[IN REVISION.] 1925.

Present: Branch C.J. and Garvin J.

IN THE MATTER OF AN APPLICATION OF LLEWELLYN SOLOMON FERNANDO, PROCTOR.

D. C. Kalutara, 10,845.

Proctor—Proxy to a firm of two partners—Joint and several appointment—Death of one partner—Right of survivor to continue without a fresh proxy.

Where a proxy, appointing a firm of two proctors to act jointly and severally, was filed of record and one of the proctors died during the pendency of the action,—

Held, that the proxy constituted sufficient authority to the survivor to continue to represent his client in the action with his consent.

APPLICATION to revise an order made by the District Judge of Kalutara. The applicant was practising in partnership with his father under the name of Fernando & Fernando, Proctors, and proxies had been filed by them in cases pending in the District Court of Kalutara authorizing them to act "jointly and severally" on behalf of their client. On the death of the senior member of the firm, the learned District Judge was of opinion that their authority terminated and directed the applicant to file fresh proxies in Court.

Hayley (with him *Cooray* and *Ranawake*), for applicant.—The proxy gives authority to them to act "jointly and severally." The death of one partner, therefore, does not affect the right of the survivor to continue to represent his client.

Where a power of attorney was given to fifteen persons jointly and severally therein named to execute such policies as they or any of them should jointly or severally think proper, it was held that an execution of such power by four of the persons named was sufficient (*Guthrie v. Armstrong*[1]). In Ceylon the Supreme Court has recognized the practise of appointing proctors carrying on business in partnership (*Rossiter v. Elphinstone*[2]). It has gone further, and permitted the appointment of a proctor and his assistants to act as such (*Times of Ceylon v. Low*[3]). Counsel also cited *Story on Agency, p. 42*, and *Halsbury's Laws of England, Vol. 26, p. 843.*

[1] *(1822) 5 B. & A. 628.*
[2] *(1881) 4 S. C. C. 53.*
[3] *(1913) 16 N. L. R. 434.*

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Fonseka, C.C., for the Crown.—The question here is not one of practice but of principle. It is a matter that affects the revenue. Every appointment of a proctor has to be stamped. In *Garvin v. Abeywardene*,[1] where a warrant of attorney to confess judgment was given to a firm of proctors, it was held that the death of one terminated the agency. A client who employs a firm of solicitors has a right to the services of each individual in the firm. A dissolution of a partnership firm of solicitors operates as a discharge of the clients (*Rawlinson v. Moss* [2]).

December 21, 1925. BRANCH C.J.—

Under section 24 of the Civil Procedure Code, 1889, any appearance, application, or act in or to any Court required or authorized by law to be made or done by a party to an action may, with the exceptions there referred to, be made or done by a proctor duly appointed by the party. By section 27 such appointment shall be in writing signed by the client, and shall be filed in Court and shall be in force until revoked with the leave of the Court and after notice to the proctor by a writing signed by the client, and filed in Court, or until the client dies, or until the proctor dies, is removed, or suspended, or otherwise becomes incapable to act, or until all proceedings in the action are ended and judgment satisfied as far as regards the client.

A form of appointment of a proctor is given in No. 7 of Schedule II. of the Civil Procedure Code, and that form—so far as is material, reads as follows :—

> " Know all men by these presents that I, —— of —— (*or* we, —— of —— and —— of ——) have nominated, constituted, and appointed, and do hereby nominate, constitute, and appoint ——, Proctor of the Honourable the Supreme Court of the Island of Ceylon (or of the District Court of ——, *as the case may be*), to be —— proctor, and for —— and in —— name and behalf before the —— to appear and therein to (sue *or* defend, *as the case may be, showing* what the action is)."

In the present case the appointment was as follows :—

> " Know all men by these presents that we —— of —— have nominated, constituted, and appointed, and do hereby nominate, constitute, and appoint, Solomon Fernando and Llewellyn Solomon Fernando, Proctors of the Honourable the Supreme Court of the Island of Ceylon, carrying on business under the name, style, and firm of Fernando & Fernando, or in their absence any other proctor or proctors to be —— true and lawful proctors, and for and in —— name and before the —— of —— jointly and severally to appear and this proxy to exhibit and by virtue hereof to ——."

[1] (*1923*) *24 N. L. R. 382.* *4 L. T. 619.*

As regards the words " or in their absence any other proctor of the Supreme Court " see *Letchemanan v. Christian*,[1] but that is not the point in the present case.

The learned District Judge of his own accord took exception to this form of proxy, and held that as Mr. Solomon Fernando had died a few months before " the partnership came to an end, and that fresh proxies must be filed in all cases by parties for whom that firm appeared either by Mr. Llewellyn Fernando alone or by some other proctor."

The question we are asked to decide is whether, assuming that the client consents to the surviving partner continuing to act for him, a joint and several appointment as the one set out above is sufficient for the purposes of the Civil Procedure Code so as to enable such surviving partner to act.

In *Rossiter v. Elphinstone* (*supra*) it was held that a proxy in favour of several proctors trading in partnership is good. In *Times of Ceylon v. Low* (*supra*) it was held that there was no objection to the appointment of a proctor and one or more qualified assistants in the same proxy. The proxy in that case was made out in the names of Mr. Osmund Tonks, Mr. R. W. Hislop, and Mr. Hellard, Proctors of the Supreme Court of the Island of Ceylon, " jointly and severally." The Court directed this proxy to be amended so as to read as follows :—

> " We, the Times of Ceylon Company, Limited, have nominated, constituted, and appointed, and do hereby nominate, constitute, and appoint, Osmund Tonks, and his assistants, Robert Hislop and John Alexander Hellard, Proctors of the Honourable the Supreme Court, &c. . . . . "

and sent the case back to the Court of Requests with a direction that the proxy should be accepted on being amended in that sense. Wood Renton C.J. concludes his judgment in the case as follows :—

> " It is eminently desirable that nothing should be done to diminish the professional responsibility of proctors to their clients and the Court, but where that responsibility is fully safeguarded there is no need to refuse formal recognition to a relaxation of the existing practice, which will be of the utmost convenience both to proctors and to their clients."

It was pointed out in that case that there is no authority in Ceylon for the appointment by a single proxy of two or more proctors not constituting a firm and not standing in any professional relationship to each other as proctors of one and the same client ; and that such appointment would be open to two substantial objections : First, it would defraud the revenue of the stamp duty due under Schedule B, Part II. of Ordinance No. 29 of 1909 on every appointment of

(1 *1898*) *4 N. L. R. 323.*

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a proctor; and, secondly, there would be in an action several independent proctors each of whom would be in a position to throw upon the other the responsibility for any act which was called in question.

The judgment of the Acting Chief Justice in *Times of Ceylon v. Low* (*supra*) contains the following :—

> " If the death even of one of several partners acts as a revocation of a proxy granted in favour of a firm, the death of the principal proctor, where a proxy was granted in favour of the principal proctor and one or more of his assistants would have a similar effect."

In *Garvin v. Abeyewardene* (*supra*) it was held that a warrant of attorney to confess judgment issued to two proctors practising in partnership did not give the survivor the power to confess judgment after the death of the other partner. Bertram C.J. says :—

> " The question we have to determine in this case is the effect of a warrant of attorney to confess judgment. The warrant was in fact issued to Messrs. G. E. & G. P. Keuneman, Crown Proctors of the Matara District. The document did not go on as it might have done, in pursuance of the form prescribed by the Code, to add the words " or other proctor of the Supreme Court." The senior partner of the firm has died, and it was the junior partner who purported to act in pursuance of the warrant and to confess judgment, his competency to do so is disputed, and the learned District Judge has found that he was not so competent. In my opinion the learned Judge is right. It is clear law that where a power is conferred upon two agents, it is presumed to be conferred upon them jointly, and an act by one purporting to be an execution of that power is not a good execution. That is settled by a number of cases *Boyd v. Durand*[1], *Brown v. Andrew*,[2] and also by two local cases, *Muttiah Chetty v. Karupaiya Kankani*[3] and the earlier case of *Lindsay v. The Oriental Bank Corporation*.[4] It seems to follow as a corollary that if the two agents are partners, and one partner purports to exercise the power singly as the survivor of the two, his act is none the less invalid; in other words, at the death of one of the two agents, it terminates the authority of the other. This is assumed by Wood Renton C.J. in the case of *Times of Ceylon v. Low* (*supra*) with reference to a proxy given in favour of two partners of a firm of proctors, and I have no doubt that the assumption was justified by the practice."

[1] *(1809) 2 Taunt 161.*
[2] *(1849) 18 L. J. Q. B. 153.*
[3] *(1903) 6 N. L. R. 285.*
[4] *(1857) 1 Lor. 108.*

Mr. Hayley, who appeared for Mr. Llewellyn Fernando, argued that the distinguishing feature of the proxy in this case was that the power was given to two persons jointly and severally, and he referred to the case of *Guthrie v. Armstrong* (*supra*). He also read an affidavit from Mr. S. F. de Saram, a partner of the firm of Messrs. F. J. & G. de Saram to the effect that the proxies which that firm obtained from their clients are " in the names of the partners of the firm jointly and severally " and that within the last twenty years three partners of the firm have died but in no case have fresh proxies been obtained in favour of the remaining partners. Mr. Hayley also pointed out the practical difficulties which would arise if new proxies were required, and that litigation in a very large number of cases would be brought to a standstill if new proxies were necessary, as with clients in Europe and elsewhere it would be impossible to obtain new appointments except after long delay. He also referred to the large expenditure in stamp duty which would in many cases be necessary.

Mr. Fonseka, for the Attorney-General, who had been served with notice of these proceedings, suggested that any inconvenience and extra expense would be avoided if clients took care specifically to set out that the appointment was exercisable by the surviving partner in case of the death of one partner. I express no opinion on this point, as I do not wish to go beyond the actual case before us.

In *Guthrie v. Armstrong* (*supra*) the defendant signed a power of attorney by which he constituted fifteen persons there named " his true and lawful attornies, jointly and separately for him and in his name, to sign and underwrite all such policies of insurance, as they, his said attornies, or any of them should jointly and separately think proper." The policy was executed for the defendant by four of the persons named in the power of attorney. This was held to be a sufficient execution of the power. J. Williams moved to enter non-suit. This was, he said, a naked authority and must be construed strictly. He argued as follows : In *Viner's Abridgement title Authority B. pl. 7* it is laid down thus : " If a letter of attorney to make livery of *seizin conjunctim et divisim* be made to three, and two of them make livery, the third being absent, it is not good, for this is not *conjunctim* nor *divisim*. And *Com. Dig. Attorney C. 11* is exactly to the same effect. And in *Co. Litt., 181, b*, it is stated " If a Charter of feoffment be made, and a letter of attorney to four or three, jointly or severally to deliver *seizin* two cannot make livery because it is neither by the four jointly nor any of them severally. Here the power is to fifteen persons jointly or severally, and it is neither executed by the whole jointly nor by any of them severally. The latter words ' or any of them ' only apply to the persons who are to exercise the discretion, but they have no reference to the authority itself." Abbott C.J. in delivering judgment said, " The law undoubtedly is as stated by Mr. Williams,

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but we are not disposed to extend the rule further. Whenever a case exactly similar to those cited shall occur the Court will feel itself bound by them. But in this case we ought to look at the whole instrument, and if we do so there is no doubt what the meaning of it is. Here a power is given to fifteen persons jointly and severally to execute such policies as they or any of them shall jointly or severally think proper. The true construction of this is, as it seems to me, that the power is given to all or any of them to sign such policies, as all or any of them should think proper. The argument is that the latter words only apply to the persons who are to exercise the discretion. This would have been quite correct if those had been different from the persons entrusted with the power. But they are the same; these latter words, therefore, control the meaning of the former and the verdict is right."

Mr. Fonseka was of the view that *Garvin v. Abeyewardene* (*supra*) was against the contention advanced by Mr. Hayley, but I do not think it is. In that case the power was conferred upon two proctors jointly, and an act done by one purporting to be an execution of that power would not be a good execution. When both partners were alive the signature of both was necessary. On the death of one of them joint action became impossible. In *Guthrie v. Armstrong* (*supra*) the argument used by Mr. Williams would not have been advanced if only one of the fifteen had signed, and in the present case it is not, I think, disputed that action could have been taken by one of the partners when both were alive. The contention is that power to act under the proxy ceased with the death of one of the partners. When Wood Renton C.J. used the words quoted in *Times of Ceylon v. Low* (*supra*) and when Bertram C.J. referred to those words in *Garvin v. Abeyewardene* (*supra*), both Judges had in mind, I think, a joint power, and not a joint and several power, and the reference by Bertram C.J. to the assumption, namely, the termination of the authority on the death of one partner, being "justified by the practice" would be at variance with the practice in Ceylon if a joint and several power were being discussed.

In *Phillips v. Alhambra Palace Company*[1] it was held that the contract there dealt with was not of such a personal character on the part of the partnership as to be put an end to by the death of the deceased partner and that it could be enforced against the defendants, the surviving partners. Lord Alverstone C.J. dealing with the question whether the death of one partner puts an end to the contract, expressed the view that the principle of law involved seemed to be that the point to be determined in every case was whether the obligation which it is sought to enforce depended upon the personal conduct of the deceased party. It is in this direction, I think, that a solution may be found of the case before us—a case

[1] *(1901) 1 Q. B. 59.*

by no means free from difficulty. When the clients gave the authority to Mr. Solomon Fernando and to Mr. Llewellyn Solomon Fernando, carrying on business under the name, style, and firm of "Fernando & Fernando" jointly and severally to appear and act for them, they relied I think on the personal skill of whichever of the two partners might act in a particular case. The form of proxy contemplates action by one of the partners independently of the other. In many a case the last thing that a client abroad would desire is that his legal matters should be held up because one of the partners has died and the joint and several power, as distinct from a joint power, may well have been given to provide for such a contingency in addition to providing for action by one of the partners in the absence abroad or otherwise of the other.

The truth of the matter appears to be that so soon as it was held in *Rossiter v. Elphinstone* (*supra*) that a proxy in favour of several proctors trading in partnership was good, and afterwards in *Times of Ceylon v. Low* (*supra*) that assistants to proctors might be included in the appointment difficulties were likely to arise. I am not suggesting that those cases were not properly decided, but the evolution—if I may so term it—of the matter creates a position which at the present time is not free from difficulty, and which may not by any means be freed from difficulty by this decision.

It is to be observed that we are only asked to say whether presuming the client consents to the surviving partner acting for him, the authority filed is sufficient for that purpose. From what I have said it will be seen that I think it is. All what we decide, and all what we are asked to decide, is that regard being had to the form of this joint and several proxy and to the fact that the client wishes Mr. Llewellyn Fernando, the surviving partner, to act for him, such surviving partner can continue to act without filing a fresh proxy. A client's consent may be conveyed to the proctor in a telegram, but for the purpose of filing a fresh proxy a long interval of time may elapse.

GARVIN J.—I agree.