

1923.*Present: Bertram C.J. and De Sampayo J.*GARVIN *v.* ABEYAWARDENE.

18—D. C. (Inty.) Matara, 421.

Warrant of attorney to confess judgment given to a firm of proctors—One proctor confessing judgment after the death of partner.

Where a power is conferred upon two agents, it is presumed to be conferred upon them jointly, and an act by one purporting to be an execution of that power is not a good execution. If the two agents are partners, and one partner purports to exercise the power singly as the survivor of the two, his act is none the less invalid. At the death of one of the two agents, it terminates the authority of the other.

A warrant of attorney to confess judgment issued to two proctors practising in partnership was held not to give the survivor the power to confess judgment after the death of the other partner.

The warrant of attorney to confess judgment was as follows:—

To Messrs. G. E. and G. P. Keuneman,
Crown Proctors, of the Matara District.

These are to desire and authorize you, the proctor above named, to appear for J. V. P. Abeyawardene of Weligama at any time in the District Court of—and to receive summons for me, the said J. V. P. Abeyawardene, in an action at the suit of the Attorney-General on a bond dated the Seventh day of July, One thousand Nine hundred and twenty, executed by me, the said J. V. P. Abeyawardene, in favour of His Majesty the King, his heirs and successors, for the sum of Rupees Eight thousand and fifty only, lawful money of Ceylon, being the amount for which I, the said J. V. P. Abeyawardene, purchased the exclusive privilege of selling fermented toddy by retail within the village of Weligama for the period of twelve months from the First day of October, One thousand Nine hundred and twenty, to the Thirtieth day of September, One thousand Nine hundred and twenty-one, sold by the Assistant Government Agent of the Matara District, and thereupon to confess the same action, or else to suffer judgment by default, or otherwise to pass against me, the said J. V. P. Abeyawardene therein, and to be thereupon forthwith entered up against me, the said J. P. Abeyawardene, of record in either of the said Courts for the said sum of Rs. 8,050 only, or for such portion thereof in respect of which the action shall be brought, together with costs of action.

And I, the said J. V. P. Abeyawardene, do hereby further authorize and empower you, the said Proctor, after the said judgment shall be entered up as aforesaid for me, the said J. V. P. Abeyawardene, to sign and execute a good and sufficient release or releases in the law to the said Attorney-General for and on behalf of His Majesty the King, his heirs, &c., of all and all manner of appeals or proceedings by way of appeal, and all benefit and advantage thereof, and defects and imperfections whatsoever, had made, committed, done, or suffered in,

about, touching or concerning the said judgment for any proceeding whatsoever in any way concerning the same. And for what you, the said proctor, shall do, or cause to be done, in the premises or any of them, this shall be to you a sufficient warrant and authority.

In witness whereof, &c.

J. V. P. ABEYAWARDENE.

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Akbar, A.S.-G. (with him V. M. Fernando, C.C.), for the Crown, appellants.

H. V. Perera, for the respondent.

March 8, 1923. BERTRAM C.J.—

The question we have to determine in this case is the effect of a warrant of attorney to confess judgment. The warrant was in fact issued to Messrs. G. E. and G. P. Keuneman, Crown Proctors, of the Matara District. The document did not go on as it might have done, in pursuance of the form prescribed by the Code, to add the words: "or other proctor of the Supreme Court." The senior partner of the firm has died, and it was the junior partner who purported to act in pursuance of the warrant and to confess judgment, his competency to do so is disputed, and the learned District Judge has found that he was not so competent. In my opinion the learned Judge is right.

It is clear law that, where a power is conferred upon two agents, it is presumed to be conferred upon them jointly, and an act by one purporting to be an execution of that power is not a good execution. That is settled by a number of cases (*Boyd v. Durand*,¹ *Brown v. Andrew*,² and also by two local cases: *Muttiah Chetty v. Karupaiya Kangany*³ and the earlier case of *Lindsay v. The Oriental Bank Corporation*.⁴ It seems to follow as a corollary that, if the two agents are partners, and one partner purports to exercise the power singly as the survivor of the two, his act is none the less invalid in other words, at the death of one of the two agents, it terminates the authority of the other. This is assumed by Wood Renton J. in the case of *Times of Ceylon Co. v. Low*⁵ with reference to a proxy given in favour of two partners of a firm of proctors, and I have no doubt that the assumption was justified by the practice.

The Solicitor-General, who appears on behalf of the appeal, wishes to distinguish these cases, and argues that the matter is put upon a new footing by a later decision. He contends that the question is a question of contract, the contract being a contract of agency, and that the authority of the agent must be determined either by the express or presumed intention of the parties to the contract. There is a case which even on this footing appears to be against him, namely, *Friend v. Young*,⁶ where it was held, there

¹ (1809) 2 Tant. 161.

² (1849) 18 L. J. Q. B. 153.

³ (1903) 6 N. L. R. 285.

⁴ (1857) 1 Lor. 108.

⁵ (1913) 16 N. L. R. 436.

⁶ (1897) 2 Ch. 421.

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being a contract with a firm of agents and one partner of this firm having died, the contract of agency was at an end. The Solicitor-General, however, distinguishes that case as well as the case of *Tuskor v. Shepherd*¹ therein cited by the help of the case of *Phillips v. Hull Alhambra Palace Company*.² That case decided that, where a contract was made with a firm styling itself "The Hull Alhambra Palace Company," that contract was not put an end to because of the death of one of the partners constituting that contract; and it was laid down in that case that the question whether such a contract has terminated must depend upon an examination of all the facts of the case. It is undoubtedly recognized law, quite apart from that case, that, if a person is appointed the agent of another under a contract, the question whether the contract continues after the death of a partner of the other party to the contract must depend on what the parties had in view in constituting the contract of agency.

I do not think, however, that this is the test here. We are not considering a question arising between two parties to a contract of agency. We are considering the appointment of two partners to confess judgment, and that appointment is an executive act performed by operative words in the document, much in the same way as a conveyance of land. The conveyance may arise as the result of a contract, and contractual relations may be set up as the result of the conveyance. But the effect of the conveyance must depend upon the operative words of the document. In this case the operative words appoint two gentlemen as agents for the purpose of confessing judgment. These words of appointment in so special a document as a warrant of attorney must be strictly construed, and, on the principles laid down in the authorities earlier cited, in my opinion a confession of judgment by one of the two gentlemen named is not a valid execution of power. It is not necessary for us in the view that we take of the case to discuss the other point raised, or the opinions expressed in the judgment of the learned District Judge as to the nature of the warrant of attorney to confess judgment.

In my opinion the appeal should be dismissed, with costs.

DE SAMPAYO J.—I agree.

Appeal dismissed.

¹(1861) 6 H & N. 575.

²(1901) 1 Q. B. 59.