1937 *Present :* **Abrahams C.J., Poyser and Maartensz JJ.**

SUPPIAYA REDDIAR *v.* MOHAMED *et al.*

78—C. R. Colombo, 24,794

Joint promissory note—Action against two makers—Judgment by default against one—Action barred against the other—English law.

Where in an action brought against two joint-makers of a promissory note, judgment by default is entered against one, the action cannot thereafter be maintained against the other.

PLAINTIFF sued two defendants on a promissory note for Rs 300, admitted to be a joint note, dated January 5, 1935, carrying interest at 18 per cent. On the day of trial, the first defendant did not appear and judgment was entered against him. The following issue was then framed: "In view of the judgment against the first defendant, can the plaintiff maintain the action against the second defendant as it is a joint promissory note?" The issue was answered against the defendant and judgment was entered for the plaintiff as prayed for with costs.

N. K. Choksy (with him *R. C. Fonseka*), for second defendant, appellant. —The decree is one for judgment against the defendants jointly and severally. This is a joint note and the decree will have accordingly to be altered.

The action cannot be maintained against the second defendant, because judgment has already been entered in favour of the plaintiff against one of the joint debtors liable on this note. That is the English Common law rule which was made applicable in Ceylon by section 98 (2) of Ordinance No. 25 of 1927 which is the Ordinance relating to Bills of Exchange.

[a] *30 N. L. R. 256.*

The rule was adopted in these Courts in the case of *Elias Appuhamy v. de Silva*[1]. See also *Parr v. Snell*[2], *Moore v. Flanagan*[3], *Hammond v. Schofield*[4], and *Kendall v. Hamilton*[5].

[ABRAHAMS C.J.—In all these cases, there were two separate actions.]

Even when the objection has been taken in the same action, it has been upheld. See *McLeod v. Power*[6].

This question has come up before the Ceylon Courts in *Mudalihamy v. Punchi Banda*[7], which does not apply, and *Babapulle v. Rajaratnam*[8], which applies. In the latter case, the action was held to be barred.

A. Muttukumaru (*S. J. V. Chelvanayagam* with him), for plaintiff, respondent.—The rule has been modified in England and under certain rules of the Supreme Court in England, an action may proceed against one of several joint debtors in which judgment has been entered against another, when, as in this case, there has been default of appearance.

[ABRAHAMS C.J.—Those rules cannot apply in this country.]

The rule can apply only if this is a question of substantive law. Substantive law will apply to a question in which the nature of a liability or its extent is involved. It is otherwise when the manner of enforcing that liability is in question—that would be a matter of procedure. See *Poyser v. Minors*[9]. In this case, the liability on the note is not denied; it is only the manner in which the liability is sought to be enforced that is questioned. That is a question of procedure which must be governed by the Civil Procedure Code which is silent on this point. Section 89 of the Code does not apply.

Even the Judges of the House of Lords, who decided *Kendall v. Hamilton* (*supra*), were divided in their opinion as to whether the rule is a question of substantive law or of procedure.

Even if this is a question of substantive law, the English Common law rule cannot apply in this case, because there is in this case only one decree. Decree is the equivalent in Ceylon of judgment in English law. So that there should have been two decrees to make the English rule applicable.

[ABRAHAMS C.J.—But there was a judgment entered when the first defendant defaulted.]

Yes. But the judgment was valueless. No rights flowed from it. It was not capable of execution. Therefore only a decree against that defendant could have made proceedings against the other defendant improper.

Cur. adv. vult.

December 16, 1937. POYSER J.—

The plaintiff sued the two defendants on a joint promissory note for the sum of Rs. 300. The defendants filed one proxy and a joint answer alleging, *inter alia*, that all sums due on the promissory note had been paid. Subsequently however the second defendant revoked his previous proxy and filed an amended answer.

On the day of the trial, the first defendant did not appear and judgment was forthwith entered against him. The following issue was then

[1] *30 N. L. R. 232.*
[2] *(1923) 1. K. B. 1, at p. 4.*
[3] *(1920) 1 K. B. 919.*
[4] *(1891) 1 Q. B. 453.*
[5] *(1876-9) 4 A. C. 504, at 522 and at 582.*
[6] *(1898) 67 L. J. R. (Ch.) 551.*
[7] *15 N. L. R. 350.*
[8] *4 N. L. R. 348.*
[9] *7 Q. B. D. 329.*

framed :—" In view of the judgment against the first defendant, can the plaintiff maintain the action against the second defendant as it is a joint promissory note ? ".

The second defendant did not desire any other issue to be framed and the plaintiff admitted that the note sued on is a joint note.

The Commissioner of Requests, to whom the same cases were cited as were brought to our notice, was of the opinion that the principles of law laid down in those cases did not apply to the present case and that to apply them would seem to be absurd and would amount to an injustice.

Judgment was consequently entered for the plaintiff against the second defendant as well as the first defendant.

The second defendant appealed and the appeal came before Moseley J. who referred it to a Bench of three Judges as he was disinclined to agree with the judgment of Lascelles C.J. in *Mudalihamy v. Punchi Banda*[1], a case which supported the Commissioner's judgment.

In deciding the question that arises on this appeal, we must be guided by English decisions. There is statutory provision to this effect, viz., section 98 (2) of the Bills of Exchange Ordinance, 1927, which is as follows :—

> " The rules of the Common Law of England including the Law Merchant, save in as far as they are inconsistent with the express provisions of this Ordinance, or any other Ordinance for the time being in force shall apply to bills of exchange, promissory notes, and cheques ".

The earliest authority to which we were referred was the case of *King v. Hoare*[2], where the point seems to have first been decided. In this case Parker B. held that a judgment (without satisfaction) recovered against one of two joint debtors is a bar to an action against the other.

The principle laid down in this case was adopted by the House of Lords in the case of *Kendall v. Hamilton*[3]. In that case judgment had been obtained against two of three joint debtors and it was sought subsequently to recover from the third. It was held the action was not maintainable as the contract had passed into a judgment and the following dictum of Parker B. in *King v. Hoare* (*supra*) was followed :—

> " The judgment of a Court of record changes the nature of that cause of action and prevents its being the subject of another suit and the cause of action being single cannot afterwards be divided into two ".

It is only necessary to cite one other English case, viz., *Parr v. Snell.*[4] In that case one action was brought against three joint contractors and final judgment was signed against two of the defendants. It was held following the rule in *King v. Hoare* (*supra*) and *Kendall v. Hamilton* (*supra*) that the plaintiff was precluded from proceeding with the action against the third.

The following passage occurs in the judgment of Scrutton L.J. at page 9 :—

> " We are dealing with a settled system of law and are not entitled to mould or disregard it, because, as I think in this case, the rule is a

[1] *15 N. L. R. 350.*
[2] *13 M. and W. 494.*
[3] *4 Law Rep. Appeal Cases 504.*
[4] *(1923) 1. K. B. 1.*

technical one which does not in any way affect the merits of the particular case. The technical rule of law which we have to apply is this: that where there are joint contractors if judgment is signed against one the other is discharged .. . . . ".

In the case of *Mudalihamy v. Punchi Banda* (*supra*), the facts were very similar to this case and Lascelles C.J. considered the question was one of procedure and English rules of procedure were not in force in Ceylon. He consequently held that a judgment by default against one of several joint makers of a note does not prejudice the plaintiff's right to proceed with the action against the other defendants.

This judgment is, as Moseley J. points out, not in accord with the English authorities and such authorities do not appear to have been cited.

This appears to be the only local decision in support of the argument on behalf of the respondent but other local decisions, viz., *Manual Istaky v. Sinnathamby* [1], and *Appuhamy v. de Silva* [2], support the appellant.

In the former case Middleton J. held that a judgment, although unsatisfied obtained against a joint contractor, is a bar to an action against the other joint contractors, and in the latter case Fisher C.J., after reference to the English authorities, held that where judgment was obtained of consent against one defendant on a joint debt, he could not sue the second defendant on the same cause of action.

From a consideration of these authorities it is clear that it is a settled rule of English law—not procedure—that a judgment against one of two joint debtors is a bar to an action against the other joint debtor unless there is some statute or rule of Court which takes the case out of this rule.

In England such rules of Court have been framed (see *1937 Annual Practice. p. 190*), but there is no Ordinance or rule of Procedure in force in Ceylon which in any way modifies this rule.

In view of the above the appeal must be allowed. I come to this conclusion with the greatest regret as there is no doubt that the rule, which in my opinion, we must follow in this case, results in injustice.

Lord Penzance in *Kendall v. Hamilton* (*supra*), in giving a dissenting judgment, apprehended that the rule might result in injustice. The following is a passage from his judgment:—

> "What justice then, is there in saying that when three persons are, all and each, individually liable to pay a debt, an action and judgment (still unsatisfied) against two of them should extinguish the liability of the third ".

In the present case the plaintiff loses his remedy against the second defendant on account of this technical rule.

The Commissioner was undoubtedly right in holding that its application to this case would amount to an injustice, but the rule in question is a settled rule of law, and must be given full effect to.

The appeal is allowed with costs both here and below and the judgment against the second defendant set aside.

[1] *13 N. L. R. 284.*

[2] *30 N. L. R. 232.*

ABRAHAMS C.J.—

I have had the advantage of reading the judgment of my brother Poyser. I agree with it, and I share his regret that in allowing this appeal we are inflicting a hardship upon a creditor and enabling the escape from his liability of a debtor who raised no point other than a technical one which we have been called upon to decide.

English law is applicable to this question and I have no doubt that the rule in *Kendall v. Hamilton*[1] applies in full force, and despite a strong dissenting judgment by Lord Penzance in that case the rule became settled law, as a number of subsequent cases in which it was followed clearly indicates. As Lord Hatherley said in *Kendall v. Hamilton*, "each of the co-contractors has a right to be sued and to have the matter settled at once, instead of its being settled piecemeal", and Scrutton L.J. stated in *Moore v. Flanagan*[2], "another technical way of putting it is to say that the contract is merged in the judgment and therefore the cause of action on the contract is gone. A more substantial way of putting the matter is that each joint contractor has a right to have his co-contractors joined as parties so as to have them all before the Court". It is not necessary in my opinion to aggravate the mortification of the respondent by going into the reason for the rule and explaining why it is expedient that the individual litigant should suffer for the maintenance of a principle of law.

The respondent struggled for judgment by urging that no authority which was cited before us was quite like this case, inasmuch as they all appeared to deal with two different sets of proceedings, whereas in this particular case the plaintiff launched one action against two joint debtors and therefore he ought not to be frustrated in obtaining judgment against a second defendant because he was fortunate enough, or rather, as it has turned out, unfortunate enough, to obtain judgment in default against the first defendant. I very much regret that that cannot help him; it is a difference in form but not in fact. Each co-contractor has a right to have the whole matter settled in a single proceedings and it cannot be said that the proceedings are single when there are two different judgments. The suit began as one but became in fact two proceedings, the dividing line being the judgment against the first defendant. As Vaughan William J. said in *Hammond v. Schofield*[3], the co-contractor has a right to insist on the rule that there shall not be more than one judgment on one entire contract. It is true that the proceedings in the case against the second defendant were restricted merely to the technical point as to whether judgment against the first defendant precluded plaintiff from further action. But he might have raised other defences and then the fact that there were actually two proceedings would have become much clearer.

The stringent operation in England of the rule in *Kendall v. Hamilton* (*supra*) can be avoided in such cases as this by resorting to the provisions of Order 14, Rule 1. It is certainly desirable in the interests of justice that some such legislation should be enacted here. When section 98 (2) of

[1] *4 A. C. 504.*

[2] *(1920) 1 K. B. 919.*

[3] *(1891) 1 Q. B. D. 453, at p. 457.*

the Bills of Exchange Ordinance, 1927, was enacted and the rule of the Common law of England directed thereby to apply to Bills of Exchange, the full implications of this provision could not have been reasonably foreseen.

MAARTENSZ J.—

I cannot usefully add to the reason given in the judgments of my lord Chief Justice and my brother Poyser for allowing the appeal with costs in both Courts. I too regret that the authorities cited on behalf of the appellants which we are bound to follow preclude us from arriving at any other result.

Appeal allowed.