MUTTIAH CHETTY *v.* DE SILVA.

1897.
October 26 and November 3.

D. C., Galle, 4,352.

Joint and several liability—Promissory note granted by one member of a firm in the name of the partnership—Non-joinder—Action against surviving partners.

Each member of a partnership is severally bound, and may be sued separately on a promissory note made by one in the name of the partnership; and so where, on the death of the partner who had granted the note, its holder sued thereon the surviving partners only—*Held*, that the action was not bad for non-joinder of the legal representatives of the deceased partner.

THE plaintiff in this case, who was the payee of a promissory note granted to him by one of the partners (since deceased) of a firm in the name of the partnership, sued the defendant, who was the surviving partner of that firm, for recovery of the amount of the note. Objection was taken by the defendants that the legal representatives of the deceased partner should have been joined in the action. The District Judge gave judgment for the plaintiff.

In appeal—

Dornhorst, for appellant.

Wendt, for respondent.

3rd November, 1897. LAWRIE, A.C.J.—

I would affirm. I take the law to be that when a partnership firm is pledged by the making of a promissory note by one partner in the name of the firm, every partner is bound severally, and may be sued separately for the whole sum mentioned in the note.

BROWNE, A.J.—

It appears to me that on the death of one partner the creditors of the firm have different rights in law and in equity.

In law their remedy is only against the surviving partners, unless the deceased was under a several as well as joint liability (*Lindley on Partnership*, 5th edition, 288-598).

In equity they are entitled to institute a suit for the administration of the estate of the deceased member and for payment of his debts, joint as well as several. It is to this right apparently that reference is made in *1. N. L. R. 350*.

In England, since the passing of the Judicature Acts, they are entitled to sue both the surviving partners and the executors of the deceased partner and obtain judgment against them all.

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Judgment against the latter would be (unless assets were admitted) limited to administration in due course, and to work it out the matter would have to be transferred to the Chancery Division (*ibid, 598*).

In Ceylon our Courts are Courts of both law and equity, so that the same right would be allowed him if he desired it; but while a creditor could pursue that double-barrelled remedy, it would be inconvenient he should pursue both in the one action, in view of the form of the decree to be made against the assets of a deceased partner (*ibid, 600*). He would have recourse to the second part of that remedy, so cumbrous in detail of filing account, &c., either when by an action against the survivors only he had failed unexpectedly to recover his claim in full against the survivors (which would leave them to their remedy against the estate of the deceased), or when this result would be plainly inevitable from the very first.

The plea of non-joinder was held competent in *6 S. C. C. 108*, when the omitted partner was still alive. When he is not, the decision in *1 N. L. R. 350* applies as to the action against surviving partners—also that in 546, C. R., Haldummulla, Beven and Siebel's Appendix, *Promissory Notes, XII.*

The decision in *2 N. L. R. 110* related to a joint and several note, not made by a partnership, and in view of what I have said respecting the difference of the decree and remedy against the estate of a deceased partner, with its partnership and separate liabilities and assets, the decision therein is not properly applicable to the present action.

I hold the plaintiff had right to institute this action against the defendants alone; that the plea of non-joinder was not maintainable; and that neither he nor the Court would be bound (as was here contended) to add the legal representatives of the deceased as parties necessary to the action, though possibly it might be done, if they, when noticed, did not oppose the same, because now there would not be any difficulty occasioned by administering the partnership and separate estate of the deceased. I do not see therefore that plaintiff's action was bad, because he preferred his simple action against the survivors to what I call double-barrelled claim, one result of which might possibly be that his judgment against the survivors would be delayed till the working out of his rights against the estate of the deceased.