1913.

Present: Pereira J. and Ennis J.

SAIBO *v.* SAIBO *et al.*

6—D. C. Colombo, 34,119.

Partnership—Parol evidence—Ordinance No. 7 of 1840, s. 21.

The provision of section 21 of Ordinance No. 7 of 1840 as to the necessity of a writing to "establish a partnership" means that the fact of the existence of a partnership cannot be proved except by means of a writing duly signed by the alleged partners; but when once a partnership has been proved to exist, the provision is not to be construed to mean that individual transactions by, or the settlement of any account between, the partners cannot be proved by parol evidence.

The correctness of the proposition that, after the dissolution of a partnership, parol evidence may be led to prove its past existence in order to adjust accounts as between the quondam partners, doubted.

THE facts are set out in the judgment.

Bawa, K.C., for plaintiff, appellant.

A. St. V. Jayewardene, for defendants, respondents.

Cur. adv. vult.

March 4, 1913. PEREIRA J.—

In this action the plaintiff seeks a dissolution of what he terms a partnership existing between himself and the defendants, and he prays for an account of the assets and liabilities and for a distribution of any balance that may remain to the credit of the partnership. It is admitted that the capital of the allegal partnership exceeds Rs. 1,000, and the question is whether the plaintiff can be allowed to prove the existence of the partnership pleaded unless he produces a writing in terms of section 21 of Ordinance No. 7 of 1840. Omitting immaterial words, that section provides as follows: "No promise, contract, bargain, or agreement, unless it be in writing and signed by the party making the same, shall be of force or avail in law for establishing a partnership where the capital exceeds one hundred pounds, provided that this shall not be construed to exclude parol evidence concerning transactions by or the settlement of any account between partners." To my mind the interpretation of these words presents no difficulty. They mean that the fact of the existence of a partnership cannot be proved except by means of a writing

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duly signed by the alleged partners; but that when once a partnership is proved to exist, the enactment is not to be construed to mean that individual transactions by, or the settlement of any account between, the partners cannot be proved by parol evidence. I take it that the concluding words of the enactment have been added to it merely *ex abundanti cantela*. There, however, are conflicting decisions on the question of the true meaning of the words quoted above. In the case reported at page 195 of *Vanderstraaten's Reports*, it was held that the section meant that a person could not by means of parol evidence prove an agreement to constitute a partnership. This ruling was followed in *Bawa v. Mohamado Cassim*,[1] in *Mendis v. Pieris*,[2] and in *Pate v. Patê*.[3] On the other hand, in *Weerappa v. Alagappa*,[4] *Silva v. Nelson*,[5] and *Arunasalam v. Shand* [6] a contrary view was taken by this Court. The balance of authority is, I think, in favour of the view that I have taken above, except that it has been further laid down that, after the dissolution of a partnership, parol evidence may be led to prove its past existence in order to adjust accounts as between the quondam partners. I confess I do not understand the reason for this distinction. The question, however, as to the proof by parol evidence of a partnership already dissolved does not arise in the present case. I am quite at one with my brother Wood Renton in the opinion that he has expressed on this point in D. C. Colombo, No. 9,731.[7] For the above reasons I consider that the District Judge's decision is right, and that it should be affirmed with costs. I would reserve to the plaintiff the right to institute an action in such other form as he may be advised for the recovery of any sum of money belonging to him that may have found its way into the hands of the defendants by reason of their having carried on business together.

ENNIS J.—

This was an action for partnership account and for dissolution of partnership, and the only question on appeal is whether it is mantainable in the absence of a written agreement establishing the partnership.

The first case on the point is that recorded in *Vanderstraaten's Reports 195*. In that case the Court held that the effect of seection 21 of the Ordinance No. 7 of 1840 was that a parol contract was insufficient to establish a partnership where a man seeks to compel another to act as a partner; but where the partnership has in fact been carried out and terminated, and there is on a balance of account a sum due from one partner to another, the proviso of

[1] *1 C. L. R. 53.*
[2] *1 C. L. R. 98.*
[3] *(1907) 11 N. L. R. 254.*
[4] *6 S. C. C. 119.*
[5] *1 Br. 75.*
[6] *1 Br. 5.*
[7] *S. C. C. Min., Nov. 4, 1910.*

the Ordinance clearly enables the plaintiff to prove his case by parol evidence, as well with regard to the fact that a partnership had existed as with regard to the balance due.

In the present case the plaintiff prayed for a dissolution of partnership, but it has been argued on appeal that this is a mere technicality, as the partnership was one at will only, and that the plaintiff could to-morrow dissolve the partnership and take action for account.

The decision in the case reported in *Vanderstraaten* was dissented from in *Weerappa v. Alagappa*,[1] but followed in the case of *Singho Appu v. Amarasuriya*,[2] in which Hutchinson C.J., referring to the case in *Vanderstraaten's Reports*, said, "that perhaps leaves no effect to the enactment as far as regards partnership, except possibly in the case (as to which I express no opinion) where the partnership is still in existence when action is brought, or where the verbal agreement has never been acted upon."

I entirely agree with the opinion of Wood Renton J. in the unreported case, D. C. Colombo, No. 9,731,[3] as to the construction to be placed on sub-section (4) of section 21 of the Ordinance No. 7 of 1840.

In the present case the partnership had not been dissolved at the time of action, and all the previous cases agree that in that event parol evidence to prove the existence of the partnership is not admissible.

I accordingly agree with the order proposed by my brother Pereira.

Affirmed.

[1] *6 S. C. C. 119.* [2] *2 Leader L. R. 87.*

[3] *S. C. C. Min., Nov. 4, 1910.*