than two partners, though where there are only two partners there is authority: *Heath v. Sansom*,[1] which shows that an assignment by one partner of his share to the other does put an end to the partnership, as indeed must obviously be the case. Where there are more than two partners and there is an assignment from one to another so that no new partner is introduced, the question is so doubtful that I do not like to express an opinion on it. The Partnership Act, 1890, leaves the matter in doubt, because the Act provides by section 46 that the rules of equity and common law applicable to partnership shall continue in force except in so far as they are inconsistent with the express provisions of the Act, and it is very arguable whether the addition of other causes of dissolution is inconsistent with a section which expresses certain causes. ''

That the question at issue is shrouded in doubt appears from the following passage from Volume 24 of Halsbury's Laws of England, page 462, paragraph 883:—

> '' An assignment of his interest by one partner to another, where there are only two partners, operates as a dissolution, but where there are more than two the point is doubtful.''

In this state of uncertainty it is relevant to consider the opinions of standard works on the Law of Partnership. In the 10th edition of Lindley on the Law of Partnership, I find the following passage on page 680:—

> '' The Partnership Act, 1890, does not mention the assignment of a share amongst the causes of dissolution; it is therefore conceived that the assignment of a share in no case operates as a dissolution. This is of slight importance in partnerships for an undefined term, as they may be dissolved at any time upon notice; nor is it of much consequence in the case of partnerships for a fixed term, if the other partners have a right to treat the assignment as a ground of dissolution. But from the silence of the Act on this point and the express mention of the option to dissolve when a partner suffers his share of the partnership property to be charged for his separate debts, it is apprehended that an assignment by a partner of his share is no more than a circumstance enabling the Court, if it thinks fit, to decree a dissolution on the ground that it is, for the reasons above stated, just and equitable to do so ''.

[1] *(1832) 4 B and Ad. 172.*

A similar opinion is expressed in the following passage from page 86 of the 11th edition of Pollock on Partnership :—

" Since the Act it seems that the assignment of a partner's share does not in any case work a dissolution of itself, or give the other partners an absolute right to have the partnership dissolved. Section 33, sub-section 2, does give that right in the event of a partner allowing his share to be charged under section 23 for his separate debt. But the fact of a partner having alienated his share so as to deprive himself of substantial interest in the firm would be a circumstance for the consideration of the Court in determining whether it was just and equitable to order a dissolution under section 35 (*a*) ".

The authors of these two standard treatises on the Law of Partnership state that the matter is not free from doubt but incline to the view that an assignment of the share of one partner to another where there are more than two partners does not terminate the partnership. The defendant in these circumstances has not established that the learned Judge came to a wrong decision and the appeal must be dismissed with costs.

Appeal dismissed.

KEUNEMAN J.—I agree.