Present : Schneider J. and Jayewardene A.J. 1925.

IDROOS *et al. v.* SHERIFF.

110—D. C. Colombo, 12,051.

Partnership—Agreement for establishing partnership where capital exceeds Rs. 1,000 — Absence of writing — Reference to partnership in documents—Ordinance No. 7 of 1840, s. 21 (4).

A partnership cannot be established in terms of section 21 (4) of the Ordinance of Frauds and Perjuries by means of statements, relative to the alleged partnership, found in documents.

A third person may offer evidence of such statements to prove the existence of a partnership between others.

ACTION by the plaintiffs as heirs of one Idroos for declaration of title to certain shop goods, stock in trade, &c., of the value of Rs. 21,000 lying at No. 1, Hospital street, Colombo, against the defendant, Sheriff. The defendant pleaded that Idroos and he carried on business in partnership at the place, and that he was entitled to a half share of the business, which he valued at Rs. 22,000. The learned District Judge held that, in the absence of an agreement in writing, the defendant could not establish the alleged partnership, and gave judgment for the plaintiffs. The defendant appealed, and it was contended for him that the documents D 3, D 4, and D 7, in which he was described as a partner by Idroos, were sufficient to comply with the requirements of section 21 (4) of the Ordinance of Frauds and Perjuries, No. 7 of 1840.

Allan Drieberg, K.C. (with him *N. K. Choksy*), for defendant, appellant.—The notification to the Registrar of Business Names (D 3) was signed by all the three partners as such. So was the notification of change (D 7). In this Idroos and Sheriff were given as the sole partners. It was tantamount to a notice to all to whom it may concern that they were partners and trading as such.

Section 5 of the Business Names Ordinance shows that it was not compulsory on the defendant to have signed the notifications.

The proviso shows that the section intended to give the fullest effect to the declaration when signed by *all* the partners.

The District Judge requires that *all* the terms should be embodied in a document to comply with the terms of section 21 of the Ordinance. Suppose a proper notarial document had been drawn up without a statement of the shares of the partners. If the Judge is correct, even such a document would not comply with the requirements of the section. The decisions on the Sale of Goods Act

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requiring the " price " to be stated, where agreed upon, can have no application to partnerships, because there can be partnerships without any reference to duration, capital, or the respective shares of the partners.

[SCHNEIDER J.—You can only come in under the word " agreement " in section 21. Have you such an " agreement " signed by the partners ?]

The only essential of an agreement of partnership is the mutual promise of the members of it to be partners. Even any capital is not required (*Lindley on Partnership, 1905 Edition, p. 50*). No provision for the sharing of profits is necessary, as the law implies, in its absence, an equal division (*Lindley on Partnership, p. 384*). Even any definite duration is not required. All that is required is a mutual agreement to trade as partners.

Hayley (with him *A. R. H. Canekeratna*), for plaintiffs, respondent.—Section 21 distinctly requires " it," that is, the promise, contract, or agreement itself, not a note or memorandum of it, to be in writing.

Section 4 of the Sale of Goods Ordinance, No. 11 of 1896, follows section 4 of the English Statute of Frauds substantially. But section 21 of the Frauds and Perjuries Ordinance, 1840, is expressed differently.

Appellant's real endeavour is only to set up an estoppel by document. The Business Names Ordinance was only intended to make a provision for ascertaining whether aliens are partners. The appellant's contention, if correct, would mean that the provisions of the Business Names Ordinance amounted to a repeal of section 21.

Declarations by A and B to C, on the same document that they are partners, is not " an agreement " between A and B.

Estoppel by conduct cannot be stronger than a definite contract, and if the alleged " contract " is of no avail by not being in writing, the defendant cannot succeed by substituting for it what is, at the most, an estoppel.

Pate v. Pate[1] clearly decides that the acts of the alleged partners cannot be looked at to decide whether or not there is a proper agreement.

In 158, D. C. (Interlocutory) Jaffna, 16,405, S. C. Civil Minutes of March 26, 1923, the plaintiff was examined *de bene esse*. Under cross-examination he admitted that the defendant was a partner, but the Supreme Court held that that evidence was not conclusive in law.

[JAYEWARDENE A.J.—But if you admit a fact, no other proof need be adduced by the other side.]

[1] *(1915) 18 N. L. R. 289.*

It has been held that even an admission in the answer does not prevent the defendant from relying on the provisions of section 21. (See *Vol. 4 of the Digest of South African Cases, p. 821.*)

Even in England, where a " note or memorandum " is all that is required it has been held that it must contain all the essential terms. (*7 Halsbury 372, 70. L. J. 767, Marshall v. Lynn,*[1] *Acebal v. Levey,*[2] *Archer v. Baynes,*[3] *Cooper v. Smith,*[4] *Bailey v. Fitz Maurice.*[5])

[JAYEWARDENE A.J.—Suppose you enter into an agreement of partnership and provide that the terms are to be agreed upon thereafter, will it be bad ?]

Yes.

[JAYEWARDENE A.J.—Referred to the second proviso to section 92 of the Evidence Ordinance.]

That refers to " matter " as distinct from " terms." Otherwise this proviso will nullify the Frauds Ordinance.

Ameer Ali on Evidence shows that only matters which do not form part of the original contract can thus be proved by oral agreement. The Court cannot, by the exercise of its discretion, allow those terms to be proved by oral evidence which are required by law to be in writing and which should have been put in.

Drieberg, K.C., in reply—The cases cited are those where, without the mention of the terms omitted, the contract becomes " indefinite " or inconceivable. Some of them are leases and contracts of service, in both of which the duration is of the very essence and nature of the contract.

Section 92 of the Evidence Ordinance and section 21 of No. 7 of 1840 require only the agreement that certain persons shall be partners. Only an " agreement for establishing the partnership," that is, a proof of the bare partnership, is all that is needed in writing, and not all its terms. Section 92, proviso 2, applies to this case.

Leroux v. Brown[6] and *Pate v. Pate* (*supra*) establish that the Statute of Frauds is only evidentiary. Therefore, it is not necessary that the original agreement itself should be in writing. So that a subsequent declaration of an existing partnership is sufficient. The opening recital of the power of attorney is that.

[SCHNEIDER J.—There is no " promise " from one to the other in that recital.]

It is not necessary that the mutual promises—implied in the declaration—should be addressed to one another. *Gibson v. Holland,*[7] *Bailey v. Sweeting.*[8]

[1] *6 M. and W. 109 at 117.*
[2] *(1834) 10 Bing. 376.*
[3] *5 Ex., 625.*
[4] *15 East. 103.*
[5] *(1857) 8 E. & B. 664.*
[6] *(1852) 12 C. B. 801.*
[7] *(1865) L. R. 1. C P. 1.*
[8] *(1861) 6 C. B. 843.*

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This appeal raises a question with regard to the nature of the evidence required to prove an agreement "for establishing a partnership where the capital exceeds one thousand rupees," which the law requires to be in writing. The plaintiffs, the heirs of one Idroos, sued the defendant, Sheriff, for a declaration of title to certain shop goods, stock in trade, fittings, &c., of the value of Rs. 21,000 lying at No. 1, Hospital street, Colombo, where Idroos appears to have carried on a tailoring business under the name of "Idroos and Sheriff." The defendant pleaded, *inter alia*, that Idroos and he had carried on the business at No. 1, Hospital street, in partnership, and that he was entitled to a half share of the business, which he valued at Rs. 22,000. The plaintiff denied that the defendant was a partner of Idroos. It was admitted that the capital of the partnership exceeded Rs. 1,000. At the trial several issues were framed, but the Court thought that the first and second issues should be tried first. They were as follows :—

(1) Was the defendant a partner of Idroos ?
(2) Was there a written agreement ? If not, can the defendant prove a partnership in the absence of a writing ?

The learned District Judge, after hearing some evidence and considering the documents filed, held that the defendant had failed to prove an agreement in writing, and that he was therefore not a partner of Idroos. He entered judgment for the plaintiffs and dismissed a claim in reconvention which the defendant had set up.

The defendant appeals, and it is contended for him that the documents D 3, D 4, and D 7, in which he is described as a partner by Idroos, are sufficient to comply with the requirements of section 21 (4) of the Ordinance of Frauds and Perjuries, No. 7 of 1840.

Section 21 runs as follows :—

"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) . . .

(4) For establishing a partnership where the capital exceeds one thousand rupees : 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."

This section has been construed by the Privy Council in *Pate v. Pate* (*supra*), (*1915*) *A. C. 1,100*, and it was laid down by their Lordships that the words "for establishing a partnership" meant "for establishing by proof *coram judice*," and that in the absence of an agreement in writing an action could not be maintained for an account even where it is alleged that a partnership had in fact existed and had been determined.

In the present case it is admitted that no agreement in writing creating a partnership between Idroos and the defendant was ever entered into, and it is clear from the evidence of the defendant that the partnership alleged by him was carried on on a verbal agreement. But it is contended for him that the documents D 3, D 4, and D 7 take the place of such an agreement, and is evidence of an agreement in writing under the section. Now, D 3 and D 7 are extracts from the "Register of Business Names" kept under Ordinance No. 6 of 1918. D 3 is dated May 6, 1919, and is "an application for registration by a firm." D 7, dated July 3, 1923, is a "statement of change under section 7" of that Ordinance.

In D 3, which was signed by Idroos, one Levana Marikkar and the defendant appear as his partners, and the business name is given as "Idroos and Sheriff."

In D 7, which was sent in when Levana Marikkar ceased to be a partner (D 5), Idroos and the defendant are entered as partners. D 4 is a power of attorney granted by Idroos, the defendant, and Levana Marikkar to the defendant, appointing him their attorney. There these three persons are described as carrying on the business of tailors and outfitters in partnership under the name, style, and firm of "Idroos and Sheriff."

These writings prove that the defendant and Idroos were carrying on business in partnership and nothing more. They do not prove what section 21 (4) requires, viz., that the agreement for carrying on their business in partnership was in writing, or that they had become partners by virtue of an agreement in writing. Now, what the section requires is that the agreement itself should be in writing; proof that in documents the parties have described themselves as partners may corroborate the original agreement, but such documents cannot be regarded as substitutes for the agreement in writing. Mr. Drieberg for the defendant, however, strenuously contended on the authority of certain cases decided under section 17 of the English Statute of Frauds (now replaced by section 4 of the Sale of Goods Act), which enacts (I give only the material parts) that no contract for the sale of any goods, shall be allowed to be good, except that some notice or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized, that D 3, D 4, and D 7 were sufficient to constitute an agreement in writing for the purposes of section 21 (4). He

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relied on the case of *Gibson v. Holland.*[1] There the plaintiff had sold a horse to the defendant's agent. The agent informed the defendant of the purchase, and the defendant wrote back confirming the purchase, and stating that he had sold the horse to another and promised to send a cheque for the price. The defendant subsequently refused to pay for the horse, and when sued by the plaintiff contended that there was no contract in writing to satisfy the 17th section of the Statute of Frauds. It was held that the letters that passed between the defendant and his agent contained a statement of the bargain amounting to a "note or memorandum" of the contract within the meaning of section 17 of the Statute which the vendor could avail himself of. Erle C.J. said :

> "In the case referred to by my brother Willes, of *Bailey v. Sweeting* (*supra*), this Court went very carefully into the general doctrine, and came to the conclusion that a letter which contained an admission of the bargain, and of all the substantial terms of it, was a sufficient note or memorandum of the contract to satisfy the 17th section, notwithstanding the writer repudiated his liability. To satisfy the Statute, you must have the oral statement of the contract corroborated by an acceptance of part of the goods or a part payment of the price, or you must have some note or memorandum in writing of the bargain. If so, the danger of perjury, which the Statute was designed to exclude, is abundantly guarded against if there be a written statement of the terms of the contract, signed by the party to be charged, made to an agent. For these reasons, I feel bound to hold that the requirements of the Statute have been complied with in this case, and consequently that there should be no rule."

And Willes J said :—

> "Provided you have in writing an admission by the party to be charged of the bargain having been made, the requirement of the Statute is satisfied, though the memorandum does not show a contract in the sense of its being a complete agreement, and intended to be the exclusive evidence of the right on the one side and of the liability on the other, as the final written agreement between the parties would be. This section uses a word which seems to afford a key to its construction ; it requires that there shall be, not any particular kind of memorandum, but 'some note or memorandum of the bargain.' There is a note or memorandum of the bargain in this case. I cannot help thinking that *Bailey v. Sweeting* (*supra*) disposes of this case, because, though the memorandum

[1] (*1865*) *L. R. 1. C. P. 1.*

there did not show a contract in the sense of an agreement, inasmuch as the defendant in terms repudiated his liability, yet, as the letter contained evidence of the terms upon which he had once contracted to be bound, it was properly held to be a sufficient memorandum to satisfy the Statute."

In *Bailey v. Sweeting* (*supra*) section 17 was similarly constructed and there too Willes J. drew attention to the words " some note or memorandum " and said that they should be given their natural meaning and effect. The English decisions under section 17 are based on the particular words used in that section. That section does not require the original contract to be in writing, it may be verbal, and the requirements of the section would be satisfied if some note or memorandum signed by the party sought to be affected comes into existence at any time before an action is brought. Such a note or memorandum might be embodied in a letter addressed to a third party, in an affidavit, or in a will. The note or memorandum must, however, contain all the terms necessary to constitute a valid contract of sale. In *Sieveruright v. Archbald*,[1] where a question arose as to whether a bought note sent to the buyer and a sold note sent to the seller by a broker who had negotiated the sale of some iron, was a sufficient note or memorandum of a contract to satisfy the requirements of section 17.

Patterson J. said :—

" The Statute of Frauds (29 C. 2, c. 3, s. 17) requires that some note or memorandum in writing of the bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized. The question is whether in this case there was any such note or memorandum in writing signed by the defendant or his agent ? If there was, I take it to be clearly immaterial whether there was any such note or memorandum signed by the plaintiff (see *Egerton v. Mathews*,[2] where the memorandum was signed by the defendants themselves, not by a broker or agent, and none was signed by the plaintiff, yet, it was held that the Statute was satisfied) ; for I consider that the memorandum need not be the contract itself, but that a contract may be made without writing ; and, if a memorandum in writing be afterwards made, embodying that contract, and be signed by one of the parties or his agent, he being the party to be charged thereby, the Statute is satisfied. Still it is plain that, if the original contract was itself in writing signed by both parties, that would be the binding instrument, and no subsequent memorandum signed by one party could have any effect."

[1] *(1851) 17 Q. B. 103.*

[2] *(1805) 6 East 307.*

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And Erle J. said :—

" It seems to be therefore that, upon principle, the mere delivery of bought and sold notes does not prove an intention to contract in writing, and does not exclude other evidence of the contract in case they disagree. Before examining the authorities on which this proposition is supposed to be founded, I would draw attention to the distinction between evidence of a contract and evidence of a compliance with the Statute of Frauds. The question of compliance with the Statute does not arise until the contract is in proof. In case of a written contract the Statute has no application. In case of other contracts, the compliance may be proved by part payment, or part delivery, or memorandum in writing of the bargain. Where a memorandum in writing is to be proved as a compliance with the Statute, it differs from a contract in writing, in that it may be made at any time after the contract, if before the action commenced ; and any number of memoranda may be made, all being equally originals ; and it is sufficient if signed by one of the parties only or his agent ; and if the terms of the bargain can be collected from it, although it be not expressed in the usual form of an agreement. (*Egerton v. Mathews* (*supra*)).

This case draws a distinction between the contract or agreement in writing and a note or memorandum of the same. Further, the English Statute of Frauds does not require that the contracts, &c., referred to in it should be in writing, its object being merely to exclude oral proof of them. As Lindley L.J. said (*In re Hoyle, Hoyle v. Hoyle* [1]) :—

" The object of the Statute was to prevent fraud and perjury by taking away the right to sue on certain agreements if only established by verbal evidence. The policy of the enactment is well explained in *Welford v. Beazely*,[2] *Barkworth v. Young*,[3] and the idea of agreement need not be present to the mind of the person signing. An affidavit made with quite a different object was in that case held to be a sufficient note or memorandum, and so have various other documents."

And at page 99 Bowen L.J. said :—

" It is shown by a catena of cases down to *Gibson v. Holland* (*supra*) and *Wilkinson v. Evans*[4] that the question is not one of intention of the party who signs the document, but simply one of evidence against him. The Court is not

[1] (*1893*) *1 Ch. 84, at p. 98.*
[2] (*1747*) *3 Alk. 503.*
[3] (*1856*) *4 Drew 1.*
[4] (*1866*) *L. R. 1 C. P. 407.*

in quest of the intention of parties, but only of evidence under the hand of one of the parties to the contract that he has entered into it. Any document signed by him and containing the terms of the contract is sufficient for that purpose."

The English decisions are the result of the construction placed on the language used in section 17 and particularly, on the words " some note or memorandum."

Now to consider the terms of section 21 (4) of our Ordinance of Frauds ; it is noticeable that, although based on the English Statute, it carefully avoids the use of the words " some note or memorandum," and even in sub-section 3 of the same section (now repealed by the Sale of Goods Ordinance), which dealt with contracts for the sales of movables or goods, the words used were " for the purchase or sale of any movable, unless such property or part thereof shall have been delivered to the purchaser or the price or a part thereof have been paid by the purchaser," and all reference to a note or memorandum was omitted.

Can it be suggested that in the construction of the sub-section, the English decisions on section 17 can be applied in the absence of the words " some note or memorandum " and where the section requires that the contract or agreement itself should be in writing, if it is to be of any force or avail in law ?

In *Pate's case* there was evidence that the members of the syndicate had described each other as partners in writings signed by them. (See the judgment of this Court reported in *11 N. L. R. 254.*) In fact, the first defendant, who took the objection under section 21, had himself written to one of the partners to say " what was there to prevent me on the strength of these withdrawals and renunciations to have ceased to recognize you as partners " (page 262), but the Privy Council attached no weight whatever to these admissions in writing, and learned Counsel who appeared for the plaintiff made no reference to the English decisions on which reliance has been placed here. The conclusion is irresistible that the Privy Council did not consider the statements made in writing that the parties were partners sufficient to overcome the absence of an agreement in writing or the English decisions applicable.

In my opinion section 21 cannot be construed as section 17 of the English Statute has been construed, in view of the marked difference in the language and object of the two enactments. It may be pointed out that in section 2 of the Ordinance of Frauds and Perjuries, 1840, which deals with the sale, purchase, &c., of immovable property, the same words are used as in section 21 in imposing the requirements of a writing and in declaring the consequences of the failure to have such a writing. The only difference

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between the two sections is that while the former requires the documents to be executed before a notary, the latter does not insist on that formality.

But if Mr. Drieberg's contention is correct, it must be possible to say that when an owner allows another who is not a co-owner to join him in executing a notarial document describing himself and the other person as the owners of a property, that the other person would be entitled to claim a share of that property as owner. In such a case the owner might have to meet estoppels when third parties are concerned, but the fact that he described the other person as an owner in a notarial document would not create any right in that other to the land. The only way in which that person can acquire a right to the property is by a transfer or other similar document signed and executed as required by section 2.

In the same way, in the absence of an agreement in writing a partnership cannot be proved between so-called partners, and statements in schedules and deeds that certain persons are partners would not entitle the persons so described to claim to be partners in law or to enforce their rights in a court of law. Such facts may be regarded as circumstances which sub-section (4) allows third parties to offer in evidence to prove a partnership existing between the parties referred to in them.

Mr. Hayley, for the plaintiffs, argued that even assuming that D 3, D 4, and D 7 amounted to an agreement in writing, they were insufficient in law, as they did not contain the essential or material terms of the partnership agreement. They do not show when the partnership commenced, or give the shares of each partner in the business, &c. He cited several English cases in support of his contention. I need not refer to them in view of the provisions of sections 91 and 92, proviso (2), of the Evidence Ordinance.

It is no doubt true that all the terms agreed upon at the time a partnership agreement is entered into it must be included in the written agreement, but if there be any separate oral agreement as to any of the terms material or otherwise on which the writing is silent, such agreement can be proved by oral evidence according to proviso 2 to section 92. This point need not be further elaborated in view of my decision that D 3, D 4, and D 7 do not amount to an agreement in writing.

The defendant has, in my opinion, failed to establish that he and Idroos had carried on business in partnership.

His appeal must therefore be dismissed, with costs.

SCHNEIDER J.—I entirely agree.

Appeal dismissed.