[FULL BENCH.]

1918.

Present: Bertram C.J., Ennis and De Sampayo JJ.

ANNAMALAI CHETTY *v.* MENIKA *et al.*

190—C. R. Kurunegala, 177.

Joint promissory note—Right of action against survivor and executor or administrator of deceased maker.

A holder of a joint promissory note cannot sue in one action both the surviving maker and the legal representative of the estate of the deceased maker.

THE facts appear from the judgment.

G. Koch, for appellant.—This is a matter of procedure, and not of substantive law. The two joint makers are jointly liable during their lives. Why should the estate of a joint maker be not liable when he is dead? We are not governed by English rules of procedure (*Mudalihamy v. Punchi Banda* [2]).

[DE SAMPAYO J.—Under the English common law only the survivor is liable.]

The Bills of Exchange Act does not enact that the survivor alone is liable. We are governed by the Bills of Exchange Act, and not by the English common law.

[1] *4 Man. & G. 860.*

[2] *(1912) 15 N. L. R. 350.*

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[DE SAMPAYO J.—The Bills of Exchange Act does not deal with this point, because it is part of the common law.]

Under the English law an executor or administrator can be brought into the action. The object of law is to prevent multiplicity of actions. The debt is not extinguished.

All the joint makers must be sued altogether. Otherwise the right of action against the person not joined as defendant is barred (*Manuel Istaky v. Sinnatamby* [1]).

Counsel also referred to *Muttiah Chetty v. De Silva* [2] and *Vattiappa Chetty v. Sinnatamby.* [3]

Chief Justice referred counsel to *Williams on Executors, vol. 2, 10th edition, p. 1375; Lindley on Partnership, 7th edition, p. 664; Summer v. Powell;* [4] *Jones v. Beach;* [5] *and Rawstone v. Parr.* [6]

Batuwantudawe (with him *H. V. Perera*), for respondent.

November 27, 1918. BERTRAM C.J.—

This was a case reserved by my Brother Ennis for the opinion of the Full Court, raising the interesting and important point whether our rules of procedure established by the Civil Procedure Code enable a person, who is the holder of a joint promissory note—one of the makers of which is dead—to sue in one action both the surviving maker and the estate of the deceased maker. It appears that express provision has been made for this purpose by section 42 of the Indian Contract Act, the terms of which are as follows: "When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons during their joint lives, and after the death of one of them, his representative jointly with the survivor or survivors, and after the death of the last survivor, the representatives of all jointly, must fulfil the promise."

It is established in English law (which is the law governing negotiable instruments in this Colony) that, where a promissory note is made by two persons jointly, and one of them dies, the liability survives to the other, and the estate of the party dying is discharged. This is a principle not confined to promissory notes alone, but applicable to all joint obligations. The Courts of Equity in English law have worked out a special exception in the case of partnership debts, where one of the partners is dead and his estate is undergoing administration, and, as is explained in *Lindley on Partnership, 7th edition, p. 664*, it is now possible for a creditor of two partners to sue the surviving partner directly, and the estate of the deceased partner indirectly, in a single action. He can in that action recover his debt in such a form as may ultimately be found convenient from both his surviving debtor and the estate

[1] *(1910) 13 N. L. R. 284.*
[2] *(1890) 2 N. L. R. 109.*
[3] *(1894) 1 N. L. R. 350.*
[4] *(1816) 2 Merivale 37.*
[5] *(1852) 2 De G. M. & G. 886.*
[6] *3 Russ. 539.*

of the deceased. Various reasons have been assigned for that principle, which it is not necessary for us here fully to discuss. But the only question which we really have to consider is whether that principle was confined to partnership debts, or whether it was recognized in English law that a similar benevolent principle could be applied to other cases of joint obligations.

We have examined the English authorities in connection with this matter, and it now appears quite clear that no such general principle is recognized in English law. The principle on which Courts of Equity have acted in England is explained in *Williams on Executors, vol. 2, 10th edition, p. 1375*: "Although a partnership liability will not generally be treated as joint and several in equity, apart from administration, there are cases in which a Court of Equity will treat a joint obligation as several, and the true doctrine on the subject of obtaining relief in equity by considering joint contracts as several appears to be that, wherever a Court of Equity sees that in a contract joint in form the real intention of the parties was that it should be joint and several, it will give effect to such intention. Accordingly, in certain cases, a joint bond has in equity been considered as several. Thus, a joint bond has in equity been considered as several, where there has been a credit previously given to the different persons who have entered into the obligation, and it was not the bond which first created the liability to pay. But where the obligation exists only by virtue of a joint covenant or bond, the extent of its operation can be measured only by the words in which it is conceived; and a Court of Equity cannot give the instrument any other than its legal effect."

The case where this principle is, perhaps, most clearly enunciated is that of *Summer v. Powell.* [1] The Master of the Rolls there said: "The question is whether any other effect can be given to this covenant in equity that it has at law. It has never been determined that every joint covenant is in equity to be considered as the several covenant of each of the covenantors. When the obligation exists, only by virtue of the covenant, its extent can be measured only by the words in which it is conceived. A partnership debt has been treated in equity as the several debt of each person, though at law it is only the joint debt of all. But, there, all have had a benefit from the money advanced, or the credit given, and the obligation to pay exists independently of any instrument by which the debt may have been secured. So, where a joint bond has in equity been considered as several, there has been a credit previously given to the different persons who have entered into the obligation. It was not the bond that first created the liability to pay. But in this case the convenant is purely matter of arbitrary convention, growing out of no antecedent liability in all or any of the covenantors to do what they have already undertaken."

[1] *(1816) 2 Merivale 37.*

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There are two other cases which have been referred to in the course of the argument. One is the case of *Jones v. Beach*, [1] and the other the case of *Rawstone v. Parr*,[2] which make it perfectly clear that, where a joint promissory note was given and one of the parties died, equity would not from those facts alone infer an intention that the instrument, which was in form a joint note, should be treated as joint and several.

It seems clear, therefore, that in English law (apart from the special case of partnership) no right as against the estate of a deceased maker of a joint promissory note, either at common law or in equity, belonged to the person entitled to claim upon the note. That being so, inasmuch as such a person has no claim against the estate, not even an indirect claim such as is recognized in the case of partnerships, it seems clear that he cannot sue in a single action both the surviving maker of the note and the estate of the maker, who is deceased. Whether he can in any form take advantage of the right of contribution, which the surviving maker may have against the estate of the deceased maker in any subsequent proceedings, is not a question for us to determine.

In view of the above considerations, I am of opinion that the judgment of the learned Commissioner in the Court below was right, and that the appeal should be dismissed, with costs.

ENNIS J.—I agree, and have nothing to add.

DE SAMPAYO J.—I also agree, and have nothing to add.

Appeal dismissed.