1939.

Present : **Soertsz A.C.J.**

RAMALINGAM *v.* JAMES.

176, 176A—C. R. Colombo, 27,433.

Waiver—Agreement to waive money due on a decree on a pro-note—Question of consideration—Roman-Dutch law.

Where a creditor agreed to waive the amount due on a decree entered in an action brought by him on a promissory note, the question whether there should be consideration for the agreement must be decided according to the Roman-Dutch law.

Manuel Estaky v. Sinnatamby (*31 N. L. R. 284*) not followed.

APPEAL from a judgment of the Commissioner of Requests, Colombo.

N. Nadarajah, for plaintiff, appellant.

No appearance for defendant, respondent.

Cur. adv. vult.

May 9, 1939. SOERTSZ A.C.J.—

On the facts, in my opinion, the learned Commissioner reached a conclusion that was inevitable. The evidence that goes to establish a waiver of his claim by the plaintiff, is overwhelming. It is a pity that the plaintiff thought fit to repent of the generosity he had shown to his debtor when he was apprised of his desperate financial state.

The only question that calls for consideration on this appeal is whether the law gives him a *locus poenitentiae* and enables him to go back on his waiver in view of the fact that there was no consideration for that waiver. That question depends for its answer on another question, namely, whether this transaction is governed by English law or by Roman-Dutch law. If English law applies, it seems clear that the second defendant must fail because he has given no consideration, as understood in that law, for the waiver by the plaintiff of the debt due to him. If, however, it is the Roman-Dutch law that governs the matter, the plaintiff is out of Court for there was an agreement entered into between him and the second defendant seriously and deliberately or with the intention that a lawful obligation should be established between them. That is all that is required in Roman-Dutch law—see *Jayawickreme v. Amarasuriya*[1]; *Conradie v. Rossoneo*[2]; *Robinson v. Rondfontein Est. G. M. Co.*[3]

In my opinion, on this point too, the view taken by the learned Commissioner is correct—the Roman-Dutch law applies. The contention that the matter is governed by the English law is based on the fact that the decree the benefit of which the plaintiff is said to have waived, was entered upon a claim made on a promissory note. It is argued that, therefore, the English law applies. I cannot take that view. The debt due on the decree is a new debt quite distinct from and independent of the debt on the promissory note. It is a debt called into existence by the process known to Roman law as *novatio necessaria.* In the words of *Voet " novatio necessaria dicitur, quae fit per litis contestationem et sententiam, quatenus, uti per stipulationem, ita quoque judicio inter actorem et*

[1] *(1918) A. C. 669.*

[2] *(1919) A. D. 279.*

[3] *(1921) A. D. 236.*

reum contrahi videtur, non tam spectata origine judicii, quam ipsa judicati obligatione". Once the decree was entered the fact that it was entered in a case brought on a promissory note is only of historical interest, so to speak. It has no legal consequence such as is contended for here. The legal characteristics of a promissory note are not imparted to the decree. The promissory note while it existed was governed by the English law, but when decree was entered, the promissory note was swallowed up by it and lost its identity. The judgment merged and destroyed the original cause of action. The debt due on the decree is a new debt and is governed by the common or Roman-Dutch law. Mr. Nadarajah relied on the judgment of Middleton J. in *Manual Estaky v. Sinnatamby* [1]. The point decided in that case was that a decree entered in a case on a joint promissory note in the terms "it is ordered and decreed that the said defendants do pay to the said plaintiff the sum of Rs. 276.82 with legal interest and costs", the liability of the defendants must be fixed by the English law and each defendant was liable for the whole sum to the decree holder. I find it difficult to accept that decision. The attention of the learned Judge does not appear to have been asked or given to the fact that it was no longer a question of a debt due on a promissory note, but on a decree. While in English law "joint" has the meaning given to it in the passage cited by Middleton J. from *Richard v. Heather* [2], in Roman-Dutch law persons jointly liable are liable *pro rata* and that is the ordinary liability of debtors unless there are clear words or indications pointing to an obligation in *solidum.*

For these reasons, I think the appeal fails.

Appeal dismissed.