THURASAMI *v.* SELLACHI.

1902.
July 21.

D. C., Colombo, 16,488.

Civil Procedure code, s. 439—Mark of declarant made in affidavit—Validity of signature in Sinhalese.

A signature in Sinhalese set down by a process server in his affidavit is not a "mark" under section 439 of the Civil Procedure Code.

The dictum of Bonser, C.J., in *The National Bank of India v. Fernando* (D. C., Colombo, 6,892), decided by the Collective Court on 4th October, 1895, commented on.

THE plaintiff sued the defendants upon a promissory note granted by them. To his plaint, instituted under chapter 53 of the Civil Procedure Code, was attached the necessary affidavit showing that the amount he claimed was justly due to him. Judgment was entered upon report of summons served on the defendants. Thereupon the second defendant moved that the judgment be set aside on the ground that the summons had not been served.

The District Judge, Mr. D. F. Browne, set aside the decree upon a ground not taken by the defendants, and allowed liberty to them to file answer. His order was as follows:—

"Without discussing any of the contentions preferred, I must allow the motion of the defendants to set aside the decree for a reason which was not advanced in argument yesterday, but, being one which the Collective Court allowed as an absolutely good reason in D. C. Colombo, 6,892, on the 4th October, 1895, is binding upon me. That ruling was made in a like application to set aside a decree when the process server had signed the affidavit or affirmation whereon the Fiscal's return was based by something written in Sinhalese. Bonser, C.J., there held: 'In my opinion a signature in Sinhalese is nothing more than a mark, because the Court knows nothing of any other language than the English language.' Section 439 requires: 'and when a mark is made instead of a signature, the person who writes the marksman's name against the mark shall also sign his name and address in the presence of the Court,'" &c.

"Here the signature is written in Sinhalese, and the manuscript in the blanks in the printed form was (judging by the handwriting) filled in by some person other than the Deputy Fiscal before whom it was affirmed. This person did not write the signatory's name against the mark, and even if he had been the Deputy Fiscal

1902.
July 21.

(who did here certify that the signatory had the matter interpreted to him and was affirmed thereto, which also was omitted in that case), I would consider that he ought also to have written the marksman's name against his mark. Hence 'this was not an affidavit at all, and furnishes nothing on which the Court could act,' as was there held.

"Decree set aside, and defendant, in view of his affidavit as to his defence, showing, as I consider, reasonable probability that he has a sufficient one, is allowed to file answer on or before the 9th instant. Costs to be costs in the cause."

Plaintiff appealed.

The case came up for argument before Moncreiff, A.C.J., and Wendt, J., on the 15th July, 1902, and was referred by them to a bench of three Judges.

On the 17th July the case was argued before Moncreiff, A.C.J., Wendt, J., and Middleton, J.

Dornhorst (with *Walter Pereira*), for appellant.—The authority relied upon by the District Judge (D. C., Colombo, 6,892, decided on the 4th October, 1895) is only an *obiter dictum* of Chief Justice Bonser. The Civil Procedure Code, section 439, provided that when a person made a mark instead of a signature, the marksman's name should be written out by a person against the mark, and that the writer of the marksman's name should sign his own name and address. Bonser, C.J., did not put the mark and signature on the same level, but only observed that the law made a signature in Sinhalese, or any other language than English, even with a mark, so far as such signature and mark necessitated certain requirements in common, but of course in the case of the mark the person who writes the marksman's name should also sign his name and address. The District Judge has wrongly interpreted the meaning of the Chief Justice.

H. J. C. Pereira (with *Jayawardene*), for defendants, respondents.—The Full Court decision in the case of *The National Bank of India v. Fernando* (D. C., Colombo, 6,892) relied on by the District Judge is binding on the Supreme Court as at present constituted. It could be reversed only by the Privy Council or by Statutory Law. In *The London Street Tramways Company v. The London County Council, L. R. App. Ca. 375 (1898)*, the House of Lords held that upon a question of law a decision of that tribunal was conclusive even if it were erroneous, and that it could be set right only by an Act of Parliament. The Supreme Court of Ceylon has no power to set aside its own decision if delivered by the Collective Court. A signature in Sinhalese is

virtually a mark to the Court, whose official language was English, and therefore the District Judge's ruling as to the insufficiency of the plaintiff's affidavit was right.

Dornhorst, in reply.—The Supreme Court has often reversed its own decisions which had been delivered by the Collective Court. It was only in recent years that the Court has regarded the collective opinion of its predecessors with an exaggerated reverence. However, the case relied on by the District Judge contains only an *obiter dictum* of one Judge, not concurred in by the other Judges. That authority, therefore, is of no value in the consideration of the present case.

Cur. adv. vult.

21st July, 1902. MONCREIFF, A.C.J.—

This is an action on a promissory note. A summons was issued on the 3rd March, 1902. On the 11th March the summons was reported to have been served on the defendants, and time having expired, judgment was entered in favour of the plaintiff in terms of the plaint. A writ of execution was issued, and on the 24th April the proctor for the second defendant asked that the judgment might be set aside and execution stayed, and that the second defendant should be allowed to defend the action. Upon argument the Judge granted this application, but not upon any of the grounds upon which it was made and by which it was supported. The process server had written his signature on his affidavit in Sinhalese. According to the Judge, the Collective Court in District Court case No. 6,892, on the 4th October, 1895, held that the affidavit upon which the Fiscal's return in that case was based, and which was signed by the process server by " something written in Sinhalese, " was not properly signed. It was held in that case by Bonser, C.J., that the process server's signature was nothing more than a mark, which ought not to be accepted, unless accredited in the same way as a common cross or mark made by an illiterate person. The case in question was heard by Chief Justice Bonser and Justices Withers and Browne. The leading judgment was delivered by the Chief Justice, who held, for several substantial reasons, that the summons had not been duly served, and said, *inter alia:* " That affidavit purports to be made by one Yohanis Perera, who describes himself as server, and it is signed in Sinhalese characters, the meaning of which I do not understand. It purports to have been affirmed before J. S. Drieberg, Deputy Fiscal, the signature of the Deputy Fiscal being affixed by what is commonly known as a rubber stamp. " The Chief Justice then expresses extreme regret that rubber stamps should be used. Later on he adds: " The signature is affixed in Sinhalese. In my

1902. *July 21.* MONCREIFF, A.C.J.

opinion a signature in Sinhalese is nothing more than a mark, because the Court knows nothing of any other language than the English language." To that judgment Mr. Justice Withers said "I entirely concur with my Lord," and Mr. Justice Browne simply "agreed".

Now, if the learned Judge was right in saying that the Collective Court decided this point in the sense meant by the Chief Justice, I should be the last to interfere with the decision, because I think it would neither be seemly nor expedient that a Full Court, even if it had the power to do so, should reverse the deliberate decision of Judges who have, sitting in Full Court, come to a different decision. I think, however, that each case must depend on its own circumstances. For example, if the decision of a case depends on the resolution of one question, or upon questions the resolution of which is essential and vital to the decision, then if the Judge who follows the Chief Justice simply says "I agree," he must be taken to have agreed upon those questions with the remarks of the Judge who gives the leading opinion. On the other hand, although I think that the following Judge is bound by the substantial grounds of a decision, he is not to be taken to agree in all the particulars of the leading judgment, nor even with all the reasons which the leading Judge has given for his opinion. In the case quoted I think that Mr. Justice Withers and Mr. Justice Browne ought not to be taken to have assented to the proposition of the Chief Justice unless they said so.

In this case the process server signed his affidavit in Sinhalese characters, and I think it is open to us to say whether the signature is good. It is possible that in some cases there may be confusion with regard to what a signature and a mark consist of. But it seems to me that in section 439 of the Civil Procedure Code, which must be taken to rule this case, the two things have a very different meaning. The section runs thus: "In the event of the declarant being a blind or illiterate person, or not able to understand writing in the English language, the affidavit shall at the same time be read over or interpreted to him in his own language, and the jurat shall express that it was read over or interpreted to him in the presence of the Court, Justice of the Peace, or Commissioner, and that he appeared to understand the contents; and also that he made his mark or wrote his signature in the presence of the Court, Justice of the Peace, or Commissioner. And when a mark is made instead of a signature, the person who writes the marksman's name against the mark shall also sign his name and address in the presence of the Court, Justice of the Peace, or Commissioner."

Now, the first part of the section provides for the reading over of the affidavit to a declarant who is one of three things, either blind, or illiterate, or not able to understand writing in the English language, and it provides that in the case of any of these three persons the jurat shall express the fact that it was read over to him. Then, it is enacted that the jurat shall state that the person has made his mark or written his signature in the presence of the Court, Justice of the Peace, or Commissioner. Therefore, there is a distinction between a person who makes his mark and one who writes his signature. I suppose a blind person, or an illiterate person, might write a signature as well as a person who does not "understand writing in the English language." The last part of the section, it seems to me, is significant, because it provides for the certifying of the mark where "a mark is made instead of a signature" by the person who writes the marksman's name against the mark. There is a clear distinction between a signature and a mark, and a provision as to cases where there is a mark and not a signature; the mark must be certified in the way specified. Chief Justice Bonser says that the signature in the case quoted, which is a signature in Sinhalese, is a mark. I am not quite able to agree with that view. There is a very substantial difference between this signature and a mark. This signature will always speak for itself; a mark says nothing. A signature may always be translated, if it is written in the characters of a foreign language; a mark cannot be translated. A mark is absolutely nothing without the adjoined certificate; a signature is always there speaking for itself. Chief Justice Bonser, however, was under the impression that, English being the language of this Court, a signature written, not as I think in a foreign language, but written in the characters of his language by a foreign person, is not a signature. I have not been able to find it expressly provided that no language but English can be admitted in any form in this Court. The rule is undeniable; but I am not aware that it has ever been made so precise as Chief Justice Bonser understood it to be. I find that in the Civil Procedure Code it is provided in section 169 that the evidence of each witness shall be taken down in the English language by the Judge. Section 186 provides that the judgment shall be written in English, and section 758 that the petition of appeal shall be written in the English language. In my opinion these provisions would have been unnecessary if the strict view of the Chief Justice were invariable. The fact that they have been made tends to indicate that the rule is not so absolute as supposed by the Chief Justice. For these reasons I think that the

1902. *July 21.*

MONCREIFF, A.C.J.

Judge was wrong, and that, although it is desirable that process servers should sign their affirmation in English, a signature made in Sinhalese is not invalid. I think that the order appealed from should be set aside on the footing that the Judge will consider the application upon which the order was made upon the merits of the grounds by which it was supported.

WENDT, J.—

I agree in what has fallen from the Acting Chief Justice on the subject of the case No. 6,892, both in its general application as a decision of a Full Bench of this Court and also in particular as regards the substance of the decision. I do not think that Justices Withers and Browne ought to be regarded as concurring in every point discussed or decided in the preceding judgment of the Chief Justice, irrespective of whether it was one of the points necessary to be decided for the disposal of the appeal. The case was brought before this Court upon a petition of appeal, which merely raised the question of the validity and effect of a substituted service of summons on the defendant, nothing being said as to the proof of that service by the affidavit in question. But, certainly, that affidavit was attacked in argument, and the decision of this Court, as embodied in the judgment of Chief Justice Bonser, proceeded on two grounds: first, that the affidavit was a bad affidavit for several reasons, one of them being that it was signed by an unattested mark; and secondly, that even if the affidavit were a good one, the substituted service was ineffectual. In the result the defendant was let in to defend, and I cannot accept the view that all the Judges concurring in that result were in favour of every reason put forward by the Chief Justice for holding that the affidavit was informal. Taking the point raised by Bonser, C.J., I do not think that he was justified in drawing, from the fact of English being the language of the Court, the inference that every signature, to be regarded as such, upon a process of Court or document used as evidence, must be in the English language. I find that the opposite view was taken in England, where of course English is the language of the Court, in the case of *Nathan v. Cohen* (*3 Dowling's Practice Cases, p. 370*), which was a case of an affidavit signed by the declarant in characters of some foreign language. Objection being taken to this as evidence, Patteson, J., said: "It is not the English character, but it is not a mark; and it purports from its position to be the signature of the person making the affidavit. I must therefore presume that the person who made those letters was able to read the affidavit, although the language in which

it was written was different from his own." It would appear that the jurat in that affidavit did not state, as the rules required in the case of a person ignorant of the English language, that the affidavit had been interpreted to the declarant, and it was not signed by the interpreter; and whereas Bonser, C.J., from the signature of the signatory being in Sinhalese, concluded that the declarant was ignorant of the English language, the inference in the case to which I have just referred was that the declarant must be presumed to have been able to read the language in which the affidavit was written. I think, therefore, that we are not obliged by the fact of English being the language of our courts to hold that a signature in the Sinhalese language is a "mark." Coming to our Code, it does appear from certain sections in it (sections 159 and 438, for example) that the term "signature" is sometimes used to include a mark; but there is no such ambiguity in section 439, inasmuch as, after speaking of the declarant "making his mark" or "writing his signature," the section goes on to provide that "when a mark is made instead of a signature" certain formalities shall be observed. I think it clear from the definition in section 5 of the word "signed" that the Code contemplated marks being made by persons unable to write only. I think, therefore, that the order appealed from should be set aside in so far as it is based on the ground I have just dealt with, and that the record should go back for the defendant's application to be disposed of in due course.

In view of the fact that this ground was taken by the District Judge of his own motion, and not by the respondent, I think there should be no costs of appeal.

MIDDLETON, J.—

This is an appeal from an order of the District Judge of Colombo, which, so far as this Court is concerned, is, I understand, taken only as to the point whether a signature in a foreign language, affixed to an affidavit, is for the purposes of section 439 of the Civil Procedure Code to be deemed a mark.

It was submitted that this point had been conclusively decided in a decision of the Collective Court, which was binding on us as a Collective Court.

The case in question was the case of the *National Bank of India v. Fernando*. It was an appeal against an order for substituted service on the defendant, and the judgment consequent thereon against defendant in his absence. The judgment of the Supreme Court held that the so-called affidavit of service was not a good affidavit, because (1) the Fiscal's signature could not have been

1902. *July 21.* MIDDLETON, J.

affixed by the rubber stamp in his presence, or section 440 would have been complied with as to erasures and interlineations; (2) that the signature was a mark, and the provisions of section 439 not observed. Further, it was held that if it was a good affidavit, the order for substituted service, even if it ought to have been made, was not properly carried out.

The decision in the case really was that substituted service ought not to have been allowed, but, if it might have been, then the affidavit witnessing such service was a bad one for the reasons set out. In his judgment, Withers, J., entirely concurred, and Browne, J., agreed.

The question then arises, whether the point as to a signature being a mark was there directly in issue and decided. I conceive the test to be applied would be almost identically that to be used in a question or *res judicata*.

In the case of *The National Bank of India v. Fernando*. the question whether a signature was a mark was not directly in issue, and was not directly determined.

In my opinion the view expressed by Bonser, C.J., was one incidental only to the validity of the affidavit in question. It was put forward without the question having been duly considered and determined as a matter in issue, and it is not clear that the Judges, who stated their concurrence in the real decision on the appeal which I have before specified, were necessarily in accord with the Chief Justice in this particular reason for his objection to the affidavit. They might have concurred generally in the result without binding themselves to all the reasons. My main reason, however, for holding that we are not bound by the judgment is that, so far as it relates to the point now before us, it was an incidental expression of the Chief Justice's opinion on a point not shown to be in issue, and not duly heard and determined by the Full Court. I think, therefore, that we are not concluded, as we might have been by a decision of the Collective Court, directly on the point.

To come to the point itself. I cannot conform to the opinion that a signature, written in a known language, can be deemed to be a mark on the ground that it is illegible to persons unacquainted with that language. It is conceivable that a signature in the English language may be so badly written as to be illegible to a well-educated person. I take it, it would still be no less the signature of the person who wrote it, and could not be treated as a mark by the Justice of the Peace or Commissioner swearing the signatory's affidavit. I do not include in the meaning of the word " signature, " as used in the sections relating to affidavits in the

Civil Procedure Code, the use of initials, which are said to be used in some instances in Ceylon for the abbreviation of long and unpronounceable names. If initials were used, as they might be in the case of a man not well understanding to write in the English language, the Justice of the Peace would do well to treat them as a mark. Section 439 provides for the case of a signature by a person not able to write the English language, and enacts that the jurat shall then express that the signature was written in the presence of the Justice of the Peace or Commissioner. If the affidavit were properly attested, the jurat should say that so and so signed his name in the presence of the Justice of the Peace or Commissioner, and, if any doubt existed, the signature, if it were one, would always be susceptible of translation by the Court Interpreter. In the case before us, the affidavit in question may not have been a good affidavit for other reasons than that it was signed in Sinhalese, but its being signed in Sinhalese does not of itself, to my mind, make it a bad one.

I agree with Wendt, J., as to costs.