1935 *Present :* **Koch J. and Soertsz A.J.**

DE SILVA *v.* DE SILVA

283—D. C. Galle, 31,564.

Partnership—Action for account—Validity of agreement—Burden of proof—Capital—Ordinance No. 7 of 1840, s. 21.

Where, in an action for account of a business carried on in partnership, a *de facto* partnership is established, the burden of proving that it was not valid in terms of section 21 of Ordinance No. 7 of 1840 is on the party who asserts it.

The capital contemplated by the section is the original capital contributed by the parties.

APPEAL from a judgment of the District Judge of Galle.

H. V. Perera (with him *N. E. Weerasooria, A. L. Jayasuriya,* and *D. W. Fernando*), for defendant, appellant.

M. T. de S. Amarasekera (with him *T. S. Fernando*), for plaintiff, respondent.

September 20, 1935. KOCH J.—

The respondent to this appeal in her capacity as administratrix of her husband's estate instituted this action against her brother-in-law, *inter alia*, for an account on the ground that the latter carried on business in partnership with her husband under the name and style of G. L. Podisinno & Bros. from the year 1915 in rice, sundries, &c., at Ambalangoda. Her case was that this partnership continued till her husband's death which occurred on June 15, 1930, that there were no other partners, and that her husband's share in the partnership was one-half. The action was filed in October, 1932. The defence was that the business of G. L. Podisinno & Bros. was not carried on in partnership but solely belonged to the defendant.

On the evidence the learned District Judge has held that the defence was untrue and that the defendant and his deceased brother were the partners of this business. If this finding is correct, I am of opinion, and it is not seriously contested, that under the law of partnership each of

the partners will be presumed to own a one-half share in the business—*Lindley on Partnership (1905) at p. 384.* I agree with the learned District Judge in his finding that there was a *de facto* partnership.

The real point of contention on appeal is that before the respondent can claim the relief she prays for, she must prove a valid agreement of partnership. Mr. H. V. Perera argues that this can only be done by the plaintiff either relying on a writing containing an agreement of partnership signed by the defendant or by her establishing that the capital of the partnership was not over Rs. 1,000. He maintains that the burden is on her on this point and does not shift.

I do not agree. The formula adopted in section 21 of Ordinance No. 7 of 1840 is, in my opinion, against this argument. The section says that "no agreement for establishing a partnership where the capital exceeds one hundred pounds (Rs. 1,000) shall be of force or avail in law unless it be in writing and signed by the party making the same". If then the evidence does not disclose that the capital was over Rs. 1,000, the agreement, I take it, can be proved orally. If the defence is that such an oral agreement is of no force or avail in law, it is for the defence to establish that the capital was over Rs. 1,000. The defendant, although this fact was especially within his knowledge, as contemplated by section 106 of the Evidence Ordinance, did not himself give evidence or produce the books of the business or call a defence.

The view I have taken is supported by another section, to wit, section 109, of this Ordinance. It runs thus: "When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively is on the persons who affirms it".

The respondent has led evidence and the learned District Judge has held, and rightly held as I have stated before, that the two brothers were *de facto* partners. Once this is the case, the burden of proving that they do not stand in this relationship is on the defendant who asserts it.

I am therefore convinced that when the trial is concluded, or if the fact is established at an earlier stage that the capital is over Rs. 1,000, the plaintiff's action fails, but if on the other hand it is not clear, that the capital is over Rs. 1,000, the claim for relief is maintainable.

I may, however, say on the evidence called by the respondent, though of an unsatisfactory nature, the District Judge has come to the conclusion that the original capital of the partnership did not appear to be over Rs. 1,000. This is a further point in favour of the respondent. The capital contemplated by section 21 of Ordinance No. 7 of 1840 the learned District Judge has held must be the original capital contributed. He is again right in doing so.

The appeal must therefore be dismissed with costs, and the case will go back for an account, subject to the findings of fact on the other issues recorded by the District Judge. The appellant will pay the costs of this appeal. The costs of the proceedings in the District Court will be in

SOERTSZ A.J.—I agree.

Appeal dismissed.