1927.

[PRIVY COUNCIL.]

*Present:* The Lord Chancellor, Lord Carson, and Lord Darling.

## ARSECULERATNE *v.* PERERA.

*Ordinance of Frauds and Perjuries—Agreement in writing to prospect for plumbago—Transfer of lease of mines—Proof of partnership—Action for account—Ordinance No. 7 of 1840, s. 22.*

By an agreement in writing, which was not notarially executed, the plaintiff and the defendant agreed to prospect for plumbago in certain mines. The agreement provided, *inter alia*, "that the defendant should give over to the partnership his interest in a lease which he had taken from the owner of a mine; that the partners should contribute equally to the expenses incurred on the pits; and that they should be entitled to the profits and liable for the losses in equal shares." The mine was worked under the management of the plaintiff from the date of the agreement for a period of two years, when it was abandoned by mutual arrangement. The plaintiff sued the defendant for a dissolution of the partnership and an account.

*Held*, that the agreement was valid for the purpose of establishing the partnership, although it was void as an agreement to effect a transfer of the lease; and that the plaintiff was entitled to an account.

The equitable doctrine of part performance has no application to the stringent provisions of section 2 of Ordinance No. 7 of 1840.

*Pate v. Pate* [1] distinguished.

APPEAL from a judgment of the Supreme Court.

December 6, 1927. Delivered by THE LORD CHANCELLOR.

This is an appeal from a decree of the Supreme Court of Ceylon affirming a decree of the District Court of Colombo in an action in which the appellant was plaintiff and the respondent was defendant.

By an agreement in writing dated December 21, 1915, the respondent and the appellant agreed to prospect for plumbago at the Pattagoda mines under the name of the Pattagoda Mining Company. The agreement provided that the respondent "would thereby give over" his interest in the lease which he had taken from the owners of the mine (which had still eight years to run) to the Company; that the appellant should manage the mine and receive a commission of 2½ per cent. on all transactions; that the partners should contribute equally to the expenses to be incurred on the pit or pits; and that they shoud be entitled to the profits

[1] *(1915) A. C. 1100.*

and liable for the losses in equal shares. The agreement was signed by both parties, but the signatures were not attested by a notary or witnesses. The mine was duly worked under the management of the appellant from the date of the agreement until the month of January, 1918, when the working was stopped by mutual arrangement.

On January 25, 1923, the appellant brought this action against the respondent pleading the above facts and alleging that he (the appellant) had paid or borrowed monies in respect of the business amounting to Rs. 72,857 and was entitled to commission amounting to a further Rs. 1,504; and the plaintiff claimed a dissolution of the partnership and payment by the defendant of one-half of those sums or of such sum as might be found due upon an account being taken. The respondent by his written statement admitted that he had agreed to work the Pattagoda plumbago pits under the name of the Pattagoda Mining Company, that the profits and losses were to be divided equally, that the plaintiff was to manage the business for a commission of 2½ per cent., and that the business had been carried on as alleged; but he pleaded that the agreement of December 21, 1915, on which the plaintiff's action was based, was invalid in law. Issues were framed, which included the following:—

(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 duly stamped?

. . . . . .

(5) Had plaintiff authority to borrow money for the working of the partnership ?

(6) Is defendant liable to pay half share of any of the monies borrowed by the plaintiff or of the interest due on such loans ?

. . . . . .

(8) What sum, if any, is due by defendant to plaintiff or by plaintiff to defendant ?

On the trial of the action the District Judge held on the first issue that the agreement of December 21, 1915, not having been attested by a notary and two witnesses in manner directed by clause 2 of Ordinance No. 7 of 1840 was void in law, and without dealing with the other issues dismissed the action with costs. On an appeal by the plaintiff to the Supreme Court of Ceylon, that Court affirmed the judgment of the District Judge, and it is against that decision that the present appeal is brought.

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DELIVERED BY THE LORD CHANCELLOR

*Arseculeratne v. Perera*

The material provisions of Ordinance No. 7 of 1840 are as follows:—

"2 No sale, purchase, transfer, or mortgage of land or other immovable property, and no promise, bargain, contract, or agreement for effecting any such object, or for establishing 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) . . . . . .

(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."

Applying these provisions, the Supreme Court held that the agreement of December 21, 1918, not having been executed and attested in manner required by the second clause of the Ordinance, was void so far as it purported to affect the lease of the Pattagoda mines vested in the respondent; and after a careful examination of

the cases of *Forster v. Hale* [1] and *Dale v. Hamilton* [2] they decided that the defect in the agreement was not cured, either by the principle laid down in those cases, or by the equitable doctrine of part performance. They further held that the agreement was one and indivisible, and that, the stipulation as to the transfer of the mine to the Pattagoda Company being ineffective, the whole agreement was void and of no effect; and accordingly that the action was rightly dismissed.

Upon the first of the two points so decided by the Supreme Court their Lordships are wholly in agreement with the opinion of that Court. The effect of clause 21 of the Ordinance was considered by this Board in the case of *Pate v. Pate*,[3] where it was held that no suit could be maintained in Ceylon upon an agreement for a partnership which was not in writing, signed by the parties as required by that section, even though the partnership business had been carried on for a time and had then been dissolved, and although the plaintiff was only claiming an account of the transactions of the dissolved partnership and payment of what might be found due. Doubtless the decision applies with equal force to an agreement affecting land which has not been executed and attested in manner required by clause 2 of the Ordinance; and their Lordships agree with the opinion of the learned Judges of the Supreme Court that in the case of such an agreement the operation of the Ordinance cannot be avoided either by an application of the principle of the decision in *Forster v. Hale* (*supra*), or under the equitable doctrine of part performance. Both the case last cited and the doctrine of part performance have reference to section 4 of the English Statute of Frauds, and they have no application to the more stringent provisions of clause 2 of the Ordinance by which an agreement as to land not duly attested by a notary and two witnesses is of no " force or avail in law."

But this does not conclude the matter. Assuming that the agreement by the respondent to " give over " the lease of the mine to the proposed Company was void for want of proper attestation under clause 2 of the Ordinance, the question remains whether a partnership between the parties is established. In this connection it is to be remembered that the respondent by his pleading admits the existence of a partnership, an admission which would appear to entitle the appellant to an order for an account. But it would not be satisfactory to decide the case on that ground alone, as the terms of the partnership as admitted by the respondent differ in some respects from those alleged in the plaint; and it is necessary to consider whether the agreement of December, 1915, although ineffective to pass any interest in the land, may yet be referred to as showing the other terms of the partnership. In their Lordships'

[1] *(1800) 3 Ves. 695, 5 Ves. 308.*
[2] *(1846) 5 Hare 369, 2 Pl. 266.*
[3] *L. R. (1915) A. C. 1100.*

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opinion it may be so referred to. Clause 21 of the Ordinance requires that an agreement for a partnership where the capital exceeds £100 shall be in writing signed by or on behalf of the parties; and the agreement of December, 1915, complies with that requirement. Clause 22 adds the proviso that an instrument affecting land shall "for that purpose" be executed and attested as required by clause 2, an expression which leads to the inference that the instrument, although not notarially executed and attested, may yet be referred to for the purpose of establishing the other terms of the contract. It is true that in the present case the agreement to transfer the mine was an important term of the contract; and it may well be that if, during the currency of the lease, the plaintiff had sought to compel the defendant to put the mine at the disposal of the Company and the defendant had refused so to do, the substratum of the partnership would have disappeared and the partnership must have been dissolved. But no such claim was ever made or is now made in this suit. It is possible, as Lord Rosslyn pointed out in *Forster v. Hale* (*supra*), for a mining business to be carried on in land in which no estate is given to those who share in the working; and in the present case it must be inferred that throughout the duration of the partnership the mine was worked by the licence of the respondent, which he did not choose to revoke. The partnership has now run its course, without the necessity for calling for a transfer of the lease, and all that is claimed is an account of the partnership transactions and payment of what may be found due. The partnership, apart from any claim to the land, is established by the written agreement and the admissions in the pleadings. If the venture had proved successful, and substantial profits had come to the plaintiff's hands, he would assuredly have been bound to account for them; and there is no reason why, now that the business has resulted in a loss, the plaintiff, who is alleged to have borne the whole expenses of the mining operations, should be left to bear that loss alone. He is entitled to an account on the footing of the agreement and to payment by the defendant of what may be found due on the taking of such account.

For these reasons their Lordships are of opinion that the judgment of the Supreme Court should be set aside, and that upon the first issue it should be declared that the agreement of December 21, 1915, is valid for the purpose of establishing a partnership between the parties, but not for the purpose of affecting the ownership of the mine, and the case should be remitted to the District Court to be dealt with upon the above footing, and their Lordships will humbly advise His Majesty accordingly. The respondent will pay the costs of the appeal to the Supreme Court and to this Board, the costs of the suit being reserved to be dealt with by the District Judge.

*Set aside; case remitted.*