

Appeal by the defendant from an order of the Master in Chambers dismissing the appellant's motion to stay proceedings in this action, upon the ground that the action was improperly brought in the name of "W. Harris & Company."

K. F. Mackenzie, for the appellant.
A. C. Heighington, for the plaintiff.

MIDDLETON, J.:—The firm of W. Harris & Company consisted of William Harris and John B. Harris. William Harris died after the transaction giving rise to the action and before the issue of the writ.

On the 11th September, 1911, the defendant conveyed certain lands to "William Harris and John B. Harris, trading as W. Harris & Company;" this conveyance being taken either as collateral to or in satisfaction of his indebtedness to the firm. The defendant had never given possession of the property, and this action is brought to recover possession; the plaintiff asserting that the conveyance was in satisfaction of the debt and is absolute. No defence has yet been delivered, but the defendant's contention is that the conveyance, though absolute in form, was in truth a mortgage, and that an account ought to be taken and that redemption should be permitted.

In making this motion the defendant disclaims any intention to harass or delay the plaintiff, but desires to be satisfied that, upon redemption, if his contention succeeds, he will receive a satisfactory conveyance. The executors of William Harris are not willing to join in the action. Two questions are involved in the motion:—

(1) As to the right of the surviving partner to sue in the firm name under the provisions of the Rule. This is not a matter of practical moment, as the plaintiff John B. Harris is willing to sue in his own name as the surviving member of the firm. Rule 100 applies only where, at the time of the bringing of the action, there are two or more persons claiming as partners. Partners carry on business jointly, and upon the death of one partner the whole partnership estate vests in the survivor. The surviving partner then asserts in his own name the rights of the firm. It, therefore, follows that the style of cause should be amended so as to read "John B. Harris, sole surviving member of the firm of W. Harris & Company."

(2) The more material question is as to the ability of the surviving partner to give a good title if the defendant is entitled to