1930

Present . **Dalton J. and Maartensz A. J.**

WAHIDU MARIKAR *v.* SAHIDU MARIKAR.

34—*D. C. Kalutara*, 14,278.

Joint tort-feasors—Claim for contribution—Roman-Dutch law and English law—Executor de son tort.

Contribution cannot be claimed as between two joint tort-feasors.

Where judgment is entered against two persons as executors *de son tort* they are joint tort-feasors.

MAARTENSZ A.J.—*Quære*, whether the principle that no contribution can be claimed as between joint tort-feasors is applicable in a case where the joint tort-feasors are in law but not in fact responsible for the tort.

THIS was an action brought by the plaintiff against the defendant to recover his share of the judgment debt entered against them jointly for a sum of Rs. 4,067.25. It would appear that one Marikar Hadjiar, in anticipation of his death, entrusted to plaintiff and defendant, who are brothers, a sum of Rs. 5,750 to pay his debts, defray funeral expenses, for almsgiving, and other purposes. On the death of Hadjiar there was a contest for letters of administration, which were eventually granted to a brother-in-law named Cassim. The plaintiff and the defendant were then ordered to produce the sum in Court. After inquiry they were ordered to bring in a sum of Rs. 5,450, making an allowance for funeral expenses. Thereafter the plaintiff alone deposited Rs. 4,250 and gave security for the balance Rs. 1,200, to recover which the administrator sued the plaintiff and the defendant. Judgment went against them jointly and severally for the sum of Rs. 4,067.25. Plaintiff paid the full amount and now claims half from the defendant. The learned District Judge gave judgment for the plaintiff.

Francis de Zoysa, K.C. (with him *Rajapakse*), for defendant, appellant.—The plaintiff and the defendant intermeddled with the estate of Marikar Hadjiar, and thereby became executors *de son tort*. They are therefore joint tort-feasors (*Sharland v. Mildon*[1]). It is a wide-established principle both in the English and the Roman-Dutch law that an action for contribution does not lie among tort-feasors (*Merryweather v. Nixan*[2]) ; *Voet IX.*, 2, 11. ; *De Villies on Injuries, p.* 47). Joint tort-feasors are liable *in solido* for the consequences of the common wrong, and where one of them has made good the damage, it is against the policy of the law to let him recover contributuon from the others. The plaintiff cannot be permitted to set up his own wrong in order to establish his claim for contribution.

Amarasekera (with him *Gratiaen*), for defendant, respondent.—The principle relied on on behalf of the defendant has no application where, as in the present case, a joint decree, creating a civil debt, has been entered against the parties. The plaintiff's claim for contribution is not based on the joint wrong but on the joint decree which he has wholly satisfied. The ordinary principle of law which provides for an action for contribution among joint judgment-debtors should be applied. It is not open to the defendant to go behind the decree and set up his own wrong in order to resist the plaintiff's claim. (*Palmer v. Wick and Poultency Town Shipping Co., Ltd.*[3]) The Roman Dutch-law authorities appear to apply the rule to a case here judgment is entered only against one of the wrong doers, and not where a decree is entered against all of them.[4]

The House of Lords has held in *Palmer v. Wick and Poultency Town Shipping Co., Ltd.* (*supra*), that the decision in *Merryweather v. Nixan* (*supra*) is not founded on any principle of justice or equity which would justify its extension to the jurisprudence of other countries.

It is submitted that this principle would not in any event apply where the tort is of a technical nature, and is not tainted

[1] 5 *Hare* 469.
[2] 8 *Term Rep.* 186.
[3] (1894) *A. C.* 318.
[4] *Nathan III.* 1549.

with fraud or other moral delinquency, (*Palmer v. Wick and Poultency Town Shipping Co. Ltd.* (*supra*), *at p.* 331 ; *Adamson v. Jarvis*.[1])

Rajapakse, in reply.

August 8, 1930. DALTON J.—

This appeal raises a difficult question, upon which there is no local decision. It is an action by one of two judgment-debtors against the other in respect of his share of the judgment-debt. The defence to the action was that the two judgment-debtors were joint tort-feasors and no Court will interfere to enforce contribution between wrong doers. The trial Judge came to the conclusion that the two judgment-debtors (*i.e.*, the present plaintiff and defendant) were not wrong doers and he gave judgment for plaintiff for the amount claimed, half the amount of the judgment-debt, with costs. The defendant appeals from that order.

The facts out of which the action arises are shortly as follows:—One Marikar Hadjiar during his lifetime but apparently in anticipation of his death entrusted to plaintiff and defendant, who are brothers, Rs. 5,750 to pay certain debts, to defray funeral expenses, for almsgiving and other purposes. He died intestate and there was then a dispute between the plaintiff and defendant on one side and a brother-in-law on the other, as to who was to administer the estate. The dispute resulted in letters of administration being granted to the brother-in-law, Cassim, and the plaintiff and defendant were ordered to produce the Rs. 5,750 in Court. They then represented to Court that they had spent Rs. 1,530 of this sum on funeral expenses and almsgiving, but after inquiry they were allowed Rs. 300 on account of the expenditure they had incurred and they were directed to bring the rest (Rs. 5,450) into Court. Thereupon Rs. 4,250 was deposited in Court, and plaintiff alone, it is to be noted, gave security for the balance Rs. 1,200. To recover this balance, Cassim on behalf of the estate sued plaintiff and defendant. Although duly served with summons defendant was in default of appearance. Plaintiff defended the action, but judgment went against both him and defendant jointly and severally for the sum of Rs. 1,200, with interest and costs, in all Rs. 4,067.65. Plaintiff paid the full amount of the judgment and is now claiming half the amount from the defendant.

There seems to me to be no doubt on the evidence that both plaintiff and defendant, whilst they were still on friendly terms and acting together, anticipating that letters would be granted to the plaintiff, ntermeddled with the estate and went beyond the mere payment of funeral expenses.

Asi t was argued before us at one stage of the case that an executor *de son tort* was not a tort-feasor, the case of *Sharland v. Mildon*[1] is decisive of this point, if any authority be required. There the widow of the testator, intending to obtain representation to her husband, began to collect the assets, and employed one Hewish to collect the debts owing to the testator. Hewish received several of the debts and paid them over to the widow. The widow did not afterwards become the legal representative of the testator, another party obtaining such representation. The question that arose for decision was whether Hewish could be sued as executor *de son tort*, it not being questioned that the widow might be so sued. The Court with evident reluctance held that Hewish was a wrong doer and was therefore properly a party to the suit. It was admitted that if he had received the money and had not paid it over he was liable. It followed therefore that he could only discharge himself by paying the money over to the legal personal representative.

There would in any event appear to be an unquestioned decision of the lower Court to the effect that the parties were joint tort-feasors when they were ordered to bring what they had already expended,

[1] 4 *Bingham* 66.

[1] 5 *Hare* 469

less a sum of Rs. 300, into Court. Each of them therefore made himself an executor *de son tort.*

With regard to the law applicable here, it is to be noted that the executor *de son tort* is unknown in our Common law, although no person has there any right to adiate who is not an executor or heir. In South Africa the matter is dealt with by legislation. There is no such legislation in Ceylon, but it was held by Bonser C.J. in *Prins v. Pieris*[1] that it was too late to argue that the English law as to an executor *de son tort* was not in force in Ceylon (*cf.* also *Pereira's Laws of Ceylon, p.* 412). Presumably in this instance, as in others that come to mind, the Courts have in process of time, by the application of English law made the law here, and it has not been questioned before us that the English law on his point is now applicable.

The leading English case on the question of contribution as between joint wrong doers is *Merryweather v. Nixan* (*supra*). One Starkey had brought an action against Meryweather and Nixan for an injury done by them, obtained judgment against both for £840, and levied the whole on Merryweather. Merryweather then brought this action against Nixan for a contribution of one-half of the sum. The plaintiff was non-suited at the trial on the ground that no contribution could by law be claimed as between joint wrong doers and a motion to set aside this non-suit was refused.

This decision has been criticised, as to its justice, in various quarters, and Courts have been very careful not to extend the principle laid down by Lord Kenyon and even it would seem on occasion to limit or qualify it. That, however, it sets out broadly the English law is beyond doubt. "Nothing can be clearer than that in an action for a joint tort each of the joint tort-feasors is liable for the whole damage and that there is no contribution between them. Further, a judgment against one of them precludes subsequent proceedings against the other or others". (Per Lord Parker of Waddington in *London Association for Protection of Trade v. Greenlands, Ltd.*[1]) ; *cf.* also remarks of Lord Shaw ; *The Drumlanrig* [2].

Mr. Gratiaen, in supporting the judgment of the lower Court, has referred us to the case of *Palmer v. Wick and Poultency Town Steam Shipping Co., Ltd.*,[3] and has sought to apply it to the facts before us. The facts there shortly were that a workman was killed by the fall of a block, part of the ship's tackle. The family of the deceased brought actions, which were conjoined, against the stevedore, Palmer, and against the company which was alleged to have supplied weak tackle. Both Palmer and the company were found jointly and severally liable, and damages were assessed at £[illegible]00. The company paid the whole sum and took an assignation to the decrees. Palmer refused to pay his half on the ground that he and the respondents were joint wrong doers. The House of Lords held that Palmer was liable, the foundation of the company's claim resting on a decree which created a civil debt.

An examination of the judgments delivered in the case goes to show that the decision in *Merryweather v. Nixan* (*supra*) as a statement of English law, cannot now be questioned although Lord Herschell states he feels bound to say it does not appear to him to be founded on any principle of justice or equity, or even of public policy, which justified its extension to the jurisprudence of other countries. Since, however, the case came from the Court of Session in Scotland, the law of Scotland was applicable, and it was held that the decison in *Merryweather v. Nixan* (*supra*) was inconsistent with the law of Scotland. This authority reaffirms the position of Lord Kenyon's decision as settled English law, but decides that the principle laid down should not be extended. The case therefore is of no assistance to counsel here.

[1] (1901) 4 *N. L. R.* 353.

[1] 8 *T. R.* 186.

[2] (1916) 2 *A. C. at p.* 40.

[3] (1894) *A. C.* 318.

In seeking to find a ground upon which the principle is based, Mr. Gratiaen has urged that the Courts will only prevent a person putting forward his own wrong in support of, or in opposition to, any claim made. He argues that here, inasmuch as plaintiff has proceeded to judgment against the defendant and obtained a decree of the Court, it is not necessary for him to prove the circumstances under which that decree was obtained, but merely the fact that it has been obtained. If defendant wishes to resist the claim which is based upon the decree of Court, he could only do so by seeking to prove his own wrong doing as a defence, and that it is not open to him to do. An examination of the authorities however shows that the argument is not sound. In the leading case relied upon by appellant, as well as in other cases, the plaintiff had obtained a judgment, but it did not avail to take the case out of the rule established.

If Roman-Dutch law, and not English law, has to be applied by us on this point, as Mr. Gratiaen urges, then it seems to me all the authorities so far as they have been brought to our notice are against him. It does not serve much useful purpose by urging that our Common law is more akin to the law of Scotland than to the law of England. It has been laid down in South Africa, applying the principles of our Common law (*Naude and Du Plessis v. Mercier*[1]) that there can be no assessment of damages as between joint tort-feasors, the general principle being that joint tort-feasors are liable *in solido* for the consequences of the common tort. In that case the trial Judge had sought to apportion the damages awarded against the two joint wrong doers in accordance with what he thought was their individual responsibility for the acts done, thereby implying that the liability of both was not identical. The Court of Appeal varied the decree in this respect on the general principle set out referring to *Voet IX*, 2, 11. Pereira in his *Laws of Ceylon*, citing *Voet IX.*, 2, 20, also points out that the ordinary rule is that in the case of several persons who commit a delict any one of them who pays in respect of the joint delict cannot recover wholly or in part from the others. The difficulties of the Court are of course not lessened if it has to seek to classify the act of an executor *de son tort* under any specific head of " delict ", but we are told, and we see it every day in these Courts, that the English law of torts has imposed itself upon the Roman-Dutch law of delict (Lee, *Roman-Dutch law*, *p.* 293). I see no reason to say that the parties before us do not come within the term " joint tort-feasors " as used in *Naude and Du Plessis v. Mercier* (*supra*).

The rule laid down in *Merryweather v. Nixan* (*supra*) has been qualified in some respects in later cases. In *Adamson v. Jarvis*[1] Best C.J., basing his conclusion in part upon the latter part of Lord Kenyon's judgment, held that the rule that wrong doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act. That qualification is of no assistance to the plaintiff here. These developments in the doctrine are also referred to by Lords Finlay and Dunedin in *Weld-Blundell v. Stephens*,[2] an English case but decided by a majority of noble Lords well versed in Scotch law. They deal with the decision of Lord Kenyon in more moderate terms than those used in *Palmer v. Wick and Poultency Town Steam Shipping Company* (*supra*) to which I have referred.

In *Betts and Drewe v. Gibbins*[3] the decision seems to have gone upon the ground that there was an engagement to idemnify, which under the circumstances was not illegal in itself, or in contravention of public policy.

In *The Englishman and the Australia*,[4] an Admiralty case, Bruce J. sets out how the two cases, *Adamson v. Jarvis* (*supra*)

[1] (1917) *A. D*, 32.

[1] 4 *Bingham* 66.
[2] (1920) *A. C.* 956.
[3] 2 *Ad. and E.* 57.
[4] (1894) *Probate* 239.

and *Betts and Drewe v. Gibbins* (*supra*), I have cited are not within the limits of the doctrine established by *Merryweather v. Nixan* (*supra*), and he adds that an examination of those and other cases has led him to conclude that the actual point decided there, that an implied idemnity does not arise as between joint tort-feasors simply by the payment by one of the whole of the joint liabilty, has never been questioned.

Applying the doctrine to particular cases may not always be a simple matter. It is particularly so in Ceylon where it is not always easy to decide what inroads have been made on the Common law whether by statute or long standing judicial decision. Whether however in this case one applies the English or the Common law the result seems to me to be the same. The rule being established that contribution cannot be claimed as between two joint tort-feasors, and plaintiff and defendant being joint tort-feasors, it is for the plaintiff to show that his claim does not fall within the rule. On all the facts of this case, and having regard to the authorities cited, I have come to the conclusion that the case is governed by the rule, and therefore plaintiffs action must fail.

In the result the appeal is allowed with costs, the order of the trial Judge must be set aside, plaintiff's action being dismissed with costs.

MAARTENSZ A.J.—

I agree, but with the greatest reluctance.

I respectfully associate myself with Lord Herschell's observation regarding the law laid down in the case of *Merryweather v. Nixan*,[1] and I reserve my opinion whether this decision should be applied in a case where the joint tort-feasors are in law but not in fact responsible for the tort from which the damages claimed resulted.

Appeal allowed.

[1] 8 *Term* 186.