1938 *Present* : **de Kretser J.**

MIGUEL APPUHAMY *v.* APPUHAMY.

235—C. R. Dandagamuwa, 178.

Tort-feasors—Joint assault and housebreaking—Action against one—Bar against further claim on the same cause of action.

Where plaintiff has sued one of several joint-tort-feasors for the recovery of a share of the damage caused to him and has obtained judgment against him, he cannot maintain an action against any of the others upon the same cause of action.

IN Courts of Requests action 188 plaintiff sued one of several persons, who broke into his house, assaulted him and his mistress and stole his jewellery, to recover a sum of Rs. 300 which he alleged was part of his damage. He sued the present defendant at the same time to recover Rs. 300. After decree had been entered in C. R. 188 the defendant amended his answer and pleaded that the plaintiff's failure to sue the other tort-feasors amounted to a release of the other tort-feasors and absolved him from liability.

The Commissioner of Requests held that the decree in C. R. 188 was a bar to the present action.

[1] *3 B. W. C. C. 368.*

L. A. Rajapakse (with him *Kariapper*), for plaintiff, appellant.—The Commissioner is wrong in holding that the English law applies. It is the Roman-Dutch law that governs the matter.

Joint tort-feasors are each and all liable *in solidum*. The injured person may sue anyone of them for the full amount of damage, or he may sue them all together and enforce his judgment *in solidum*. But if he recovers the full amount from one, he cannot sue the others. *Naude v. Mercier* [1]; *Nathan on Torts (1921 edition), pp. 42, 43.*

The option is given to the plaintiff to sue one or several joint tort-feasors. If it can be proved that one was responsible for part of the damage, and another for the rest of the damage, he may divide the liability and sue them in separate actions each for his proportionate liability. It is only *payment* of the whole amount by one—not merely a *judgment* for the whole amount—that extinguishes the obligation and releases the others. *Grek v. Jankelowitz* [2].

The reason is that it is a compensatory action. *Mc Kerron on Torts, pp. 71 to 72.*

Counsel also referred to *Voet 9.2.12; Pothier, vol. I, pp. 147-155 and 264-277; Gooneratne v. Porolis* [3]; and *Aiyampillai v. Kurukkal* [4].

A. L. J. Croos [illegible] *Brera*, for the defendant, *respondent*.—The amount due is a joint one [illegible]udgment against one releases the others. The plaintiff must be deemed to have waived his right to proceed against the others. The plaintiff cannot divide his cause of action. The local cases cited have no application, and the matter has not been specifically decided in Ceylon. The *dictum* in *Grek v. Jankelowitz* (*supra*) is *obiter*, and should not be followed. In the matter of procedure Roman-Dutch law has no application. A consideration of sections 14 and 34 of the Civil Procedure Code shows that this action is not maintainable.

If it is a *Casus omissus*, then the English law should be followed. The principle in *Richardson v. Mellish* [5] should be followed. Counsel also cited *Supraya Reddiar v. Mohamed* [6]; and *Mack v. Perera* [7].

Cur. adv. vult.

June 16, 1938. DE KRETSER J.—

Plaintiff's house was broken into, money and jewellery stolen, and plaintiff and his mistress injured. As a result he claims to have suffered damage to the extent of Rs. 900.

Five persons were convicted in consequence and sentenced to different terms of imprisonment.

Plaintiff sued one of them in C. R. 188 for Rs. 300 and obtained judgment against him.

Judging by the numbers, he sued the present defendant at the same time, also to recover Rs. 300. He alleged that Rs. 300 represented part of his damages.

[1] *1917 (S.A.) A.D. 32 at pp. 38 and 39.*
[2] *1918 (S.A.) C. P. 140 at 143; 1 C. L. Rec. 58.*
[3] *4 N. L. R. 818.*
[4] *16 N. L. R. 231.*
[5] *2 Bing 240.*
[6] *17 C. L. R. 136.*
[7] *33 N. L. R. 179.*

After decree had been entered in C. R. 188 the defendant amended his answer and pleaded that the plaintiff's failure to sue the other tort-feasors amounted to a release of the defendant and absolved him from liability. He also pleaded that the decree in C. R. 188 was a bar to any further action in this case.

Issues were framed on these lines.

The learned Commissioner held that he was obliged to follow the English law and that against two or more joint tort-feasors there was only one cause of action and, if that cause of action were released or merged in a judgment, no second action could be brought.

It is conceded that it is the Roman-Dutch law which applies regarding the liability of joint tort-feasors but Mr. Dabrera urges that a question of procedure is involved and that on this question English law should be followed.

In *Nathan on Torts (1921 ed.)* at page 42 will be found a statement of the law on the subject.

He says, "Where two or more persons are jointly concerned in doing an unlawful act, they are jointly and severally liable *in solidum* for the consequences, and the plaintiff may sue any one of such tort-feasors whom he pleases. The law recognizes no partnership in the commission of a tort for, says *Voet*, partnership is concerned with lawful matters, and not with unlawful acts. Consequently, if two or more persons act in concert in committing a tort, each is regarded as acting on his own account, and is individually liable; and, if judgment be given against one of several persons who together were guilty of a tort, it would be against the policy of the law for him to recover a contribution from the others . . . . . And, according to the Digest, if an action be instituted against one of several joint tort-feasors, the *others are not discharged* . . . . As a general rule a *plaintiff has a right to bring separate actions* against two or more joint tort-feasors.

Pothier (vol. 1 p. 150) discusses the effect of solidity between several debtors and says, "Observe, that the choice which the creditor makes of one of the debtors against whom he exercises his pursuits, does not liberate the others until he is paid. He may discontinue his pursuits against the first, and proceed against the others; or if he pleases he may proceed against them all at the same time".

In the South African case of *Grek v. Jankelowitz*[1], Juta J.A. said, "But the points raised in the present case are whether the person assaulted can sue each tort-feaser concurrently for the particular and individual damage caused to him by such defendants, or whether having begun the action against Meirowitz, one tort-feasor, the plaintiff is debarred from suing Grek, another tort-feasor, until the first action has been determined; by which I understand is meant, until the plaintiff has proceeded against Meirowitz, not only to judgment but to execution. Now in the case of persons liable in *solidum* where the liability arises from contractual obligations, each is liable individually for the whole amount, so that payment and not merely a judgment against him of the whole amount extinguishes the obligation and releases the other party. The plaintiff cannot be forced to divide his actions against the defendants,

[1] *1 C. L. Rec. 58.*

but he can do so and sue each defendant for a proportionate share. This is clear from *Voet 45.2.4.* I cannot find any authority which applies these principles to the case of the liability *in solidum* arising from a joint assault. But on principle I cannot see why a plaintiff should not sue each tort-feasor for the damages which arise from his undivided share in the assault". He goes on to say that should the one tort-feasor pay all the damages sustained by the plaintiff in the first case before judgment is delivered in the second case such payment might be pleaded by way of an amended plea, and should payment be made after judgment is delivered execution could be stayed in the second case.

He was dealing with a case of assault.

In *Nande and Don Plessis v. Mercier*[1], Innes C.J. said, "As regards procedure, a complainant may sue any one of those who jointly injured him for the full damage caused by the injury. Or he may bring his action against all of them as co-defendants, and enforce his judgment *in solidum*".

From these and other authorities to the same effect we have no difficulty in deciding that the liability of the five persons concerned in the burglary was joint and several, and that each was liable *in solidum*. The question now to be considered is one of procedure.

It is agreed that all tort-feasors may be sued together. That would be justified by section 15 of the Civil Procedure Code.

I suppose the real reason why that convenient form of procedure was not adopted in this case is that there is only a Court of Requests at Dandagamuwa and plaintiff found it convenient to sue there.

It is conceded that a single tort-feasor may be selected or some out of many.

The question is whether having selected one or some and having proceeded to judgment the plaintiff may then maintain an action against any one or more of the others.

The question is not free from difficulty. Plaintiff's right is not necessarily co-extensive with the liability of the defendants. The passage from *Nathan* indicates that separate actions may be brought but does not say what happens when judgment is obtained in one nor does it contemplate division of the claim. Pothier says that it is only payment and not a judgment which terminates the obligation.

In *Grek v. Jankelowitz* (*supra*) the plea was that one action had to be terminated and execution exhausted before another was begun. Juta J.A. thought that the second could be brought and that the claim could be divided in he case of an action based on assault. In the case of an assault individual liability is ascertainable and when the action is only compensatory and not penal in character such division was allowed even in the Roman law.

Being a matter of procedure one has to see how the question is affected by the Civil Procedure Code, and first must be settled the question whether the plaintiff has only one cause of action or different causes of action against each wrongdoer. I think it is clear that there is one. There may be a class of case in which each individual's liability may be

[1] *South African Law Reports, Appellate Division (1917-32).*

asecertainable and where the cause of action against each may therefore be different but in the present case the cause of action is the joint act of burglars.

That there is only one cause of action seems to be the view taken by the English law, which holds that a judgment against one is itself, and without execution, a sufficient bar to an action against another joint tort-feasor because *transit in rem judicatam*, the cause of action is changed into matter of record—cf. *King v. Hoare* [1]; *Brinamead v. Harrison* [2].

Our Code defines "cause of action". It is the wrong for the redress of which an action may be brought and includes the infliction of an affirmative injury. That makes it clear that plaintiff had one cause of action. That cause of action he may enforce against all the wrongdoers or against one or more of them. Having done so and having obtained judgment can he maintain any further action? If the reasoning of the English cases be accepted, and there seems to be no reason why it should not be, his cause of action is exhausted and he cannot therefore proceed.

This view accords with the maxim of the law *Reipublicae interest ut sit finis litium*, which we find embodied in section 33 of our Civil Procedure Code. That section says, "Every regular action shall, as far as practicable, be so framed as to afford ground for a final decision upon the subjects in dispute, and so as to prevent further litigation concerning them".

It is followed by section 34 which says:—

> "Every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the action within the jurisdiction of any Court.
>
> "If a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished".

This section is very wide in its scope and emphatic in its language. It embodies the policy of our law. It clearly refuses to recognize division of a claim.

Broughton in his commentary on the corresponding section of the Indian Code of 1882, says that the cases bearing on the subject have arisen generally where it was sought to divide one action into several for the purpose of giving jurisdiction to the County Courts and they afford good illustrations of the principle involved in this section.

Best C.J. said in *Richardson v. Mellish* [3], "When the cause of an action is complete, when the whole thing has but one neck, and that neck has been cut off by the defendant, it would be most mischievous to say—it would be increasing litigation to say, you shall be driven to bring a second, a third, or a fourth action for the recovery of your damages".

In *Mack v. Perera* [4], Akbar J. states, without reference to any authority, "any judgment against a joint tort-feasor for damages suffered by the plaintiff would operate as an accord and satisfaction and would discharge other joint-feasors from liability".

[1] *13 Meeson & Welby p. 494.*
[2] *(1872) 41 L. J. C. P. 190.*
[3] *2 Bingham 240.*
[4] *33 N. L. R. 179.*

It seems to me therefore that whatever may have been the procedure under the Roman or the Roman-Dutch law our own Code of Procedure prevents this second action from proceeding and it would seem that our law is on the same lines as the English law in this respect.

On grounds of convenience too a multiplicity of actions is to be deplored. Take the present plaintiff's conduct. He claimed Rs. 300 from one wrongdoer and now claims Rs. 300 from another. There is no statement in the plaint as to what his total damages were but it was later taken to be Rs. 900. Had he been free to sue he might have gone on suing each of the five for Rs. 300. Had his damages to be estimated in the first case it would mean that the trial would be concerned with a claim for Rs. 900. Even if Rs. 300 were clearly due in that case it would not be so clearly due in the following cases. Besides the *quantum* of damages might be differently estimated by different Judges.

I think the decree entered in this case is right and I therefore dismiss this appeal with costs.

Appeal dismissed.