1938 *Present :* **Poyser S.P.J. and Keuneman J.**

BALASUBRAMANIAM *v.* VALLIAPPAR CHETTIAR.

S. C. No. 51 (Inty.) and S. C. 286 (F)—D. C. Colombo, 4,520.

Partnership—Parol evidence by way of defence—Stamps—Failure to supply stamps " together with " petition of appeal—Interlocutory appeal from an order admitting or rejecting evidence—Rejection of interlocutory appeal—Does it operate as an adjudication of the points raised in the appeal ?—Ordinance No. 7 of 1840, s. 21.

In an action brought by the executor of a deceased person to recover money on the basis of a gratuitous agency between the deceased and the defendant, the defendant is not precluded by section 21 of Ordinance No. 7 of 1840, from leading parol evidence of a partnership, in contravention of the section, in order to exclude the plaintiff's claim.

Silva v. Nelson (*1 Browne* 75) followed.

A tender of the deficiency in the value of stamps for the interlocutory appeal five days after the filing of the petition does not regularize the failure to tender the stamps " together with " the petition of appeal, even though the deficiency is made good within the appealable period.

An interlocutory appeal does not lie against the admission or rejection of evidence only.

The Supreme Court is free to consider the points raised in an interlocutory appeal rejected for non-compliance with the requirements of the Stamp Ordinance in the final appeal.

THE plaintiff as the executor of the last will of his father S. M. P. Pillai sued the defendant for the recovery of a certain sum of money on the footing that the defendant acted as the agent of S. M. P. Pillai in connection with the purchase and sale of tea and rubber coupons and that the sum claimed was the balance due by the defendant as such agent. The defendant denied that he acted as the agent of S. M. P. Pillai and further pleaded that he carried on business in partnership with the deceased and that the action could not be maintained in the absence of a written agreement as the capital exceeded Rs. 1,000. At the trial the learned District Judge held that the defendant was not entitled to lead evidence in proof of the alleged partnership. From this order an interlocutory appeal (S. C. No. 51) was filed. The trial proceeded and judgment was delivered in favour of the plaintiff. The defendant appealed from this as well (S. C. No. 286).

H. V. Perera, K.C. (with him *S. Subramaniam*), for plaintiff, respondent.—There is a preliminary objection to the hearing of the interlocutory appeal. On the day the petition of appeal was filed, sufficient stamps were not supplied for the decree or order of the Supreme Court and the certificate in appeal, but they were tendered five days later. In accordance with the decision in *Sinnapoo v. Theivanai and another* [1], the appeal should be rejected.

The interlocutory appeal was filed against the order admitting certain evidence. The final appeal is also on the same point. If the interlocutory

[1] *(1937) 39 N. L. R. 121.*

appeal had not been filed, it could have been argued at the final appeal. Here the appellant had the choice of two modes of procedure, he had elected one and he cannot make use of the other.

[KEUNEMAN J.—Is not there a decision which states that the admissibility of evidence should not be the subject-matter of an interlocutory appeal ?]

Yes, there is such a decision, but every order under the Civil Procedure Code is appealable.

[POYSER S.P.J.—Let this matter be stayed and let the final appeal be argued.]

F. A. Hayley, K.C. (with him *E. F. N. Gratiaen* and *J. A. T. Perera*), for the defendant, appellant.—In this case the appeal was filed on the first day and the necessary stamps were tendered within the appealable time. The rejection of the interlocutory appeal would not bar the hearing of the final appeal.

No agency had been pleaded in the plaint. No definite evidence had been given of the existence of an agency. It had to be inferred from the account books. The defendant was prevented from leading evidence to prove the existence of a partnership. If the business was a partnership, the plaintiff cannot maintain this action—but the defendant can lead evidence to show the true nature of the agreement—see *Silva v. Nelson* [1]. In *Pate v. Pate* [2], the Privy Council disagreed with a number of cases decided in Ceylon on section 21 of An Ordinance to Prevent Frauds and Perjuries, No. 7 of 1840, but *Silva v. Nelson* was not considered. Hence it cannot be said to have been overruled. The defendant is not seeking to enforce a contract or agreement, but he is trying to place the true nature of the agreement before Court. In *Hussey v. Horne-Payne* [3], it was held that the *Statute of Frauds* is a weapon of defence and not of offence. The English law is different, but there are parallel cases with respect to land—see *Kiri Banda v. Marikar* [4].

[POYSER S.P.J.—We like to hear you on the interlocutory appeal now, before you address us on the facts.]

Ramalingam Pillai v. Wimalaratne [5] is followed in *Attorney-General v. Karunaratne* [6], but there is no decision which has stated that the stamps could not be accepted if tendered within the appealable time. The Stamp Ordinance, 1909, is not very definite. When the document is filed there is nothing to be stamped, except the petition of appeal. The other stamps are merely handed over to be kept till the document comes into existence. If there is a deficiency of stamps the petition could be withdrawn and a fresh petition could be filed.

Counsel cited *Shah Mukhun Lal v. Baboo Sree Kishen Singh* [7].

H. V. Perera, K.C. (with him *S. Subramaniam*), for the plaintiff, respondent.—The Civil Procedure Code provides that a stamped petition of

[1] *(1898) 1 Browne 75.*
[2] *(1915) 18 N. L. R. 289 ; (1915) A. C. 1,100.*
[3] *(1879) 4 A. C. 311.*
[4] *(1917) 20 N. L. R. 123.*
[5] *(1934) 36 N. L. R. 52.*
[6] *(1935) 37 N. L. R. 57.*
[7] *(1868) 12 Moore's Indian Appeals 157.*

appeal must be field. This point was considered in *Mathes v. Mathes*[1] If there is a deficiency the document cannot be handed back. Under sections 33 and 34 of the Stamp Ordinance, 1909, the document should be impounded. *Salgado v. Peiris*[2] decides that stamps must be supplied at the time of filing the petition in insolvency appeals. Further the stamps must be affixed at the time of the execution. Hence the petition had not been properly stamped. Though documents—the decree and the certificate of appeal in the Supreme Court—come into existence later, it was held in *Attorney-General v. Karunaratne* (*supra*) that the stamps should be handed at the time of the filing of the petition of appeal.

[POYSER S.P.J.—The point whether the stamps were handed within the appealable time was not considered. The only question was whether relief could be granted.]

Under section 756 of the Civil Procedure Code, various things had to be done from the time of the filing of the petition. He could not state that he could have waited till the last date allowed. The case of *Mathes v. Mathes*[3] cannot be disinguished.

[POYSER S.P.J.—In this case the interlocutory appeal should not have been allowed to be filed.]

There are cases where it was held that if an appeal had not been filed in time his right is barred if the decision goes to the root of the cause—see *Thamotherampillai v. Ramalingam.*[4].

The appellant has taken a certain course. It cannot be said that he relies on the other merely because the former proved abortive.

The case was fought on the basis of an agency. Where a plaintiff comes into Court alleging a partnership, the defendant can take the benefit of section 21 of Ordinance No. 7 of 1840. If third parties claim any benefit under a partnership, the partnership must be in writing—see *Rajaratnam v. The Commissioner of Stamps*, which follows *Pate v. Pate* (*supra*). If the defendant says that he is entitled to half the profits, it must be shown in the writing. If the Legislature says that a fact must be proved in a certain way, it must be proved in that particular way, however hard it may be—see *Idroos v. Sheriff*[5]; *Abeyagoonesekera v. Mendis*[6]. Further there is no reference anywhere that the deceased made contributions.

Cur. adv. vult.

May 27, 1938. KEUNEMAN J.—

The plaintiff who is the executor of the last will of S. M. P. Pillai brought this action alleging that about March, 1934, the defendant requested the deceased Pillai to give money and/or hand cheques to the defendant for the purpose of arranging for the transfer of tea coupons from various persons to the said Pillai; that the said Pillai had given the defendant money aggregating to Rs. 51,657.50 for this purpose; that between March, 1934, and March, 1935, the defendant had purchased tea coupons or entered into agreements to purchase tea coupons for a certain amount; defendant had paid to Pillai or accounted to him for Rs. 28,834; and that Pillai had died on March 11, 1935. On the 1st cause of action plaintiff

[1] *(1937) 9 C. L. W. 141.*
[2] *(1909) 12 N. L. R. 379.*
[3] *(1937) 9 C. L. W 141.*
[4] *(1915) 18 N. L. R. 449.*
[5] *(1932) 34 N. L. R. 359.*
[6] *(1938) 11 C. L. W. 15.*
[7] *(1925) 27 N. L. R. 231.*

claimed that Pillai had delivered tea coupons amounting to 6,256 lb. to defendent who sold these coupons and received the sum of Rs. 2,377.28. The 2nd cause of action alleged that defendant had failed and neglected to deliver certain agreements for purchase of tea coupons to the amount of 172,094 lb., or to account for such agreements or coupons receivable thereunder, and to account for or to pay to Pillai the proceeds of the transactions relating to certain tea coupons for 192,116 lb. On this count the plaintiff claimed the sum of Rs. 29,648.54. Alternatively the plaintiff prayed for an accounting.

On July 31, 1936, certain issues were framed which were as follows :—

(1) Did the deceased S. M. P. Pillai advance to the defendant various sums of money between March 1, 1934, and December 25, 1934, aggregating to a sum of Rs. 51,657.50 for the purpose of purchasing tea coupons and for entering into agreements for the purchase of tea coupons ?
(2) Did the defendant on deceased's behalf purchase tea coupons and enter into agreements for the purchase of same with the money so advanced or out of the sale proceeds of the said tea coupons ?
(3) Did the defendant fail to hand over to the deceased the tea coupons or agreements of sale receipts ?
(4) Did defendant fail to account for the sums advanced by the deceased or for the tea coupons purchased and sold by him or for agreement for the purchase of tea ?
(5) What sum or sums of moneys is due to the plaintiff from the defendant ?
(6) Were the defendant and the deceased at all times relevant carrying on business in partnership for the purchase and sale of tea coupons ?
(7) Was the capital of the said partnership business over Rs. 1,000 ?
(8) Was the agreement between the defendant and the deceased for establishing the said partnership in writing and signed by the defendant and the deceased ? Were the transactions referred to in the plaint entered into in pursuance of the said agreement of partnership ?
(9) If so, can the plaintiff maintain this action ?
(10) Is it open to the defendant to prove a partnership on parol evidence ?
(11) Did the deceased deliver tea coupons for 6,256 lb. to the defendant for the purpose of sale ?
(12) What is its value ?

Although no definite issue was raised on the question of agency, the learned District Judge appears to have treated the questions raised by the issue as amounting to an allegation by the plaintiff that the defendant acted as agent for Pillai gratuitously, and both parties appear to have conducted their cases on that footing, and the appeal was argued upon that basis.

At an early stage in the proceedings objection was taken by the plaintiff to parol evidence being led by the defendant in respect of issues 6, 7, 8, and 9, and the learned District Judge ruled that parol evidence could not

be led on the point. This order was the subject-matter of the interlocutory appeal No. 51 and was also questioned in the final appeal No. 286. The trial then proceeded, and in the result the learned District Judge entered judgment for the plaintiff for the sum of Rs. 4,051.92 as balance of cash to be returned by the defendant to the plaintiff, and a further sum of Rs. 18,018 as representing the value of tea coupons standing in the defendant's name for which he has failed to account to the plaintiff. The aggregate of these two sums was Rs. 22,059.92. From this judgment the defendant appealed in final appeal No. 286.

It would be more convenient to deal first with the learned District Judge's ruling with regard to issues 6 to 9. The evidence which the defendant proposed to give on this point was in contradiction of the plaintiff's allegation that the defendant had acted gratuitously as the agent of Pillai. He proposed to prove that the relationship between the parties was one of partnership, and that in virtue of section 21 of Ordinance No. 7 of 1840 no action could be maintained by the plaintiff. Objection was taken by Counsel for the plaintiff to any parol evidence being led by the defendant to establish the partnership. The learned District Judge after discussing certain cases ruled that "the principle to be deduced from these decisions is that for whatever purpose no parol evidence can be adduced to prove the existence of a partnership where the capital exceeds Rs. 1,000".

The learned District Judge depended mainly on the case of *Pate v. Pate*[1] decided by the Privy Council. In that case the plaintiff alleging a partnership between himself and the defendant brought an action for accounting. There was no written agreement between plaintiff and defendant, though the capital exceeded Rs. 1,000. Their Lordships considered the language of section 21 the relevant portions of which are as follows:—"No . . . . agreement, unless it be in writing and signed by the party making the same . . . . shall be of force and avail in law for any of the following purposes . . . . (4) for establishing a partnership where the capital exceeds Rs. 1,000". The proviso however permits third parties to sue partners and to offer in evidence circumstances to prove a partnership between such persons, and permits parol testimony for the purpose.

Their Lordships of the Privy Council after holding that the word "establishing" meant "establishing by proof *coram judice*" make this interesting comment: "In their Lordships' opinion the words 'for establishing a partnership' clearly apply to the present case which was *founded* on the allegation of an agreement, not expressed in any writing, of which parol evidence was adduced for the *purpose of establishing a partnership as the basis of the suit.* The agreement was in their opinion of no force and did not avail in law unless it could be brought within the proviso. They are unable to accept the somewhat unpractical contention that 'establishing' here specially refers to cases (if such there be) where the plaintiff seeks to establish his disputed right to be a partner, and not to cases where the parties have acted as if they were partners in fact and some dispute has arisen as to their partnership rights or property *inter se.*"

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

Now clearly their Lordships were dealing with the case where the suit was founded on the allegation of partnership, where no written agreement was produced, and where parol evidence was adduced for the purpose of establishing a partnership as the basis of the suit. And the later language on which great stress was placed must be read in relationship to these facts. The passage which was emphasized runs as follows :—

> " Whenever the law enacts that the truth shall be proved by one form of testimony only, and not by all admissible and available forms there is peril of doing injustice for the sake of some general good, and even of enabling some rogue to cloak his fraud by taking advantage of a statutory prescription the policy of which was the prevention of fraud ".

The present case stands on an entirely different footing. The plaintiff alleges that there was a gratuitous agency on the part of defendant in relationship to Pillai. The defendant seeks to rebut that allegation, and to prove that the relationship between these persons was one of partnership, but that in consequence of the absence of any written agreement, that relationship was of no force or avail at law, and that the plaintiff cannot maintain this action. The defendant cannot be said to found his case on the allegation of partnership, nor to make parol evidence the basis of his suit. On the contrary his allegation is that the relationship between the parties was such that it was of no force or avail at law. If a defendant in this position were not allowed to give such evidence, a ready means would be available for a dishonest plaintiff so to frame his action as to escape the effect of section 21.

Counsel for the respondent also referred to *Rajaratnam v. Commissioner for Stamps* [1]. In this case the Commissioner had valued the property of a certain deceased. Objection was taken to the assessment on the ground *inter alia* that a particular business had been wrongly treated as belonging exclusively to the deceased. It was contended that the business was a partnership between the deceased and his two sons. In dealing with that contention Soertsz J. said, " The position that results from the evidence in this case is that there was a business conducted by these parties which cannot, however, be adduced to a Court of law as a partnership ' of force and avail ' because a rule of evidence stands in the way and prevents it from being so adduced ". In that case also the basis of the objector's claim was the partnership, but his claim was not accepted because it was of no force or avail at law.

Counsel for the appellant depended on the case of *Silva v. Nelson* [2]. In this case the plaintiff sued for remuneration on the footing that he was manager of a business entitled to salary and a percentage of profits. The defendant alleged that a partnership existed between himself and the plaintiff, which he admitted was not supported by a written agreement. The District Judge declined to allow any evidence to be led on this point. Bonser C.J. said in his judgment, " As I understand section 21 of Ordinance No. 7 of 1840 it is not open to a person who alleges an agreement of partnership which has not been reduced to writing to prove the existence of a partnership with a view to make that person liable for the debts of the partnership or to recover the profits. I do not think the

[1] *(1938) 11 C. L. W. 15.*

[2] *(1898) 1 Browne 75.*

effect of that section is to estop a person from setting up what the agreement really was. It cannot be competent for one of two partners to sue the other alleging that he was to have a share of the profits, and then object to the defendant's showing that the real agreement was that he was not only to share the profits but also the losses. That would be unreasonable in the present case".

I do not think that the fact that *Silva v. Nelson* is referred to in *Pate v. Pate* in conjunction with a large number of cases implies that their Lordships of the Privy Council meant to deal with and overrule the particular point in question, which was not before them for decision. I may also refer to the dictum of Lord Selbourne in *Hussey v. Horne-Payne* [1],

"The Statute of Frauds is a weapon of defence not offence".

In the circumstances I think that the order of the learned District Judge disallowing evidence on issues 6 to 9 was wrong.

One further matter remains to be discussed in this connection. When the proctor for the defendant filed the interlocutory petition of appeal No. 51, he tendered stamps for the decree or order of the Supreme Court and the certificate in appeal, but there was a deficiency in the value of these stamps. This deficiency was not made good till five days later but within the appealable time. Objection is taken to that appeal on the ground that the stamps were not tendered 'together with' the petition of appeal, as required by Schedule B, Part 2, Miscellaneous, of the Stamp Ordinance. A number of authorities were cited in this connection including *Attorney-General v. Karunaratne* [2], decided by a Bench of three Judges; and *Mathes v. Mathes* [3] where a very similar point was decided. I think we must follow these decisions. It may have made a difference if the error was corrected immediately or so shortly after the tendering of the petition of appeal as to have formed a part of that transaction. But in this case there has been a lapse of five days, and I think the due tender of stamps cannot be said to have been made together with the petition of appeal. The interlocutory appeal No. 51 must accordingly be rejected. I do not think however, and no authority has been cited to us to show that we are precluded from dealing with this point in the final appeal No. 286. The interlocutory appeal, in my opinion, being an appeal against the rejection of evidence merely, was in any event wrongly constituted. I have a recollection, and Counsel for the respondent confirms this, that the point was decided some years ago that no interlocutory appeal lay against the admission or rejection of evidence only. The authority however cannot be traced. But in any case the rejection of interlocutory appeal No. 51, cannot be said to be an adjudication on the points raised in that appeal, and I think we are entitled to consider those points in the final appeal No. 286. The question of costs would however be affected.

If the question of the wrongful rejection of evidence had been the only point in the appeal, the case would have to be sent back for a new trial. But Counsel for the appellant went further and argued that the plaintiff had failed to establish his cause of action, viz., that the defendant acted gratuitously as agent of Pillai for the purpose of purchase and sale of tea coupons, and of entering into agreements for tea coupons. As regards

[1] *L. R. (1879) 4 A. C. 311 at p. 320; 48 L. J. Ch. 846; 41 L. T. 1.*

[2] *37 N. L. R. 57.*

[3] *9 C. L. W. 141.*

this point the learned District Judge held that it was clear from the evidence of Sangaralingam the kanakapillai and of the vakil and from the whole course of the transactions that the defendant acted as agent of Pillai gratuitously. It is necessary accordingly to consider that evidence.

His Lordship after discussing the evidence proceeds as follows :

On the whole evidence, I am satisfied that the plaintiff has failed to establish the gratuitous agency on which he relied, and in the circumstances his action must be dismissed and the appeal No. 286 allowed with costs in both Courts. In this case however plaintiff is an executor, and if he has misconceived his claim, and has another claim which can be legally established, I think the right should be reserved to him to bring any action on any ground not decided in this case, and it should be open to the defendant to take any objections he desires to such action. The interlocutory appeal No. 51 will however be rejected with costs.

POYSER S.P.J.—

I have had the advantage of reading the judgment of my brother Keuneman. I agree with it and there is very little that I desire to add.

In regard to the interlocutory appeal, S.C. No. 51, this must be rejected, for we are bound by the decision referred to by my brother. The rejection of an appeal, however, does not operate as an adjudication on any point raised in such appeal and we can consequently consider the subject-matter of that appeal, namely, the rejection of certain evidence, in the final appeal. There is authority for this proposition, namely, the case of *Fernando v. Fernando* [1], to which my brother referred me.

In that case Bertram C.J. held " that it was open to the appellant to raise a point by way of appeal against the order of the District Judge finally disposing of the matter, though he had originally taken the point as a preliminary objection and though an appeal was lodged against the decision of the Judge on this objection and that appeal was rejected as being out of time ".

Further, I agree that the interlocutory appeal was in any event wrongly constituted. The admission or rejection of evidence is, in my opinion, not a ground for an interlocutory appeal. There are obvious reasons why such appeals should not be allowed, for if there is to be an appeal on every question raised in regard to the admissibility or otherwise of evidence, litigation would become interminable. As Bertram C.J. observed in the case above referred to, " it is contrary to the general principle observed in this Court which discourages appeals against incidental decisions when an appeal may effectively be taken against the order disposing of the matter under consideration at its final stage ".

In regard to the final appeal, I, too, agree that the District Judge should have allowed evidence to be led in respect of issues 6, 7, 8, and 9.

Mr. Gratiaen, who appeared in the lower Court for the defendant, made it perfectly clear what his object was in making the application to lead evidence in regard to the partnership. He stated that his object was not to establish a partnership but merely by way of defence to negative the plaintiff's allegations that the defendant acted only as the deceased's agent.

[1] *6 Ceylon Weekly Reporter 262.*

The case of *Pate v. Pate* [1] overruled D. C. Kandy, No. 52,568 (1871)—and cases following that decision. *Silva v. Nelson* [2] was referred to in the judgment as being one of such cases. A passage however, in the judgment of Bonser C.J. in *Silva v. Nelson* (*supra*) which is set out in full in my brother's judgment, does not appear to have been specifically referred to in the argument before the Privy Council nor does such passage appear to have been specifically overruled, and I think Mr. Gratiaen's application in the lower Court should have been allowed.

In spite, however, of the Judge's rejection of the evidence that the appellant desired to lead, it is unnecessary that the case should go back for a fresh trial. There is sufficient material before us to enable us to determine the case. The District Judge has, I think, misdirected himself in coming to the conclusion to which he did. He has accepted the evidence of the vakil that the defendant admitted that in the tea coupon business he acted gratuitously as agent for the deceased, but in the rubber business they were acting in partnership. No doubt there must be very strong grounds for a Court of Appeal to dissent from a Judge of first instance on a finding of fact. There are such grounds in this case. In the first place, it seems in the highest degree improbable that the defendant and the deceased should make forward purchase of rubber in partnership while in another type of transaction—the purchase of tea coupons—their relationship should be one of principal and agent. Further, the District Judge has not appreciated, in my opinion, the importance of the correspondence in the case in regard to this point. The letters to which my brother has referred in particular D 1, D 3, and D 7 in my opinion prove beyond all doubt that the relationship between the parties was not one of principal and agent.

I, therefore, agree that the plaintiff has failed to prove this case, and that his action must be dismissed with costs on the terms set out by my brother.

Appeal allowed.