1938 *Present :* **Soertsz J. and de Kretser A.J.**

RAJARATNAM *v.* THE COMMISSIONER OF STAMPS.

192—D. C. Jaffna, 58.

Estate duty—Business carried on under vilasam—Admission of sons into partnership—No agreement in writing—Validity—Registration of business—Death of father—Claim by sons of a gift of one-third share of partnership—Proof of gift—Ordinance No. 7 of 1840, s. 21 (4)—Estate Duty Ordinance, No. 8 of 1919, s. 8 (1) (c).

A person, who carried on business under the vilasam S. V., decided in 1929 to admit his two sons into partnership and registered the business under the business name S. V. The business was described as a partnership, the partners being the father and the two sons. No written agreement of partnership was entered into. Although regular accounts were kept, there was no separate account of the capital of each partner nor was the distribution of profits and loss shown as against each partner.

In October, 1933, a document was executed declaring that they had been partners in the business. On the death of the father in December, 1933, it was claimed on behalf of the sons that S. V. had gifted a one-third share of the partnership to each of them and that these shares should be excluded from the property of the partnership passing on the death of S. V. for purposes of estate duty.

Held, that the partnership could not be established in the absence of a written agreement.

Pate v. Pate (*18 N. L. R. 289*) and *Idroos v. Sheriff* (*27 N. L. R. 231*) followed.

Held further, that there had been a gift by the father of a one-third share of the business to each of the sons and that *bona fide* possession and enjoyment of those shares had been assumed by the sons immediately upon the gifts being made and thenceforward retained to the entire exclusion of the father of any benefit to him by contract or otherwise, within the meaning of section 8 (1) (c) of the Estate Duty Ordinance.

The presumption created by section 109 of the Evidence Ordinance operates only when the existence of a partnership has been proved according to law.

THIS was an appeal from an order of the District Judge of Jaffna on an appeal taken to him under section 22 (3) of the Estate Duty Ordinance.

The facts are given in the headnote.

The only question argued in appeal concerned the extent of the share that passed in the business carried on under the business name of S. V. and registered in the name of the deceased S. V. and the two appellants as partners.

H. V. Perera, K.C. (with him *N. Nadaraja* and *N. Kumarasingham*), for the appellants.—A partnership need not always be proved by an agreement in writing. For tax purposes, if there is a partnership *in fact*, there is liability. There is ample evidence in this case of a partnership from March 2, 1929. A partnership can well exist without a formal agreement in writing.

Under section 21 (4) of Ordinance No. 7 of 1840, there was no onus on appellants to prove writing. *Pate v. Pate* [1] can be distinguished from this case because that was an action between two partners. The existence of a partnership can be established by oral evidence as held in *Idroos v. Sheriff* [2]. Section 21 (4) consists of two parts ; first part applies only to a case where a partner seeks to enforce a contract of partnership as against another partner.

In this case, the only question is whether there was a contract of partnership. No relief is sought for on the terms of the contract. The provisions of Ordinance No. 7 of 1840 are only of evidentiary value. The agreements referred to there are not declared null and void merely by reason of absence of writing. It is only where the basis of a suit is partnership that proof of writing is necessary.—Vide *Pate v. Pate* [1].

The existence of a partnership was clearly established. The onus was on the Crown, therefore, to prove that there was no partnership. See section 109 of Evidence Ordinance *De Silva v. De Silva* [3].

A taxing officer should not look at the forms of transactions, but at the substance of them. See Lord Tomlin's dictum in *Munro v. Commissioner of Stamp Duties* [4].

The Commissioner of Income Tax had already accepted the position that there was a partnership. This decision must operate as *res judicata.* The parties and the subject-matter were the same, parties being the executor and the Crown. Income tax authority is a Court. Crown is in the same position as a private party, although represented by different persons—*Spencer Bower on Res Judicata, pp. 128, 129 ; Hoystead et al. v. Commissioner of Taxation* [5].

Even if there was no partnership, there was certainly a co-ownership. Document A 4 is conclusive evidence that there was a gift of a third of the business to each of the two sons in March, 1929. Only a one-third share, therefore, belonged to the deceased. The distinction between a partnership and a co-ownership is of very little practical importance. The beneficial interest of the whole of the estate did not pass, even though it can be held that the legal interest passed.

J. E. M. Obeyesekere, C.C., for the Commissioner of Stamps.—The question in this case is really what share of the partnership property is liable to Estate Duty. The burden of establishing that only one-sixth share and not the whole property is liable, is on the appellants.

[Soertsz J.—What is your reply to Lord Tomlin's dictum in *Munro v. Commissioner of Stamp Duties* [6] ?]

It will not apply in all cases.

Crown's claim to tax the whole of the partnership property as belonging to the deceased can be put on an alternative basis. Assuming that the appellant's suggestion can be accepted that the partnership dates from March, 1929, and that a gift resulted from it, Crown's position is that it was a gift which could be caught up by section 8 (2) of the Estate Duties Ordinance, No. 8 of 1919. It was a gift with a reservation "*by contract or otherwise*". The evidence is clear that the father had some beneficial

[1] *(1915) 18 N. L. R. 289.*
[2] *(1925) 27 N. L. R. 231.*
[3] *(1935) 15 Cey. L. Rec. 36.*
[4] *(1934) 150 L. T. 145.*
[5] *(1926) A. C. 155.*
[6] *(1934) 150 L. T. 145.*

interest. See *Attorney-General v. Worrall* [1], *Crossman et al. v. The Queen* [2] *Earl Grey v. The Attorney-General* [3], *Attorney-General v. Johnson* [4], *Hanson on Death Duties (1931 ed.), p. 84.*

Alternatively, the evidence is that the deceased had by a notarial document (A 4) declared that he was a partner with his two sons. This document was made within four months of the father's death. If a gift can be presumed from it, it will come under section 8 (1) (c) of the Estate Duties Ordinance.

In any event, even if there was a partnership, agreement in writing is necessary. The whole basis of a partnership is the written agreement—*Pate v. Pate* [5].

The decision of the Board of Review cannot operate as *res judicata*—Income Tax Ordinance, No. 2 of 1932, sections 64, 69, 73 (3), and 75. The decision is final only for the purposes of assessment made under the Income Tax Ordinance. So far as Estate Duty is concerned, there is a different Ordinance. Income Tax Assessor is a party quite independent of the Commissioner of Stamps. They are two different persons representing the Crown in different capacities—*Leggott v. The Great Northern Railway Company* [6]; *Manton v. Cantwell* [7]; *Spencer Bower on Res Judicata, p. 128.*

As to applicability of section 109 of the Evidence Ordinance, there was no legal proof in this case that a partnership had at all existed.

H. V. Perera, K.C., in reply.—The evidence does show that the father and the two sons had acted as partners. Section 109 of Evidence Ordinance would therefore apply.

In construing a taxing Act, the presumption is that the Legislature has granted precisely the tax mentioned in the Statute, and no more—*Attorney-General v. Seccombe* [8].

As regards the gift, the onus was on the Crown to prove that, under the gift, there was a benefit reserved for the donor. There was no evidence to show that the deceased had drawn more than one-third of the profits in the business. The decisions cited by the respondent regarding gifts with reservations can be interpreted in appellant's favour.

Cur. adv. vult.

March 18, 1938. SOERTSZ J.—

This appeal is brought under section 33 of the Estate Duties Ordinance, against an order made by the District Judge of Jaffna on an appeal taken to him under section 22 (3) of that Ordinance. The learned Judge upheld the assessment made by the Commissioner of Stamps on two or three matters in dispute between him and the appellants, and found for the appellants on the third point. There is no cross-appeal by the Commissioner from the finding against him, and so far as the appellants are concerned their appeal was not pressed in regard to the decision given on the liability of the executor to pay interest on the estate duty from the expiration of one year from the date of the death of the deceased. The

[1] *(1895) 1 Q. B. 99.*
[2] *(1886) 18 Q. B. D. 256.*
[3] *(1900) A. C. 124.*
[4] *(1903) 1 K. B. 617.*
[5] *(1915) 8 N. L. R. 289 at pp. 291 & 292.*
[6] *(1876) 1 Q. B. D. 599.*
[7] *(1920) A. C. 781, at p. 788.*
[8] *(1911) 2 K. B. 688.*

one and only question debated on the appeal before us concerned the extent of the share that passed in the business in paddy, tiles, teak and other articles carried on under the business name S. V. and registered as from March 2, 1929, in the name of the deceased and the two appellants as partners.

The case for the appellants is that only a one-sixth passed on the basis that this business must be regarded as "tediatetam" and, therefore, belonged equally to the deceased and his wife, and that on his death, only a one-third of his half passed because the business belonged to the three of them. The Commissioner of Stamps, on the other hand, contends that the whole business was carried on by the deceased, and that the appellants did nothing more than assist him, and that on that footing when a half share is excluded for the wife of the deceased, the whole of the other half must be deemed to have passed at his death.

The appellants based their claim on the ground that from March, 1929, a partnership had subsisted between them and their father ; alternatively, on the ground that by virtue of what occurred in March, 1929, when the business was registered in the names of the three of them, there was at least, a gift of a one-third of the father's share to each of them, and that they took *bona fide* possession and enjoyment of it immediately and thenceforward retained it to the exclusion of the donor. They also set up a plea of *res judicata,* relying on the decision of the Board of Review when this question arose between them and the Income Tax Commissioner. Now, with regard to this question of partnership the point is whether the appellants can rely on it in the absence of such an agreement as is required by section 21 (4) of Ordinance No. 7 of 1840. The plea put forward on behalf of the appellants sounds like a voice from beyond the grave in which *Pate v. Pate*[1], buried the earlier decisions of this Court on the meaning of that section. The opinion of the Judicial Committee of the Privy Council delivered by Lord Sumner was that the words for "establishing a partnership" meant "establishing by proof *coram judice*"; that they constituted "a binding rule of evidence in Courts of law ; and whenever issue was joined on the question of partnership or no partnership, an agreement in writing duly signed was necessary to establish it "whether the partnership alleged to be agreed is or was, or is to be". Mr. Perera's contention that the proviso to section 21 (4) is merely illustrative, and that the section applies to cases in which partners are suing one another to enforce an agreement of partnership, and not to a case like the present cannot, I fear, be sustained in view of the opinion clearly expressed by the Board that the proviso is strictly "exceptive" and that the words for establishing a partnership refer to proof of a partnership *generally*. In this case admittedly, there is no written agreement, unless documents A 2, A 3, and A 4 can be said to constitute such an agreement. But here again authority confronts us. This Court, held, if I may say so, quite rightly, that documents such as these prove that the parties were carrying on business in partnership and nothing more. They do not prove what section 21 (4) requires, namely, that the agreement for carrying on the business in partnership was in writing (*Idroos v. Sheriff*[2]). Consequently the position that results from the

[1] *18 N. L. R. 289.*

[2] *27 N. L. R. 231.*

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 or avail" because a rule of evidence stands in the way and prevents it from being so adduced.

But we were pressed with section 109 of the Evidence Ordinance. That section enacts that "when the question is whether persons or partners . . . . . and it has been shown that they have been acting as such, the burden of proving that they do not stand to each other in "that relationship . . . ." is on the person who affirms it". Mr. Perera submits that apart from the oral evidence in the case, the documents A 2, A 3, and A 4 show that the appellants and the deceased has been acting as partners, and that, therefore, the burden is on the Commissioner of Stamps to show that they were not partners or had ceased to stand in that relationship. Now this section of the Evidence Act is in substance a re-enactment of section 27 of the Partnership Act of 1890, which says: 27 (2) "A continuance of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership". Ordinance No. 22 of 1866 introduced the English law of partnership into Ceylon, and provided that in regard to that matter "the law to be administered shall be the same as would be administered in England, in the like case, at the corresponding period". In view of this provision the same argument was addressed to the Judges in the case of *Raman Chetty v. Vyraven Chetty*[1], although on that occasion there does not appear to have been any reference made to section 109 of our Evidence Act, Ennis J. met it by stating that "in view of the decision of the Privy Council in *Pate v. Pate,* I am of opinion that this contention is not good. The Privy Council held that the Ordinance No. 22 of 1866 "in no way enlarged or diminished" the prior Ordinance No. 7 of 1840. The Ordinance No. 7 of 1840 provided that no agreement should be of force or avail in law for establishing a partnership, where the capital exceeds one hundred pounds, unless in writing and signed by the parties to be bound. The Privy Council interpreted this provision as an "evidentiary" one and section 27 of the Partnership Act or section 109 of the Evidence Act "would if followed enlarge this provision by allowing a presumption in place of documentary proof". I would adopt this view and hold that section 109 of the Evidence Act when examined in the light of section 21 of the Ordinance No. 7 of 1840 means that the presumption created thereby operates only when the existence of a partnership has been duly proved, that is to say, when it has been proved according to law. It occurred to me at one stage of the argument that perhaps as between the taxing authority and the subject liability on a question of this kind should be examined without the embarrassment occasioned by technical rules of evidence in order that the real position might be ascertained. But then it was at once obvious that if ultimately the question comes before a Judicial Tribunal, it is involved in the rules of procedure and of evidence by which Courts are required to guide themselves. The inevitable, although artificial, result therefore is that a partnership appear to have subsisted between these parties, but

[1] *2 C. W. R. 81.*

that the appellants are unable to establish it according to law. In this predicament, the appellants sought adroitly to turn the tables on the Commissioner of Stamps by contending that there was nothing to show that the capital of this partnership exceeded £100 at the time it came into being, for it is only partnerships of that magnitude that require to be attested by a written agreement. But the answer to that is, I think, two-fold. Firstly although there is no definite evidence to that effect, although it is not stated in so many words, all the facts and circumstances disclosed in the course of this case inevitably lead us to the conclusion that this capital was over one hundred pounds. Section 3 of the Evidence Act says that "a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable, that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists". Applying that principle I have no difficulty in this case in saying that the capital was over one hundred pounds. Secondly, it seems to me that this is an instance for the application of section 106 of the Evidence Act which says that, "when any fact is specially within the knowledge of any person, the burden of proving that fact is upon him". If, therefore, the matter rested entirely on this question of a partnership it would appear that a half share of the business must be deemed to have passed for the purpose of Estate Duty.

But, as I have already observed, there were other grounds on which it was claimed that only a sixth passed. There was the alternative claim that when in March, 1929, the deceased admitted his two sons into the business on an equal footing with himself as evidenced by A 4, there was, in effect a gift of a third of the business to each of his sons, and that that gift satisfied the condition necessary to ensure that their shares did not pass on his death. Counsel for the Commissioner of Stamps, however, strongly questioned these propositions. He maintained in the first place that there were no gifts made by the deceased or that, if these transactions amounted to gifts, that they were gifts which were caught up by section 8 (1) of the Ordinance because bona fide possession and enjoyment of the subject-matter of the gifts was not immediately assumed by the donees and thenceforward, retained to the exclusion of the donor or of any benefit to him by contract or otherwise". The finding of fact on this point was recorded by the District Judge in these words: "there can be no doubt that the deceased wanted to gift to the two sons a one-third share of the business, but the date when the gift was to take effect was not fixed". I am unable to agree with the latter part of this finding. The District Judge appears to have reached it because "no proper accounts were kept even after 1929". He probably means no separate accounts were kept to show their individual dealings. I will deal with the matter presently, but I wish to say at once that in my view, the fact that there were no such accounts does not in the circumstances of this case, negative an immediate gift. The District Judge appears also to have been influenced by the fact that "there was no effective transfer of any share of the business to the two sons". If by this he means that there was no document, then although the absence of a document such as is required by section 21 (4) of Ordinance No. 7 of 1840 affects the question

whether there was a partnership or not, it does not affect the quēstion of a gift, for in view of the nature of the gift set up in this case, a writing was not necessary for its creation. If the father declared the gift, or delivered its subject-matter to his sons, there was an effective gift. The evidence in the case shows that he did both. The rulings in *Attorney-General v. Worrall*[1]; *Crossman v. The Queen*[2]; *In re Clark*[3]; *Ld. Adv. v. Wilson*[4]; (the two latter cases have been available to me only to the extent of the summaries of them contained on page 84 of Hanson's *Death Duties, 1931 ed.*), as I understand them, are clear authority for holding that in this case there were gifts of a one-third share to each of the two sons. The next question is whether bona fide possession and enjoyment of the gifts was taken immediately by the donees and retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise. Mr. Obeysekere's contention was that the District Judge had rightly found that "on the evidence it is clear that the donees had not assumed bona fide possession and enjoyment of all that had been gifted to them and retained it to the entire exclusion of the donor". It is unfortunate that the District Judge does not state his reasons for this view. But from the trend of the cross-examination of Rajaratnam and from Mr. Obeysekere's argument this contention appears to be based on the facts (1) that Rajaratnam (that is one of the appellants stated in cross-examination that "the regular account books do not contain separate accounts showing my account, my brother's account and my father's account. In the ledger and journal there is only one account, Veeragathipillai & Sons . . . . Neither the capital of each partner nor the distribution of profit and loss is shown against each partner; (2) that he stated "between 1929 and the date of the death of my father, we did not look into accounts to find out how much each partner had drawn. Up to the date of my father's death, my father would have drawn the money he wanted from his own account. *He could have drawn the balance amount from the common account and given to the other children if he wanted to but he did not do so*".

In regard to (1) I think it is easy to over-emphasize the fact that the accounts of this business were not kept in accordance with approved methods of Western book-keeping. It is common experience in our Courts that firms of this kind have different methods of keeping their accounts, all of them more or less crude. No doubt labour is often multiplied by these methods, but it is always possible to ascertain from them the position of the partners at any point of time. The evidence of the accountant Sambamoothy shows that although drawings by these three persons were debited to the general account S. Veeragathypillai & Sons, they were debited in *the individual names of the drawers.* It is of great significance that when income tax was introduced into this Island in the year 1932, "proper account books were kept". The accountant says so; he adds "so far as the partnership account was concerned, there was only one account book. There was no capital account book. The drawings by the partners went into this common account. All the three could easily have drawn the money from the common account. The creditors were also entered in the same folio. The profits up to March,

[1] *(1895) 1 K. B. 99.*
[2] *(18) Q. B. D. 256.*
[3] *40 I. N. L. T. R. 11.*
[4] *21 S. C. C. 4th ser. 997.*

1933, were distributed among the three partners . . . . A return was made for 33-34 on the same basis allocating the profits to each of the three partners". In regard to (2), namely, the statement "he (*i.e.*, the father) could have drawn the balance amount from the common account and given to the other children if he wanted to", when regarded by itself it does appear to militate against the donees having taken bona fide possession and enjoyment of their shares to the exclusion of the donor, but it must be examined in the light of other statements and of the circumstances of the case in order to attach to it the weight due to it. The witness after making the statement I have quoted, qualified it at once by saying "when we had shares in the business, he could not have drawn the full amount". Then there is the evidence of D. Duraiswamy, another son of the deceased. He says "the arrangement between my father and my two brothers was that they should carry on the business in equal shares. This arrangement was come to in 1929. My father told me that this business had been registered in pursuance of this arrangement and that he was entitled to one-third share of the business". This statement of the deceased is an admissible statement under section 32 of the Evidence Ordinance ; it was a statement against the pecuniary interest of the deceased ; and it gains additional force from the fact that it is against the interest of the witness making it. None of the other children of the deceased appears to claim any interest in the business from him on the footing that a half passed. The position might perhaps have been different if the Commissioner of Stamps had shown that the comparative drawings of the three persons were such that the father had consistently drawn the lion's share and thus negatived a bona fide possession and enjoyment immediately by the donees of their shares. My own view is that even if the Commissioner had established that fact, it would by no means have been conclusive in the circumstances in this case. But he has not even sought to establish it. In the case of *Munro v. Commissioner of Stamp Duties*[1], Lord Tomlin in delivering the opinion of the Board said, "It is not always suffciently appreciated that it is for the taxing authority to bring each case within the taxing act", and in the case of *Attorney-General v. Seccombe*[2] Lord Sumner (then Hamilton) J. said "in construing a taxing Act the presumption is that the Legislature has granted precisely that tax to the Crown which it has described, and no more". In the expressive phrase employed by Lord Show of Dumfermilne in *Thomsom v. C. S. D.*[3], the Act must fit the facts "like hand and glove" before it can be enforced against the subject. In the case before us, the evidence shows that each of the appellants had drawn large sums of money out of the business. It seems possible if not probable that if an account is taken, they may be found to have drawn during the relevant period larger shares than their father. It is therefore impossible in my opinion to say that they did not have bona fide possession and enjoyment of their shares from the date of the gift to the exclusion of the donor. It is also significant that the money was banked in the names of the two sons. Nothing in the nature of a benefit accruing to the donor out of these shares has been shown to have been brought about "by contract or otherwise". For these reasons I would hold that only a sixth and not a

[1] *(1934) 150 Law Times 145.*
[2] *(1911) 2 K. B. 686.*
[3] *(1929) A. C. 450, at p. 155.*

half passed on the death of the deceased for the purpose of Estate Duty. In this connection it is noteworthy that it was not the case for the Commissioner of Stamps that what occurred in 1929 when the business was registered in the name of all three was a sham or a blind. At any rate the District Judge did not so find. He says: "In 1929 the deceased appears to have decided to make his two sons partners in the business. There can be no doubt about his intention but no partnership deed was executed". As Lord Tomlin pointed out in *Munro v. Commissioner of Stamp Duties* (*supra*) "it is the substance of the transactions which must be ascertained, and if when so ascertained the substance does not fall within the words of the statute it cannot be brought within them merely because the forms employed did not give true effect to the substance".

In view of the conclusion which I have reached on this point it is not necessary for me to address myself to the interesting question of *res judicata* discussed before us. I would allow the appeal with costs here and below. The result is that estate duty will be paid so far as the matters that were taken on appeal before the District Judge and concerned on the basis (1) that land No. 1 on deed No. 18,251 is not liable to duty, (2) that a one-sixth and not a one-half of the business must be deemed to have passed on the death of the deceased, (3) that the executor is liable to pay interest as charged by the Commissioner of Stamps on the estate duty.

DE KRETSER A.J.—I agree.

Appeal allowed.