1911.

Present: Middleton J. and Wood Renton J.

In re the Estate of H. P. FERNANDO WIMALAGOONEWARDENE.

FERNANDO *et al. v.* MATHEW *et al.*

140—D. C. Colombo, 3,858.

Joint proxy in favour of one proctor by several executors—Application by some of the executors to revoke the proxy granted by them—Discretion of Court—Civil Procedure Code, s. 27.

Section 27 of the Civil Procedure Code invests the Court with a real discretion as to whether or not the revocation of a proxy should be allowed

THE facts are set out in the judgment of Wood Renton J.

Bawa (with him *H. A. Jayewardene* and *A. St. V. Jayewardene*), for appellants,—A party has a general right to change his pleader. This section no doubt makes it necessary to obtain the leave of the Court for that. The Court will usually grant leave on the request of the party. See *Hukm Chand's Civil Procedure Code, vol. I., p. 493.* James L. J. said in *Ex parte Yalden*,[1] " A man has a right to change his solicitor if he likes, but then the law imposes certain terms in favour of the solicitor, that is to say, that the papers in the suit cannot be taken out of his hands without his having his costs paid ".

The Civil Procedure Code nowhere gives the grounds on which leave to revoke a proxy could be given or withheld; the position of proctor and client is merely that of an agent and principal. The proctor cannot insist on acting for the client against the client's will. In *re Galland*,[2] *Saffron Walden Building Society v. Rayner*.[3]

The four executors need not have gone to one proctor at the start; there is nothing to prevent their separating at this stage.

Wedderburn v. Wedderburn,[4] relied on by the Judge, is not quite in point.

van Langenberg (*with him Weinman* and *Schneider*), for the respondents.—The principles of English law do not apply to Ceylon; in Ceylon the proctor is an officer of Court.

There is nothing to prevent the appellants to give a proxy to another proctor when they cannot agree on any important matter; but it would be most inconvenient to have four proctors doing the work of the four executors in ordinary matters. The cost would be enormous.

[1] *(1876) 4 Ch. D. 131.*
[2] *(1885) 31 Ch. D. 296, 300.*
[3] *(1880) 14 Ch. D. 406.*
[4] *17 Beav. 158.*

Bawa, in reply.—The fact that Messrs. Prins and Swan have brought many charges against the appellants is enough to show that the proxy could not be allowed to stand.

The appellants are prepared to bear the extra costs.

Cur. adv. vult.

November 7, 1911. WOOD RENTON J.—

The applicants, appellants, two of the executors appointed under the will of the late H. P. Fernando, moved the District Court of Colombo that they might be allowed to revoke the proxy granted by them, together with the other two executors, to Messrs. Prins and Swan, Proctors, in connection with the testamentary case. The learned District Judge disallowed the motion, and the present appeal is brought against his order doing so.

The material facts have been stated by the District Judge, and I do not propose to repeat them. It appears to me that section 27 of the Civil Procedure Code invests the Court with a real discretion as to whether or not the revocation of a proxy should be allowed, and that in such cases as the present the only question to be decided is whether that discretion has been shown to have been wrongly exercised. I am not prepared to answer that question in the affirmative in this case. All four executors concurred in the joint proxy given to Messrs. Prins and Swan at the commencement of the proceedings. The case is a testamentary one, and the proxy authorized Messrs. Prins and Swan, not merely to apply for probates, but to do all necessary acts in the subsequent testamentary proceedings. The allegations——which the learned District Judge has accepted—in the affidavits filed by Messrs. Prins and Swan and Mr. C. J. Mathew, one of the executors, respondents, show that the appellants themselves at first assented to the proposal that Mr. C. J. Mathew should be empowered to act for all the executors in the management of the estate. It is a desirable thing in itself that, where a testator has appointed a number of executors, one of them should be appointed as attorney of all in regard to various administrative matters, and there are in the present case special reasons why that position should be given to Mr. Mathew. The first appellant, the testator's widow, is an illiterate person, and the testator himself in his will has expressly provided that she should not affix her mark to any documents unless signed by Mr. C. J. Mathew along with her. Whatever the real reason may be of the endorsement by the second appellant of the two cheques R 1 and R 2, the fact at least supports the allegation in Mr. Mathew's affidavit as to his business inexperience. I agree with the District Judge that if the appellants were allowed to appoint one firm of proctors to act for them, while the opposing executors were represented by Messrs. Prins and Swan, the result would in all probability be a state of

1911.

WOOD RANTON J.

Fernando v. Mathew

chaos in so far as the administration of the estate of the deceased was concerned. In particular I would adopt the language used by the District Judge in the following passage: "It will be quite impossible for the Court to exercise a proper control over the executors and compel the filing of the necessary accounts, for each proctor will lay the responsibility for any neglect upon the shoulders of the other."

This difficulty might arise under any circumstances. But it would almost inevitably do so where, as here, the executors themselves were not working harmoniously together. The appellants' counsel, in reply, stated that his clients were willing to undertake that no costs of the separate firm of proctors whom they wish to employ should be chargeable to the estate. Counsel for the respondents was not ready, however, to assent to the separate representation of the appellants even on such an undertaking. I do not think that it constitutes a ground for any interference by the Supreme Court with the order under appeal. The undertaking now tendered might save costs to the estate. But it would not meet what to my mind is the main difficulty, viz., the probability amounting almost to a certainty, in view of the state of feeling between the parties, that the proposed separate representation of the appellants would produce a deadlock in the administration of the estate. It is no doubt unfortunate that the appellants have to be represented by a firm of proctors whom they, rightly or wrongly, regard as adverse to themselves. But they concurred in the joint appointment of that firm by the executors as a body. The learned District Judge has not credited the specific allegations made by them against the firm of proctors so appointed, and there is nothing to prevent the appellants from taking independent legal advice whenever they deem it necessary, without rendering the administration of the estate unworkable. I see no reason why the principle applied in the case of *Wedderburn v. Wedderburn*[1]—a decision apparently (see *Annual Practice, 1910, 42*) still regarded as good law in England—should not be adopted here.

I think that the appeal should be dismissed with costs.

MIDDLETON J.—

I concur, and have nothing to add.

Appeal dismissed.

[1] *(1853) 17 Beav. 158.*