1941 *Present :* **Howard C.J. and Hearne J.**

GUNASEKERE *v.* GUNASEKERE.

340—D. C. Balapitiya, B 158.

Obligation in solidum—*Joint note by plaintiff and defendants—Plaintiff an accommodating party—Note discharged by plaintiff—Action by plaintiff to recover amount of note—Roman-Dutch law.*

Where the defendants, who were partners in a business, requested the plaintiff to be an accommodating party to a promissory note on which they raised money for the business and where the plaintiff, having discharged the note, sued the defendants to recover the amount due on the note,—

Held, that the liability of the defendants was an obiligation *in solidum*, and that each was liable to pay the whole debt.

Held, further, that the case was governed by the Roman-Dutch law.

By a promissory note dated December 16, 1937, the defendants and the plaintiff jointly and severally promised to pay R. M. P. L. P. R. Palaniappa Chettiar a sum of Rs. 500 with interest at 18 per cent. per annum. On December 3, 1939, the plaintiff paid a sum of Rs. 657.50 owing on the note, which was discharged. In this action he claimed the said sum, which he maintained he paid on their behalf.

The claim was made on the footing that he signed the promissory note at the request of the defendants as an accommodating party. The claim was not contested by the first defendant but the second defendant filed answer denying that the plaintiff was an accommodating party. The learned District Judge gave judgment for the plaintiff.

L. A. Rajapakse (with him *J. M. Jayamanne*), for the second defendant, appellant.—The only point that arises is whether one of three debtors who pays the entirety of the debt to crditor and seeks recovery from the co-debtors can get the full amount or only a *pro-rata* share from a co-debtor. The Obligation under the pro-note is governed by English law. If this obligation is extinguished by decree or otherwise, as; for example, by payment, there arises a new obligation which is governed by the Roman-Dutch law—*Ramalingam v. James*[1]. The new cause of action which arises may be historically connected with the old cause of action but is different. English law applies only to actions *on* pro-notes. Under the Roman-Dutch law plaintiff can claim only a *pro rata* share from the defendants—Walter Pereira: Laws of Ceylon, 2nd ed., pp. 586-588 *Kotze's Van Leeuwen, Vol. II., p. 35 ; Panis Appuhamy v. Selenchi Appu*[2].

M. T. de S. Amerasekere, K.C. (with him *R. N. Ilangakoon*), for plaintiff, respondent.—The cause of action is the refusal to pay a certain sum of money which plaintiff has paid on behalf of defendants. The authorities cited for appellant apply to the case of persons who are joint debtors. Plaintiff here is not a joint debtor. No doubt on the pro-note he is. The District Judge has held that he was only an accommodating party. The passage cited from *Walter Pereira* applies only where parties are in fact joint debtors. Here, as between the debtors themselves, plaintiff is

[1] *(1939) 40 N. L. R. 486.*

[2] *(1903) 7 N. L. R. 16.*

only an accommodating party, *i.e.*, a surety.—*Burge on Suretyship, p. 364 ; Pothier; Vol. I., Evan's Translation, pp. 146, 147.* As regards suretyship, whether English or Roman-Dutch law applies, the defendants are jointly and severally liable.

L. A. Rajapakse, in reply.—The passage cited from *Burge* deals with subrogation. In English law statutory provisions apply as regards suretyship. In Ceylon Roman-Dutch law applies. As regards co-obligors see *3 Maasdorp, 1907 ed., pp. 86, 87.* Each of several co-obligors is liable only for a share.

Cur. adv. vult.

November 26, 1941. HOWARD C.J.—

This is an appeal by the second defendant from a judgment of the Additional District Judge of Galle giving judgment for the plaintiff as claimed with costs. The action arose out of a promissory note dated December 16, 1937, whereby the two defendants and the respondent jointly and severally promised to pay to Messrs. R. M. P. L. P. R. Palaniappa Chettiar a sum of Rs. 500 and interest thereon at 18 per centum per annum. On November 3, 1939, the respondent paid an amount of Rs. 657.50 owing on the note which was discharged. In this action he claimed from the defendants the said sum of Rs. 657.50 which he maintained he had paid on their behalf. The claim of the respondent, which was not contested by the first defendant, was based on the contention that he signed the promissory note for Rs. 500 at the request of the defendants as an accommodating party without receiving any consideration. Moreover he alleged that the Chettiar was not prepared to lend the money unless he also signed the note as a debtor. The second appellant filed answer denying that the respondent was merely an accommodating party and signed the note without receiving consideration. On this point, which was a question of fact, the finding of the learned District Judge was in favour of the respondent. This finding has not been contested by Counsel for the appellant in this Court. The latter, however, maintains that the respondent could only recover from each defendant one half of the amount he had paid in discharge of the promissory note.

The first point that arises for consideration is whether the position as between the respondent and the defendants was governed by English or by Roman-Dutch law. Mr. Rajapakse contends that Roman-Dutch law applies, a contention not seriously challenged by Mr. Amerasekere. In my opinion the principle laid down by Soertsz J. in *Ramalingam v. James*[1] is applicable. The promissory note while it existed was governed by English law. When it was discharged by payment, it was swallowed up by such payment and lost its identity. Any debt due to the respondent by reason of his payment of the amount due on the promissory note is a new debt and is governed by the common or Roman-Dutch law.

Both Counsel have referred us to the law as stated in *Walter Pereira's Laws of Ceylon.* At page 586 the following passage occurs :—

"In general, when any one enters into an obligation for one and the same thing to different persons, or, on the contrary, when different

[1] *40 N. L. R. 486.*

persons are jointly bound to another, each is only liable or entitled *pro rata* as debtor or creditor of the thing. However, an obligation may be entered into by which each party may be bound or entitled *in solidum,* when this is the object of the several parties, provided however that payment made to or by one of the parties frees all the others. This is entitled an obligation *in solidum ;* and according to the general rule, has no place, but which expressly stipulated except in some few cases, as when the partners of any firm enter into any contract on account of their trade, or when several persons are charged with one and the same .guardianship, or when several persons have conspired together, and are equally principals in the commission of some crime, and are thus equally liable in damages, or have contracted together a debt *in solidum,* and are each liable for the whole with respect to the creditor, though among themselves the debt is divisible."

Again on page 588 it is stated as follows:—

"Solidity must be stipulated in all contracts of whatever kind. As already observed, strictly speaking, it ought to be expressed. If it is not, when several persons have contracted an obligation in favour of another, each is presumed to have contracted as to his own part".

A similar view of the law is also expressed in *Maasdorp's Institutes of Cape Law, Vol. III., p.* 86, where the following passage occurs :—

"Whereas there are several co-obligors or co-obligees, the general rule of our law is that, unless otherwise expressly agreed upon, the liability of the co-obligors is joint merely, and not joint and several, whilst the rights of the co-obligees are held in common. In other words, each of several co-obligors (except in the case of co-partners) is only liable for his share of the contract, and not for the whole contract *in solidum."*

A similar statement of the law is also to be found in *Evan's translation of Pothier on Obligations, Vol. I., p. 147,* where it is stated as follows :—

"Solidity may be stipulated in all contracts of whatever kind. But regularly, it ought to be expressed ; if it is not, when several persons have contracted an obligation in favour of another, each is presumed to have contracted has to his own part. And this is confirmed by Justinian in the Novel 99. The reason is that the interpretation of obligations is made in cases of doubt in favour of debtors, as has been shown elsewhere. According to this principle, where an estate belonged to four proprietors, and three of them sold it *in solido,* and promised to procure a ratification by the fourth proprietor, it was adjudged that the fourth, by ratifying the sale, was not to be concidered as having sold *in solido* with the others: for although the three had promised that he should accede to the contract of sale, it was not expressed that he should accede *in solido.*

"Nevertheless, there are certain cases in which solidity between several debtors of the same thing takes place, although it is not expressly stipulated."

"The first case is when partners in commerce contract some obligation in respect of their joint concern."

The law as formulated by the authorities to which I have referred was considered by Layard C.J. in *Panis Appuhamy v. Selenchi Appu*[1], in which it was held that where two or more persons have joined in stipulating for the payment of a certain sum of money, each is ordinarily liable to pay a quota of that money. It is only when the intention of the parties is clearly expressed that each person shall severally pay the whole that each person becomes bound *in solidum.* When two lessees covenant to pay a certain sum of money as rent and there are no words in the lease clearly showing that each lessee bound himself *in solidum* it was held that each lessee is not severally liable for the payment of the whole rent. From the concluding words of his judgment in *Ramalingam v. James*[2] it is clear that Soertsz J. took the same view of the law as expressed by Layard C.J. in *Panis Appuhamy v. Selenchi Appu* (*supra*).

The question for consideration is, therefore, whether there is anything in the contractual relationship between the respondent on the one hand and the defendants on the other hand to take this case out of the ordinary rule creating a joint obligation, and by reason of such relationship creating an obligation *in solidum.* The respondent became liable on the promissory note without receiving consideration and was, so far as the defendants are concerned, in the position of a surety. The position of sureties with regard to recourse against the principal debtor after they have paid is formulated in *Pothier, Vol. I., p.* 277, as follows:—

> "After the surety has paid, if he has procured a subrogation to the rights and actions of the creditor, he may exercise them against the debtor, as the creditor himself might have done: if he has neglected to acquire this subrogation, he has still in his own right an action against the principal debtor, to reimburse him what he has paid."

And again on p. 282 it is stated as follows:—

> "The surety who demands from one of the principal debtors, for whom he has become surety, the whole of the debt, which he has discharged, ought to cede to this debtor, not only his action in his own right against the other debtors, but also the actions of the creditor to whom he may have procured a subrogation; if the surety in paying the creditor has neglected to acquire this subrogation, and has thereby incapacitated himself from assigning it to the principal debtor from whom he demands the whole of the debt, this debtor may, on offering to reimburse him for his own part, obtain a liberation from the demand of the surety for the parts of the other principal debtors."

In this case the respondent in paying the Chettiar did not acquire subrogation of the latter's rights. In these circumstances he is only in a position to enforce his own rights against the defendants. There remains for consideration the question of the respondent's own rights. The nature of the obligation must be ascertained by reference to the circumstances in which he became a party to the bond. According to the evidence the defendants were jointly engaged in a bus business and the money was raised for the benefit of that business. In these circumstances I am of opinion that the implied obligation to repay the respondent the sum of money he had paid the Chettiar in discharge of the promissory note was on

[1] *7 N. L. R. 16.*

[2] *40 N. L. R. 486.*

account of the defendant's trade. Moreover, apart from the fact that the defendants approached the respondent and requested him to become a party to the bond as partners in a business, he undertook at their request and without consideration the liability of each of them to pay the whole debt. In these circumstances a joint and several liability must be implied. Hence for the reasons I have given the defendants were liable for the whole obligation *in solidum* and on this ground the respondent is entitled to succeed in this action.

For the reasons I have given, I have come to the conclusion that the judgment of the learned District Judge is right and the appeal must be dismissed with costs.

HEARNE J.—I agree.

Appeal dismissed.