1907.
November 4.

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Wood Renton.

PERERA *et al. v.* PERERA.

Ex parte C. VANDERWALL, Proctor, Appellant.

D. C., Kandy, 15,487.

Petition of appeal—Proctor-appellant—Signature by proctor himself—Civil Procedure Code, s. 755.

Section 755 of the Civil Procedure Code enacts that "all petitions of appeal shall be drawn and signed by some advocate or proctor, or else the same shall not be received. Provided always that any party desirous to appeal may, within the time limited for presenting a petition of appeal, and upon his producing the proper stamp required for a petition of appeal, be allowed to state *viva voce* his wish to appeal, together with the particular grounds of such appeal, and the same shall (so far as they are material) be concisely taken down in writing from the mouth of the party by the Secretary or Chief Clerk of the Court in the form of a petition of appeal, when it shall be signed by such party and attested by the Secretary or Chief Clerk, and be received as the petition of appeal of such party without the signature of any advocate or proctor."

Held, that where the appellant himself is an advocate or proctor, the words of the enactment are satisfied if he draws and signs the petition of appeal himself.

Silva v. Coppe Tamby followed.

APPEAL by the proctor from an order of the District Judge holding that he has no lien over a sum of money in Court, the proceeds of execution of the judgment.

The facts material to the report sufficiently appear in the judgment.

H. J. C. Pereira (with him *Van Langenberg*), for the appellant.

F. J. de Saram, for the respondent.

Counsel for the respondent objected to the admission of the appeal on the ground that the petition of appeal did not conform to the provisions of section 755 of the Civil Procedure Code, inasmuch as it was not signed by some advocate or proctor on behalf of the appellant.

Cur. adv. vult.

[1] *Ram.* (1843-55) 66.

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The appellant is a proctor. He was proctor in the action for the original plaintiff, who then died, and the present plaintiff was substituted for him and employed another proctor. The appellant claimed a lien for his costs over a sum of money in Court, the proceeds of execution of the judgment. The District Judge disallowed his claim, and he appeals against the order of the District Judge.

A preliminary objection is taken by the plaintiff that the petition of appeal does not comply with section 755 of the Civil Procedure Code, inasmuch as it is signed only by the appellant.

Section 755 enacts that all petitions of appeal shall be drawn or signed by some advocate or proctor, or else they shall not be received, provided that any party desirous to appeal may state *vivâ voce* his wish to appeal, and the grounds of his appeal, which shall be taken down in writing by the Secretary of the Court in the form of a petition of appeal, when it shall be signed by the party and attested by the Secretary, and be received without the signature of any advocate or proctor. Where the appellant himself is an advocate or proctor the words of this enactment are satisfied if he draws and signs the petition himself; but it is not so clear that the real meaning and intention of the enactment are satisfied. It looks as if the intention was that some advocate or proctor other than the appellant should draw and sign on his behalf, with a proviso that he may dictate his petition to the Secretary and get the Secretary to attest it. But the Legislature has not expressed this; probably it did not think of the case where the appellant is an advocate or proctor; it is a case omitted. It is arguable that the Legislature, if it had intended that the petition should be drawn by some proctor " other than the appellant, " would have inserted those words, or, on the other hand, that if it had intended that a proctor-appellant might draw his own petition, it would have inserted the words " unless the appellant himself is a proctor. "

There is, however, a decision which seems to be in point (*Silva v. Coppe Tamby*) reported in *Ram.* (1843-55) 66. This is a decision on the rule of 1846, which is in the same terms as section 755, and the Court held that a proctor-appellant need not employ another proctor to draw and sign his petition of appeal, but that his own signature, with the addition " Proctor of the D. C. " is enough. The case is referred to in *Thompson's Institutes*, i. 180, where the author in a footnote says: " The rule was introduced in the hope that professional men would not give their aid to vexatious and frivolous appeals, " giving as his authority 4,401, D. C., Colombo, August 10, 1846.

The reason given by the Judges for their decision does not seem a good one. But the decision does not appear to have been over-ruled or dissented from, and I think we ought to follow it. I would therefore over-rule the preliminary objection.

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WOOD RENTON J.—

I agree that we are bound by the authority of *Silva v. Coppe Tamby*,[1] decided under a rule (rule 2 of the rules of December 12, 1846) identical in tenor and even in terms with section 755 of the Civil Procedure Code, to over-rule the preliminary objection taken on behalf of the respondent to the admission of the present appeal. I desire to add, with the greatest respect for the learned Judges who decided that case, that I should not be prepared to follow it as *ratio scripta*. I do not think that the proposition with which the judgment commences, that "proctors, attorneys, and solicitors are privileged to sue or be sued in their respective Courts in person," is strictly accurate in itself, or constitutes any foundation for the conclusion deduced from it, that a proctor of the District Court need not employ another proctor to sign his petition of appeal. It is true that in England a proctor, attorney, or solicitor was privileged to sue or be sued only in the Court to which he belonged, on the principle that his attendance was constantly required there for the despatch of business. It is also true that this privilege was sometimes asserted in person (see *Chatland v. Thornley*[2]), although it was latterly held that it could only be pleaded by attorney (see *Groom v. Wortham*,[3] and *cf. Hunter v. Neck*[4]). But just as the privilege itself existed for the convenience of the Courts and their officers and of suitors, so the right of the proctor, attorney, or solicitor, in so far as it was recognized, to assert the privilege in person, had nothing to do with his professional standing. When an unsuccessful attempt was made in *Hunter v. Neck* (*ubi sup.*) to induce the Courts to hold that a plea by which the defendant alleged that he was an attorney of another Court, and privileged to be sued there, must be pleaded in person, the claim was based solely on the contention that if he appeared by attorney, he must be taken to have submitted to the jurisdiction which he challenged. I do not think that the privilege relied on by the Judges in *Silva v. Coppe Tamby* has any real bearing on the question at issue in that case or in the present one.

Moreover, as a mere matter of construction, section 755 of the Civil Procedure Code seems to me to require an appellant, whether he be a proctor or an advocate or a layman, either to present his appeal under the signature of an advocate or proctor, or to avail himself of the proviso to the same section, and have it recorded and forwarded by the Secretary or Chief Clerk of the Court below. This interpretation of the section results clearly, I think, from the use of words "any party desirous to appeal" in the proviso. It appears to me that the proviso prescribes the mode, and the sole mode, in which an appeal can be received in this Court without being authenticated by the signature of an advocate or proctor.

[1] (1846) *Ram.* (1843-55) 66.
[2] (1810) 12 *East* 544.
[3] (1842) 2 *Dowl. N. S.* 657.
[4] (1841) 3 *Man. & Gr.* 181.

As a matter of policy there are substantial reasons why this construction of the law should have been maintained. It may quite well be that the identification of appellants and the exclusion of the undesirable services of the baser sort of petition drawers and of touts were among the objects of section 755 of the Code of Civil Procedure; and, of course, that section affords no absolute safeguard against the presentation of frivolous petitions, inasmuch as, whatever may be the view of an appeal taken by the advocate or proctor, any party may have it brought before the Appeal Court by means of the proviso. At the same time the enactment embodied in section 755 of the Code was designed to check frivolous appeals (see *Thompson's Institutes*, i. 180, and 4,401, D.C., Colombo, August 10, 1846); and the fact that his proctor or advocate refused to sign an appeal would in many cases act as a wholsome check on a vexatious litigant. Experience has shown that the legal profession itself may furnish, from both its branches, types of this class who stand in great need of such restraint. In saying this I am, of course, treating the question as an abstract one, and not referring in any way to the position of Mr. Vanderwall, against whose good faith, in the present matter, no imputation whatever is suggested. I agree, however, that *Silva v. Coppe Tamby* is binding on us here, and that the preliminary objection must fail.

Preliminary objection over-ruled.