1899.
May 29 and June 1.

BABAPULLE *v.* RAJARATNAM *et al.*

D. C., Colombo, 10,344.

Action on promissory note granted by husband and wife—Default of wife to appear—Judgment entered against wife after husband's appearance to defend—Invalidity of judgment.

When a husband and wife are sued on a joint promissory note, and the husband has obtained leave to appear and defend, no judgment can be entered against the wife for non-appearance, because by her legal guardian appearing she cannot be said to be in default.

THE plaintiff sued his daughter, the second defendant, and her husband, the first defendant, for the recovery of a sum of Rs. 5,000 due upon a promissory note made by them in favour of plaintiff on the 29th March, 1897.

The second defendant did not appear, and judgment was entered against her.

The first defendant filed answer admitting the debt due on the promissory note, but claimed in reconvention a sum of Rs. 8,000, which he alleged became payable to him in respect of a marriage contract entered into between the plaintiff and the two defendants. It appeared that by a deed dated 25th November, 1896, the plaintiff, in consideration of the first defendant marrying the second defendant, the daughter of the plaintiff, covenanted with them to give to his daughter (the second defendant) within six months after her marrying the first plaintiff, on their joint request, certain jewellery and a house in Barber street, Colombo, in addition to another land in Jampettah street already conveyed to the daughter, and to build at a cost of Rs. 2,000 a house on the land in Jampettah street, and it was provided in the said deed:—

"If the said Babapulle (plaintiff) shall fail, refuse, or neglect within six months after the marriage of Rajaratnam and Maria Babapulle (defendants), on their joint request, to deliver the said jewellery, or to convey the said house in Barber street, or to build at a cost of Rs. 2,000 a house on the land in Jampettah street, he shall pay to the said Maria Babapulle (second defendant), in case of default occurring in respect of the jewellery, Rs. 2,500; and in case of default occurring in respect of the said house in Barber street, Rs. 8,000, being the value thereof; and in case of default occurring in respect of the building of the house in Jampettah street, Rs. 2,000."

The marriage of the defendants took place on the 25th November, 1896, and the plaintiff, though thereto requested, failed to convey the land to the second defendant. The first defendant thereupon claimed the sum of Rs. 8,000, as due to him personally under section 19 of the Ordinance No. 15 of 1876.

On the day of trial it was contended for the first defendant that, as plaintiff had already obtained judgment against the second defendant, he was not entitled to proceed further with the action against the first defendant. *McLeod v. Power*, *L. R. 2 Ch., Div. 295* (1898), was cited in support of this objection.

BROWNE, D.J., overruled it in these terms:—

"I hold that the decision in *McLeod v. Power* is not applicable, as there the writ was not specially endorsed. It could not be, because the claim was not one pure and simple for such a debt or liquidated demand as may under order 3, rule 6, be sued for by a specially endorsed writ, but was, *inter alia*, for damages for detention of shares and alternatively for specific performance of certain agreements. The debt in the present action is sued for by our procedure analogous to the English specially endorsed writ. All the remarks made by Byrne, J., inimical to the defendant's contention there because the writ was *not* specially endorsed, apply here in favour of the plaintiff, where (as I may say) it was the special exception made in a plaintiff's favour by order 14, rule 5, where in an action by specially endorsed writ one defendant has not leave to defend and has judgment marked against him. That the plaintiff is not thereby prejudiced in his right to proceed with his action against him, who has leave to defend, applies by parity of reasoning to our procedure; and if our Procedure Code has not been supplemented by such a rule, I would now initiate what I believe to be a just practice. Because I consider that Mr. Grenier, for plaintiff, has very rightly drawn attention to the fact that the second defendant here is the wife of the first; the consequence whereof must be that neither her appearance nor (equally) her non-appearance is of any validity, unless she has her husband's assistance therein, when at all events it is not shown she has a separate estate of her own, in which case possibly her abstention from a defence might be fatal to her, for if her husband were to refuse to aid her. I think it not impossible she could obtain leave to defend without his aid. I would say of this case that I consider that the Court, had it known the fact that she was a married woman without separate estate, would not have entered

1899.
May 29 and June 1.
BROWNE, D.J.

judgment against her on the 24th August, 1897, when her husband on that day filed answer, certainly not without further inquiry whether both defendants desired she should not answer; *i.e.*, that they expressly consented to entry of decree against her, a joint defendant with her husband.

" I therefore overrule the first defendant's objection with costs, but without execution for same ere final decree, and order the action for further hearing for 19th July, 1899."

The first defendant appealed.

H. A. Jayawardena, for appellant.—There is only one course of action in a joint promissory note, and that being merged in the judgment against the second defendant there is no foundation for any further proceedings against the first defendant. The English Rules and Orders on which the District Judge relied have no force in Ceylon. The Civil Procedure Code does not provide for the continuation of an action on a joint contract where judgment has been already entered against one or more of the joint contractors. The fact that defendants are husband and wife does not prevent the operation of this principle in this case, as they were married after the framing of the Ordinance No. 15 of 1876, and their liability is separate, as if they were two different persons contracting jointly with the plaintiff. *McLeod v. Power* (*67 L. J. Chancery, 551*) is applicable to this case.

Grenier, for respondent.—The promissory note says, " we, husband and wife," and under the Roman-Dutch Law a wife could not appear without the consent of her husband. The judgment obtained against the second defendant is therefore bad. In *McLeod v. Power* both appeared, which is not the case here.

H. A. Jayawardane replied.

Cur. adv. vult.

1st June, 1899. WITHERS, J.—

In this case a husband and wife—married, we are told, not in community of estate—have been sued on their joint promissory note by the maker. The plaintiff proceeded under chapter LIII. of the Civil Procedure Code and took out the appropriate summons, which requires the defendant to obtain leave from the Court to appear and defend the action. The first defendant, the husband, applied for leave to appear and defend. A day was fixed for the filing of the answer, answer was filed, and

the trial of the case was fixed for the 23rd September, 1897. On the day the first defendant's answer was filed, viz., the 24th August, 1897, the journal entry contains this note: "Second defendant absent, time expired; enter decree as against her," and in pursuance of that order a formal decree was drawn up bearing date the 24th August, 1897. Why this decree was passed I cannot understand: the plaintiff did not ask for the decree, and section 90 of the Civil Procedure Code enacts that " in the case " of an action where there are more defendants than one, the Court " shall not be obliged to pass a decree for default against the " defendants for failing to appear at a stage of the action, provided " that one defendant at least appears at that stage against whom " the action must proceed." In my opinion, as the husband had come forward to defend the note, the decree against his wife was not a binding one: *in foro* the wife is always *in statu pupilari*. It makes no difference whether she married before or after the Ordinance of 1876. For if married before 1876 she could only be brought into Court under the protection of her legal guardian. her husband, though by ante-nuptial contract she was allowed to administer her separate estate. When the case ultimately came for trial against the first defendant in February last, he raised as an issue of law between himself and the plaintiff, whether the judgment already obtained against his wife did not estop the plaintiff from recovering anything against him. In other words, he pleaded the judgment as a bar to further action against him.

The appellant sought to apply to this case the judgment in *McLeod v. Power* (*67 L. J. Chancery, 551*). The principle of that case I understand to be this: joint debtors are entitled to be sued together, as there is but one cause of action and the cause of action becomes merged in the judgment. Thus, if judgment is recovered against one of the debtors, the other can plead the merger. This rule of law may apply here to promissory notes, but I question if it applies to joint obligations outside the law merchant. Such a rule of law can only apply where the judgment pleaded is a binding one. In my opinion this decree is not binding on the wife, for her legal guardian had appeared and was defending the action when it was obtained. I would affirm the order.

LAWRIE, A.C.J.—

When (as here) a husband and wife are sued, and the husband on affidavit obtains leave to appear and defend, the wife is not in default, and no judgment can be entered against her.

1899.
May 29 and June 1.
LAWRIE, A.C.J.

The decree against the wife must have been entered *per incuriam*. I agree with my brother Withers that it is not a binding decree: if it had been asked for, I would have recommended that (in revision) it be set aside. It is sufficient that we say that it has no validity.

The first defendant (the husband) has taken the altogether untenable position that the decree against his wife relieves him of all further liability.

This plea has been rightly repelled by the learned District Judge, though I do not fully understand his reasons.

I will not enter on the general question of the disability of married women to contract, nor on the question whether a married woman be bound if she signs a promissory note along with her husband. Nor will I enter on the question of the liability of joint debtors, how they can be used, and when the obligation is extinguished.

I always understood our law to be that in joint obligations each debtor is liable only for his proportion of the debt.

It is sufficient, for the purposes of this decision, to hold that the decree against the wife ought not to have been entered, that it is not *res judicata*, and that the trial must proceed on the answer filed by the first defendant. His defence (if successful) will avail his wife equally with himself.