1938

Present : **Hearne J. and Wijeyewardene A.J.**

BEEBEE AMMAL *v.* IBRAHIM SAIBO.

341—D. C. Badulla, 5,808.

Partnership—Purchase of land by partners—Death and retirement of partners—Formation of new partnership—Transfer of beneficial interest in property purchased to new partnership—Rights of heirs of deceased partners—Partition action.

Where land was conveyed to seven persons trading in partnership " as K. A. S. & Co., and their successors and assigns ", the property vested in the partnership and the beneficial title was in the partners as such.

On the death or retirement of a partner the beneficial interest in the property remained to the surviving partners, and on the formation of a new partnership such beneficial interest became an asset of the new partnership for the purpose of its business.

The transfer of this beneficial interest from one partnership to another does not require a notarial instrument.

THIS was a partition action. The facts are stated by Wijeyewardene A. J. as follows:—

The plaintiffs respondents instituted this action under Ordinance No. 10 of 1863 for the partition of a land called Kandewatta *alias* Childer's lot, situated at Haputale. The seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and sixteenth defendants-appellants filed answer claiming the property exclusively and stating that the property was originally partnership property belonging to the branch business of the firm known as K. Abram Saibu & Company, carrying on a business at Haputale and that by certain deeds the property has now devolved on them subject to certain rights of the plaintiffs in the legal estate in respect of the property. The first six defendants have not filed an answer.

It is necessary to set out in detail the various transactions with regard to the partnership and the property as they have an important bearing on the questions of fact and law which arise in this case.

By indenture P 27 of April 4, 1902, the following seven persons formed themselves into a partnership for the purpose of "establishing and opening boutiques, shops, stores, bakeries and carrying on a supply of contract business as well as any other partnership business under the style and firm of . . . . K. Abram Saibu & Company . . . . ." for three years or a longer period at the discretion of the principal partners —K. Ibrahim Rawther, Mohamadu Saibu, Kader Ibrahim Saibu, Sheik Adam Saibu, P. Esubu Saibu, A. K. Ahamed Saibu.

By deed P 3 of May 1, 1902, one J. L. Devar sold the property in question to these seven individuals "trading in Ceylon as K. Abram Saibu & Company".

During the pendency of this partnership, the second partner died and the sixth partner retired from the business. Te estate of the second partner was administered in the District Court of Kandy. P 7 of 1909 is the inventory filed by the administrators.

By indenture P 28 of September 17, 1906, the first, third, fourth, fifth and seventh partners of the earlier partnership and one Kader Batcha Saibu agreed to carry on the same business as under P 3 for a term of three years from August 6, 1906, or "for a longer period not exceeding six months".

The first and seventh partners of the first partnership who were also partners of the second partnership died in 1911 and 1909 respectively. Their estates were administered in the District Court of Kandy. P 4 and P 6 of 1914 are the inventory and administrator's deed in respect of the estate of the first partner while P 14 of 1912 is the inventory in respect of the estate of the seventh partner.

By the indenture P 29 of March, 1912, the third, fourth and fifth partners of the first partnership, some of the heirs of the first partner of the first partnership including Ibrahim Saibu, Kader Batcha Saibu, who was a partner of the second partnership, and some others agreed to carry on a business similar to the business of the first partnership under the old name of K. Abram Saibu & Company for a period of forty months commencing from November 19, 1911. The deed also provided for a continuance of the partnership for a period not exceeding twelve months.

By P 9 of May, 1912, P. Esubu Saibu (the sixth partner of the first partnership) and the heirs of Mohamadu Kani Saibu, (the second partner of the first partnership) sold their interests in the property to the several partner of the third partnership carrying on business as K. Abram Saibu.

The deed of partnership P 29 empowered Kader Ibrahim Saibu (the third partner of the first partnership) Sheik Adam Saibu (the fourth partner of the first partnership) and K. Ibrahim Saibu who were partners of the third partnership or any two of them to sell the immovable property and buildings " now belonging or which may hereafter at any time during the continuance of this partnership become the property of the said partnership business ". Purporting to act in the exercise of this power, two of the partners so authorized with some of the other partners conveyed the property in question by P 21 of 1917 and the rights of the vendees under that deed have now devolved on the appellants.

Before the execution of P 21, P. Ibrahim Saibu (the fifth partner of the first partnership) who was a partner of all the three partnerships died in 1915, leaving as his heirs the plaintiffs-respondents.

H. V. Perera, K.C. (with him *N. E. Weerasooria, K.C.* and *E. B. Wikramanayake*), for defendants, appellants.—The property in dispute was property bought for the partnership business. The deed itself indicates that it was bought by seven persons trading as Abram Saibu & Company. It is also significant that the word " successors." is used and not the usual " heirs, executors, &c.". The seven vendees had the legal title but the beneficial interest was vested in the partnership. They were *trustees for sale* and for distribution of the assets at the dissolution—see section 20 of the English Act and *Lindley (9th ed.), pp. 816, 973 and 409.* When any one of them died or retired there was no separation of the beneficial interest. It remained in the partnership. At the dissolution of the first partnership the remaining partners and some others continued the business by forming a second partnership. The assets of the first partnership were transferred to the second including this beneficial interest. A notarial document was not necessary for the transfer of this beneficial interest. Ordinance No. 7 of 1840 deals only with the transfer of legal estate. (*Narayanan Chetty v. James Finlay & Co.*[1]) It is not correct to say as Fernando J. said in the connected case *39 N. L. R. 105* that this statement was *obiter*. The case of *Madar Saibo v. Sirajudeen*[2], on which Fernando J. relied, is really in our favour. It merely decided that as against a stranger the only persons entitled to an action were the holders of the legal title. Similarly at the dissolution of the second partnership their beneficial interest vested in the third and under a power of sale in the partnership deed was conveyed to the appellants. The interests of the partners at the dissolution of the partnership was only to an accounting. There is evidence D 1 and D 5 that the retiring partners were paid their shares. The fact that this property was partnership property is further indicated by P 9 which was a transfer by a retired partner and the heirs of a deceased partner in which it is stated that this

[1] *29 N. L. R. 65.* [2] *17 N. L. R. 97.*

was partnership property. The inventories prove nothing. But D 10 which was an application to Court to sell by the administrators of one of the partners described this as part of the partnership assets. It is submitted that the previous case *Ammal v. Ibrahim*[1] was wrongly decided on the law. In any event the decision on the facts in that case was that the property in dispute there was not partnership property. The statement of the law was *obiter*. If the view of the law is not *obiter* this appeal should be referred to a divisional or full Court, as that view is wrong.

L. A. Rajapakse (with him *M. M. I. Kariapper*), for plaintiffs, respondent.—The Supreme Court as a Court of Appeal decided the same questions of law and fact between the same parties in *Ammal v. Ibrahim.* The same Court should not and cannot refuse to follow the earlier decision. *Judicial comity* or courtesy of Courts require that Courts of co-ordinate jurisdiction or of equal rank should follow the decisions of one another, even if the decision is based on a wrong principle. (*Merry v. Nickalls*[2].) The whole theory of our legal system is based on that; otherwise there will be no finality in the law. If the principle is wrong, it is for a higher Court—the Privy Council—to correct it and settle the principle. *Vilazquez v. Com. of Inland Revenue*[3]; *The Vera Cruz*[4]; *Lyons v. Lond. and Midland Bank*[5].

[WIJEYEWARDENE J.—Are two Judges of this Court bound by a decision of two other Judges ?]

Yes, otherwise it will lead to endless confusion and misery of litigation. See *Wake v. Varah*[6]; but in cases where the previous decision was not appealable to a higher Court and the second Court is satisfied the decision is obviously and clearly wrong, the matter may be considered by a Full Court. See *Jane Nona v. Leo*[7]; *Leech v. N. Staffordshire Rly. Co.*[8]; and *Beale on Interpretation, pt. 1, s. iii, p. 29 et seq.*

[HEARNE J.—May two Judges not refer a case to a fuller Bench ?]

Not unless they are disagreed or the Chief Justice so orders. The practice of two Judges referring cases to a Divisional Court is not authorized by law. See sections 41 and 54A of the Courts Ordinance, No. 1 of 1889.

Another ground on which this appeal should be dismissed is that it involves a question of fact. The decision of the trial Judge should not be disturbed. He has held that the land in question was not bought with partnership money, nor formed partnership property. He has rejected the evidence of the appellants that the share of the respondents was by consent deposited in a branch firm.

Moreover, P 3 *ex facie* vests full title in the vendees. The onus is on the appellants to prove it was bought with partnership money or that a trust was created. They have not discharged that onus. They have suppressed their books, see P 36 and P 35, and produced only two books D 1 and D 7 prepared *ad hoc*. They are forgeries and unreliable.

[1] *39 N. L. R. 105.*
[2] *(1872) L. R. 7 Ch. 733 at pp. 749-751.*
[3] *(1914) 3 K. B. 458 at 461.*
[4] *(1884) 9 P. D. 96 at p. 98.*
[5] *(1903) 2 K. B. 135 at p. 138.*
[6] *(1876) 2 Ch. D. 348 at 357.*
[7] *25 N. L. R. 241 at pp. 247 & 250.*
[8] *29 L. J. (M. C.) 150 at p. 155.*

Even if the legal estate was in the vendees on P 3 and the beneficial interest was in the plaintiffs, the latter could not be *transferred* from one plaintiff to another orally. The partnerships were different ones. Even in English law a writing is necessary to transfer an equitable interest in land. See section 9 of the *Statute of Frauds*. The provisions of our Ordinance of Frauds are more stringent. See *Arseculаratne v. Perera*[1]. Section 2 of our Ordinance No. 7 of 1840 clearly states that "a contract for establishing *any* interest in land" is void unless it is notarially executed. "Any interest" includes an equitable interest. P 28 and P 29 are not deeds *transferring* title, but are only partnership agreements. The decision in *Narayanan Chetty v. James Finlay* (*supra*) is *obiter*, and *Ammal v. Ibrahim* (*supra*) is good law. Section 22 of Ordinance No. 7 of 1840 read with section 21 shows that without a deed of *transfer* the title (both beneficial and legal) in the seven vendees could not vest in the second or third partnerships.

The decision of law in *Ammal v. Ibrahim* is not *obiter*. That case decided (1) that the land in question did not form partnership property, and (2) even if it did, the beneficial interest could not pass from one partnership to another without a notarial document.

The conduct of the parties as borne out by the documentary evidence shows that the land did not form part of the partnership assets. See P 4, P 7, P 11, P 14, P 16. Valuable consideration has been paid by the appellants in making the purchases on P6, P 19, P 20, P 24. Rents have been paid as are said to be due by the partners to the co-owners. See P 7, P 14, P 16, P 18, P 27, P 28, P 29.

The vendees on P 3 remained co-owners of the land, while some of them and certain others became partners in regard to the movables and stock-in-trade. (*Lindley (6th ed.), pp. 409, 410, 415, 416, 418, 419 and 421.*)

The appellants have perpetrated a fraud on the plaintiffs who are a purdah widow and minors in India.

H. V. Perera, K.C., in reply.—The beneficial interest of the partners in plaintiffs property is joint. (*Ashton v. Robinson*[2].) This appeal need not be referred to a fuller Court. It can be decided here.

Cur. adv. vult.

September 13, 1938. HEARNE J.—

The action filed by the plaintiffs was one for the partition of land at Haputale.

It is common ground that the land in question was conveyed by P 3 on May 1, 1902, to (1) Kawana Kader Ibrahim Rawther, (2) Ana Mohamadu Kanny Saibo, (3) Kawanna Cader Ibrahim Saibo, (4) Pawana Sheik Adam Saibo, (5) Pawanna Ibrahim Saibo, (6) Ena Usoof Saibo, and (7) Kuna Ahamadu Saibo.

These seven persons had become partners upon an agreement dated April 4, 1902 (P 27), and the conveyance under P 3 was executed during the currency of the partnership.

Pawanna Ibrahim Saibo died intestate in 1915. It is claimed by the plaintiffs that under P 3 he was entitled to an undivided 1/7 plus 2/63 shares on a deed of conveyance No. 361 dated May 14, 1912, and that he thus left 11/63 shares to which his widow (the first plaintiff) and his sons

[1] *29 N. L. R. 342 at p. 345.*

[2] *(1875) 2 Eq. 25.*

(the second and third plaintiffs) became entitled, the former to 11/504 or 22/1,008 shares and the latter each to 77/1,008 shares.

The history of the 2/63 shares is traced by the plaintiffs in this way.

Ana Mohamadu Kanny Saibo (the second partner) died on August 2, 1906, leaving as his heirs his widow Ameer Beebee Ammal who became entitled to an undivided 1/4 of 1/7, *i.e.*, 1/28 shares and his daughter Hamida Beebee Ammal who became entitled to the remaining 3/28 shares.

Ameer Beebee Ammal, Hamida Beebee Ammal and Ena Usoof Saibo (the sixth partner) sold and conveyed their 1/28, 3/28 and 1/7 shares respectively, a total of 2/7 shares, to nine persons of whom Pawanna Ibrahim Saibo was one. Ibrahim Saibo thus became entitled to 1/× 2/7 or 2/63 shares. The defendants admit the execution of deed of conveyance No. 361. The facts pleaded by the defendants may be summarized thus: The land at Haputale was partnership property and was treated as part of the assets of the branch there. Ana Mohamadu Kanny Saibo (the second partner) died in August, 1906, and his heirs were paid his share of the capital and profits. Ena Usoof Saibo (the sixth partner) retired from the partnership and was paid his share of the capital and profits. (It is through these two that the plaintiffs trace their 2/63 shares.) The remaining five partners, *i.e.*, Kawanna Kader Ibrahim Rawther, Kawanna Cader Ibrahaim Saibo, Pawanna Sheik Adam Saibo, Pawanna Ibrahim Saibo and Kuna Ahamadu Saibo, together with Ena Kader Batcha Saibo formed a new partnership constituted by P 28 dated September 17, 1906, " the land and premises at Haputale being treated as part of the assets of the said partnership ". During the subsistence of the second partnership Kawanna Kader Ibrahim Rawther (the first partner in the first and second partnership) and Kuna Ahamadu Saibo (the seventh partner in the first and the fifth partner in the second partnership) died. The heirs of the latter were paid their share of the capital and profits, the value of the land and buildings at Haputale being taken into account, while some of the heirs of the former were allotted his share in the business. The remaining four partners and five others formed a new partnership constituted by P 29 dated March, 1912, the land and premises at Haputale again being treated as partnership property. In terms of the powers conferred by P 29 two of the partners sold the entirety of the land and premises to seventh and eighth defendants and K. K. Ibrahim Saibo and Kawanna Ibrahim Saibo in April, 1917 (P 21), and it is under P 21 and subsequent conveyances that the seventh to sixteenth defendants claim that " they are the lawful owners of the entirety of the land ".

Apart from a question of *res judicata* which Counsel for the respondents raised but later abandoned, it was agreed that the determination of this appeal involved the consideration of three questions, two of law and one of fact.

On the question of fact, viz., whether the land at Haputale was partnership property, Counsel for the appellants admitted that, assuming it was held that it was not, the appeal must fail.

But even assuming that it was held that it was, two questions of law required to be answered in his favour before the appellants could succeed. The first was this: did the grantees under P 3 become, as the plaintiffs-respondents say, co-owners of the land or, as the defendants-appellants say, was the legal title only in them and was the beneficial title in the partners *qua* partners. The second was whether, assuming the beneficial title was in the partners *qua* partners, their beneficial title could pass to a second set of partners and then to a third without a conveyance.

In the arguments addressed to the Court reference was made to the case of *Ammal v. Ibrahim* [1], and the view was pressed upon us by Counsel for the respondents that the questions of law involved in this appeal were decided in the case referred to. It appears to me on a perusal of the judgment in that case that it was decided on a question of fact, viz., that the land in dispute was not partnership property, and that the Judges who heard the appeal did no more than express their doubts that the law, as propounded by Counsel for the appellants in this appeal, is the law of Ceylon.

On the first question of law Fernando J. who wrote the judgment of the Court said: "It may of course happen that a person who is not himself a partner, may hold property in trust for the partners, while the legal title is in the grantee, but it is *difficult* to see how such a position can arise as the result of a deed which *ex facie* transfers the property to the partners themselves".

On the second question of law he said, "It *seems*, therefore, that this judgment (*Narayanan Chetty v. James Finlay & Co.* [2]) is no authority for the proposition that the *cestui que* trust can transfer his interest to a total stranger without any writing whether notarial or otherwise. It seems inconvenient, to say the least, that the interests of a *cestui que* trust can pass by mere consent of parties and quite unknown to the trustee himself, because it would be difficult for the trustee at any particular time to ascertain who was the *cestui que* trust in whom the beneficial interest vested".

"In the case before us, however", he went on "the conduct of the parties themselves appears to indicate that each of the seven grantees was regarded as the full owner of his one seventh share . . . . .". He then considered the facts and on a finding regarding the facts favourable to the appellants the appeal was allowed.

I do not think the Judges intended that the doubts they expressed were to be regarded as an authoritative pronouncement of the law.

The facts in the present appeal and the construction of the documents lead me strongly to the view that the land in dispute was partnership property and was treated as such, and the questions of law which I have stated must, therefore, be categorically answered.

The law of partnership in Ceylon is the same as that in England but the introduction into Ceylon of the law of partnership obtaining in England does not introduce into Ceylon any part of the law of England relating to the tenure or conveyance or assurance of, or succession to any land, or other immovable property, or any estate, right or interest therein (Ordinance No. 22 of 1866).

[1] *(1937) 39 N. L. R. 105.*

[2] *29 N. L. R. 65.*

The decision of the first legal question solely with reference to the law of partnership in England presents, I venture to think, no difficulty. If one partner purchased property in his own name and it was paid for out of partnership moneys, he would be deemed to hold the property in trust for the partnership, and if the property was purchased, as in this case, in the names of the seven persons who alone constituted the partnership they would also hold the property in trust for the partnership ; or, to use the language employed here in this connection the beneficial title in the property would be in the partnership. Having regard to the law of partnership what the term "beneficial title" connotes is not that any particular partner has a right to take away any portion of the partnership property and to say that it is exclusively his, but that he is entitled to a share in his proportion of the partnership assets after they have been realized and converted into money, and all the partnership debts and liabilities have been paid and discharged. For these reasons the beneficial interest of partners in partnership property may be said to be joint.

The doubt expressed by Fernando J. was whether "the beneficial interest in the land could vest in a firm or partnership as such without a conveyance expressly in favour of the firm or partnership". The deed Fernando J. was there considering was one in which one partner purported to convey to himself and six others as co-partners trading under the name of "K. Abram Saibo & Co." and their respective heirs, executors, administrators and assigns, all his estate, possession, rights, title, &c., in certain land. It is unnecessary for me to state whether in my view the question of a further conveyance in that case did in fact arise. For, on a consideration of the deed relevant in this case in which a third party conveyed the land in dispute to seven persons trading as K. Abram Saibo & Company, their successors (a significant word) and assigns, there is, in my opinion, no doubt that the deed vested the property in the partnership, that is to say, that the beneficial title was in the partners as such, and that no further conveyance was necessary in order to satisfy the requirements of our law.

I come to the second point of law.

It is claimed by the appellants that on the death of the second partner in the first partnership and the retirement of the sixth, an accounting with the heirs of the former and with the latter having taken place, the beneficial interest in the property, for the purposes of the partnership business, was in the remaining five. These five did not thereafter realize all the partnership property and divide the proceeds of sale in the proportion to which each was entitled. They formed a second partnership consisting of themselves and a sixth person. The latter made certain contributions and the beneficial interest in the land which was brought into the second partnership became the beneficial interest of the second partnership for the purpose of the business of that partnership; that is to say, each member of the second partnership was entitled, on a dissolution, to a share in the proportion of the partnership assets, including the land, after they had been realized and converted into money and all partnership debts had been paid. Similarly on the death of two of the partners of the second partnership, the remaining four, instead of realizing all the

partnership assets and dividing the proceeds of sale after paying the debts and accounting with the heirs of the deceased partners, formed a third partnership consisting of themselves and five others and the beneficial interest in the land enjoyed by the second partnership became the beneficial interest of the third partnership for the purpose of the business of that partnership.

I have said that the beneficial interest of the partners in partnership property is, in my opinion, joint in the sense I have indicated. Further, as on the death of a partner it is only to an accounting and a share that his representatives would be entitled, the beneficial interest in land belonging to the partnership would remain in the members of the partnership for the time being, and if not required to be sold for the purpose of paying partnership debts, could by agreement form one of the assets of a second partnership, and thereafter, subject to the same conditions of a third. This frequently happens.

As is pointed out in *Lindley on Partnership (8th ed.) at p. 424,* " Where a change occurs in a firm by the retirement of one or more of its members, nothing is more common than for the partners to agree that those who continue the business shall take the property of the old firm and pay its debts, or that part of the property of the old firm shall become the property of those by whom its business is to be continued, whilst the rest of the property shall be otherwise dealt with ".

The objection raised by Counsel for the respondent was that the interests in land which the appellants assert passed by agreement from the first partnership to the second, and from the second to the third, could not and did not so pass in the absence of a conveyance, while the argument of Counsel for the appellants was that a deed was not necessary for the acquisition of beneficial interests.

In *Narayanan Chetty v. James Finlay & Co.* (*supra*) it was held according to the head note that " there is nothing in section 2 of Ordinance No. 7 of 1840, repugnant to the proof, by parol evidence, of the transfer of equitable interests in land arising out of a trust created by operation of law ". It was submitted by Counsel for the respondents that that case decided that the grantee of land subject to a trust could acquire the interests of the *cestui que* trust without a notarial instrument, and that the decision must be confined to the particular facts of that case. The Judges who heard the appeal in *Narayanan Chetty v. James Finlay & Co.* (*supra*) examined at length the provisions of section 2 of Ordinance No. 7 of 1840 and concluded that the Ordinance must be read as limited to acts of parties which are directed to affect the legal estate, and that it is not concerned with equitable interests in regard to which it has made no provision. Even if, as has been suggested, the case was decided on a wider principle than was necessary, I would respectfully adopt the views of the law as set out in the judgments of Garvin and Dalton JJ.

In my view the two legal questions involved in this appeal must be answered in favour of the appellants.

I would point out that Fernando J. did not say that the case of *Narayanan Chetty v. James Finlay & Co.* " was not an authority that the

cestui que trust can transfer his interest to a total stranger without any writing notarial or otherwise" but only that it seemed to him to be so.

In regard to the facts the trial Judge appears to have misconceived the position of the defendants when he said that, even if the property was purchased with the funds of the firm, " their purchase in the name of all the partners must be taken to be for their exclusive benefit and not for the benefit of partnerships that may or may not be constituted by the partners in future ". Again he does not appear to have considered the main question of fact in detachment from the questions of law. It is true that he says, " on the oral and documentary evidence before me I am of the opinion that the rights of the vendees on P 3 did not vest in the third partnership, but this appears to have been (and I use the word in no way derogatory to him) coloured by his view that " in the absence of an effectual vesting of the property in the second partnership according to the law of the country I fail to see how this property came to be considered part of the assets of it ". It appears to me that if he had fully taken into account the documents in the case, he could not have decided the matter without an examination in his judgment of the implication, contrary to his finding, of such documents as P 3 and P 9. I have had the advantage of reading my brother's judgment on the questions of fact involved in this appeal and I agree with the conclusions at which he has arrived.

If, as I hold, the beneficial title is in the appellants, the plaintiffs-respondents have made out no case for partition, even on the assumption that they have legal title in the shares set out by them.

I would allow the appeal with costs and dismiss the plaintiffs' action with costs.

WIJEYEWARDENE A.J.—

[His Lordship after stating the facts proceeds as follows :—]

A study of the various documents filed in the case leaves no doubt in my mind that the property in question was regarded by the vendees on P 3 and their representatives in interest as partnership property until the present dispute arose. The deed P 3 itself shows that the purchase by the seven individuals named in the deed was not for the purpose of holding the property as co-owners but for the purposes of the partnership established shortly before by P 27.

The vendees are described in the deed as persons trading under the name of K. Abram Saibu & Company, and the Notary who has drawn the deed has made a significant departure from the usual formula employed in deeds of conveyance in referring to the representatives of the vendees as " successors and assigns " and not as " heirs, executors, administrators and assigns ".

The deed P 9 of 1902 is as previously stated by me a deed of conveyance executed by a retired partner and the heirs of a deceased partner of the first partnership. The vendees were all the partners of the third partnership including P. Ibrahim Saibu under whom the plaintiffs claim.

This deed refers to the property in question as an asset of the partnership of K. Abram Saibu & Company and purports to be a conveyance to the vendees " carrying on business under the name and style of K. Abram

Saibu & Company ", under deed P 29. Though the entire consideration is mentioned in the body of the deed as Rs. 20,000 the attestation clause shows that only sums of Rs. 3,055.58 and Rs. 8,871.41 were paid in the presence of the Notary to the heirs of the deceased partner and the retired partner and that these payments were made by cheques issued by P. Abram Saibu & Company. The Notary does not mention that the vendors acknowledged the payment of the balance sums to them before the execution of the deed.

According to the appellants the partners looked into the accounts of the partnership and found that the shares of Mohamadu Kani Saibu the deceased partner and P. Esubu Saibu, the retired partner in the first partnership including Kadewatta as an asset of the partnership amounted to Rs. 8,871.41 and Rs. 3,055.58 respectively. The recitals in the deed P 12 of 1912 show that the accounts of the partnership have been looked into before the execution of P 12 while D 1 and D 5 show that the immovable properties were included among the assets of the partnership. On paying out the shares of Mohamed Kani Saibu and P. Esubu Saibu, the second partnership desired to obtain a conveyance of the interest of these partners in the legal estate of Kadewatta and other immovable properties and for that purpose the deed P 9 was executed. The oral evidence on this point is strongly supported by the statements in the deeds P 9 and P 12 and the documents D 1 and D 5. Though the respondents have questioned the genuineness of D 1 and D 5, I see no reason to reject them and it appears to me to be distinctly unfair to expect the appellants to lead more cogent evidence than they have been able to adduce with regard to transactions which took place over twenty-five years ago. The document D 1 bears the signature of P. Ibrahim Saibu, the predecessor in title of the plaintiffs and the witnesses called by the defendants have sworn to the fact that the document was signed by P. Ibrahim Saibu. As against this evidence there is only the statement of the third plaintiff, son of P. Ibrahim Saibu, who was a boy of thirteen when his father died in 1915. He says that he does not think that the signature on D 1 is the signature of his father. He does not state that he has seen his father signing any documents nor has any attempt been made to place before the Court the evidence of any witness who has compared the admitted signatures of P. Ibrahim Saibu with the signature on D 1. The plaintiffs also seek to throw doubt on the signature on D I by pointing to the fact that P. Ibrahim Saibu was ill for some time before his death in 1915 and that he therefore could not have signed D 1 at Haputale in 1911. The evidence of the plaintiffs however discloses the fact that P. Ibrahim Saibu was ill for less than two years prior to his death in India, in 1915, and I am not prepared to reject the positive evidence led on behalf of the appellants merely on the suggestions made by the plaintiffs. In view of the fact that one of the vendees on P 9 is the predecessor in title of the plaintiff this document militates very strongly against the contention of the plaintiffs that the property in question was not regarded as partnership property.

The three deeds of partnerships P 27, P 28, P 29 contain recitals which show that immovable property formed part of the assets of the various

partnerships and the appellants I think are entitled to rely on these recitals as supporting their plea that the property in dispute is an asset of the partnership in view of the failure of the respondents to show that any property other than this property formed an asset of the partnership.

The inventories P 4, P 7, and P 14 and the administration deed P 6 which is based on P 4, no doubt, appear to support the plaintiffs' contention that the immovable properties were not assets of the partnerships as these inventories mention in addition to a share of the partnership business an undivided share of the immovable properties.

One cannot, however, ignore the fact that these inventories are generally prepared on the deeds handed by the parties concerned to their lawyers and the person responsible for the preparation of the inventories may well have thought that he was required by the provisions of section 538 of the Civil Procedure Code, 1889, to include a share of the immovable properties in view of the deed of transfer P 3. Whatever may be the reason for the inclusion of the shares of immovable properties in these inventories, they do not afford any ground for drawing an inference that the parties concerned did not regard this property as partnership property. The administrator in whose name P 4 was prepared filed a motion D 10 in Court a month afterwards asking the sanction of Court to sell the undivided shares of the immovable properties stating that these properties formed part of the assets of the partnership. The document D 10 shows that it is unsafe to draw any inference adverse to the appellants from the fact that the inventories mention the shares of the immovable properties as separate assets.

The oral evidence led in this case shows that the value of the property was taken into account in assessing the shares due to the retired and deceased partners and I do not see any reason for not accepting such evidence as it is supported by the documents produced in the case. Moreover the learned District Judge has not stated in express terms that he rejects the oral evidence adduced in support of the appellants.

On the oral and documentary evidence in the case I have reached the decision that Kadewatta was acquired on account of the firm of P. Abram Saibu & Company and for the purposes and in the course of the first partnership.

I am further of opinion that this property has always been regarded by the original purchasers and their representatives in interest as partnership property. It now remains to consider whether this property became in law the partnership property of the second and third partnerships.

Ordinance No. 22 of 1866 introduced the English law of partnership to Ceylon subject however to the limitation that " nothing therein contained shall be taken to introduce into this Colony any part of the law of England relating to the tenure or conveyance, or assurance of, or succession to, any land or other immovable property, or any estate, right, or interest therein ".

The relevant provisions with regard to the transfer of interests in land are contained in section 2 of Ordinance No. 7 of 1840 which reads :—" No sale, purchase, transfer, assignment, 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 in 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 ".

By deed P 3 the legal estate in the property was vested in the seven persons named therein but the property was to be held subject to the condition imposed by operation of law that it should be available for the payment of the debts of the partnership and that after such payment the balance if any of the proceeds of sale should be distributed among the surviving partners according to the terms of the partnership deed, at the winding up of the business and affairs of the firm. The result would then be that while the legal estate was vested in the seven purchasers the beneficial estate would be in the partnership as indicated by me. The question of law that now arises for consideration is whether this beneficial estate of the first partnership could have been transferred to the second partnership and later on to the third partnership except by notarial documents executed according to section 2 of 1840. In *Narayanan Chetty v. James Finlay & Co.*[1], the Court had to consider the scope of this section. On a comparison of our Ordinance with the English Statute of Frauds (29 Car. 11 c. 3) Garvin and Dalton JJ. held in that case that Ordinance No. 7 of 1840 should be read as limited to the acts of parties which are directed to affect the legal estate in immovable property and should not be extended to apply to equitable interests.

I am unable to agree with the view of Fernando J. in *Ammal et al. v. Ibrahim et al.*[2] that the decision in *Narayanan Chetty v. James Finlay & Co.* (*supra*) is applicable only to the special facts in that case and should not be regarded as an interpretation of the scope of section 2 of Ordinance No. 7 of 1840 on the question whether the Ordinance regulates and governs the assignment of equitable interests created by operation of law.

On my findings on the question of fact and law the position is that while the respondents are entitled to the legal estate in certain undivided shares of the property the beneficial estate in the entire property is now vested in the appellants who do not desire the property to be dealt with under Ordinance No. 10 of 1863. I hold therefore that the plaintiffs are not entitled to maintain the present action and that the action shall therefore be dismissed with costs. The appellants are entitled to the costs of this appeal.

Appeal allowed.

[1] (1927) 29 N. L. R. 65.

[2] (1937) 39 N. L. R. 10.