1929.

Present : Fisher C.J. and Garvin J.

ELIAS APPUHAMY *v.* DE SILVA *et al.*

296—D. C. Hatton, 1,646.

Joint-debt—Action against both creditors—Judgment against one—Withdrawal of claim against other—Action barred against latter.

Where the plaintiff sued the defendants on a joint-debt and obtained judgment of consent against the first defendant, withdrawing his action as against the second defendant,—

Held, that he was debarred from suing the second defendant on the same cause of action.

THIS was an action instituted by the plaintiff to recover a sum of Rs. 800 from the defendants on a promissory note. On October 25, 1926, the plaintiff sued the defendants on the note in question, and on December 3, 1926, judgment was entered of consent against the first defendant only, the plaintiff being permitcd to withdraw his action under section 406 of the Civil Procedure Code as against the second defendant. The present action was begun on October 12, 1927, against the same defendants. The learned District Judge gave judgment against both of them, and the second defendant appealed.

H. V. Perera (with *D. E. Wijeyewardene*), for second defendant, appellant.

H. H. Bartholomeusz, for plaintiff, respondent.

February 1, 1929. FISHER C.J.—

In this case a promissory note dated October 9, 1924, for Rs. 800 was signed by K. H. E. de Silva " for K. H. Endoris de Silva & Company." The body of the note was as follows :—" On demand we, the undersigned K. H. Endoris de Silva & Company, Diyagama, Agrapatna, promise to pay to D. E. Subasinghe of Talawakele or order the sum of Rupees Eight hundred only, currency for value received with interest, &c." On October 25, 1926, the plaintiff in the present action sued the defendants in the present action on the note in question, and on December 3, 1926, a decree was entered, of which the following portion is material to this case :

" . . . . It is ordered and decreed of consent that the first defendant (K. H. E. de Silva) do pay to the plaintiff a sum of Rs. 927·72, together with interest thereon at the rate of 9 per cent. per annum from October 25, 1926, till payment in full.

" It is further ordered that the plaintiff be and he is hereby permitted to withdraw this action under section 406 as against the second defendant.

"And it is further ordered that the first said defendant do pay to the said plaintiff and the plaintiff to the second defendant their costs of this action as taxed by the officer of the Court."

The present action was begun on October 12, 1927. Both the defendants in the first action were again made parties to this action. On July 20 a decree was made ordering "that the defendants do pay to the plaintiff a sum of Rs. 800 with interest thereon, &c." From that decree the second defendant appeals. The point was raised but not persisted in that leave had not been given by the Court to the plaintiff under section 406 of the Civil Procedure Code to bring another action against the present appellant. I do not think there can be any doubt that leave was granted. The granting of leave under that section, however, does not give the party to whom it is granted a cause of action in a case in which he would otherwise have none, and the sole question on this appeal is whether the fact that the plaintiff obtained judgment against the first defendant in the former action on the promissory note sued upon in this action is a bar to his prosecuting a second action against the appellant. There can be no question that both actions were brought to recover a partnership debt. The wording of the promissory note sued upon clearly shows this. That being so, the debt was a joint-debt. That that is so is clear from many English decisions beginning with *King v. Hoare*,[1] which was cited by Mr. Perera. That decision was acted upon by the House of Lords in *Kendall v. Hamilton*,[2] in which case the expression that partnership debts are treated in a Court of Equity as joint and several was explained by the Lord Chancellor (Lord Cairns) in his judgment at page 517.

Once it is established that the debt was a joint-debt the judgment in the first action against the first defendant precludes the plaintiff from being able to make the second defendant liable in the second action. In the words of Scrutton L.J. in his judgment in *Parr v. Snell*[3] "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."

For these reasons the judgment of the District Court, in so far as it holds the second defendant (the appellant) liable, must be set aside and judgment must be entered dismissing the action against him, but having regard to the course the proceedings took in the District Court, without costs, but respondent must pay the appellant his costs of this appeal.

GARVIN J.—I agree.

Set aside.

[1] *13 M. & W. 494.* [2] *L. R. 4, A. C. 504.*

[3] *L. R. 1923, 1 K. B., at p. 9.*