1930

Present : Garvin A.C.J. and Jayewardene A.J.

NATIONAL BANK OF INDIA, LTD. *v.* GEORGE GILL.

68—*D. C.* (*Inty.*) *Colombo*, 36,476.

Warrant of attorney to confess judgment given by attorney—Power of attorney giving specific authority—Mortgage bond—Civil Procedure Code, s. 31.

A warrant of attorney to confess judgment under section 31 of the Civil Procedure Code cannot be given and executed for a person, and in his name by an agent of that person even where the agent is given specific authority to do so.

Where a warrant of attorney to confess judgment is filed with a plaint, the District Judge has no power to make it a rule of Court, requiring an affidavit in proof of the fact that the proctor attesting the signature of the person granting the warrant had, in fact, been chosen by him, and that the debt was truly due.

APPEAL from an order of the District Judge of Colombo. The plaintiff sued the defendant upon a mortgage bond, No. 178 of June 28, 1926. With the plaint the proctor for plaintiff tendered a warrant of attorney to confess judgment directed to Mr. C. M. G. de Saram, a proctor of the Supreme Court, and moved that summons be issued on the said proctor. The bond sued upon was not executed by the defendant personally but by his attorney, Mr. Maartensz, on his behalf. On the same day the attorney, acting on behalf of the defendant, executed the warrant of attorney to confess judgment. The power of attorney under which Mr. Maartensz acted was a specific authority to him to execute in favour of the plaintiff the mortgage bond sued upon and also to execute a warrant of attorney to confess judgment identical in terms with the warrant tendered with the plaint. After argument the learned District Judge held that the warrant of attorney was void and ordered summons to be served in the ordinary way.

H. H. Bartholomeusz, for the appellant.

June 26, 1930. GARVIN A.C.J.—

This is a hypothecary action. The plaintiff sued upon a bond bearing No. 178 of June 28, 1926. With the plaint the proctor for the plaintiff tendered a warrant of attorney to confess judgment directed to Mr. C. M. G. de Saram, a proctor of the Supreme Court, and moved that summons be issued on the said Mr. C. M. G. de Saram. The learned District Judge states in the course of an order to which I shall presently refer, that he asked for an affidavit in proof of the fact that the proctor attesting the warrant of attorney on behalf of the person who granted it had, in fact, been chosen by the debtor indicating also that the affidavit should show that the debt was truly due. The plaintiff, however, desired to be heard before a definite order was made and the matter was set down for hearing. After argument the learned District Judge made an order in which, to use his own words, he went further and upon discovery that the warrant of attorney to confess judgment filed in this case had been executed not by the defendant in person but by his attorney, declared the warrant to be void and ordered that

summons be served "in the ordinary way". The bond upon which this action was based was not executed by the defendant personally but for and on his behalf and in his name by the attorney, Mr. J. A. Maartensz of the firm of Messrs F. J. & G. de Saram. On the same day and at the same time Mr. Maartensz acting for and on behalf of and in the name of the defendant executed a warrant of attorney to confess judgment. The warrant is in the usual form. To the warrant is attached a declaration by Mr. J. F. van Langenberg, a proctor of the Supreme Court, in which he declares that he is the proctor for George Gill, who is the defendant in this action, and that he read and explained the contents of the warrant of attorney to Mr. George Aubrey Maartensz, the duly appointed attorney of George Gill. This mortgage bond and the warrant of attorney to confess judgment were both executed by Mr. Maartensz in the name of George Gill, purporting to act under and by virtue of the authority of a power of attorney granted to Leslie Frederick de Saram, Stanley Frederick de Saram, and himself, in which they and each of them was appointed by the said George Gill to be his "true and lawful attorney and attorneys" in Ceylon and for (him) and in (his) name and on his behalf and as his act and deed to sign, seal, and execute in the Island of Ceylon in conformity with the laws and usages of the said Island—

(1) a bond or obligation and mortgage in terms identical with the draft already prepared and a copy whereof is hereto annexed as the first schedule, being or purporting to be a bond or obligation and mortgage by me the said George Gill in favour of the National Bank of India, Limited, and (2) a warrant of attorney to confess judgment in terms identical with the draft already prepared and a copy whereof is hereto annexed as the second schedule being or purporting to be a warrant of attorney addressed to Cyril Morgan George de Saram, a proctor of the Supreme Court of the Island of Ceylon, or to any other proctor of the said Supreme Court or any proctor of the District Court of Colombo for the purposes herein mentioned and contained . . . .

The draft bond set out in the first schedule referred to is identical in all respects with the bond on which the present action is based. Similarly, the draft warrant of attorney referred to in the second schedule is identical in all respects with the warrant of attorney tendered with the plaint. It would be seen, therefore, that the power under which Mr. Maartensz acted is a specific authority to him to execute in favour of the National Bank of India, Limited, which is the plaintiff in this action, a mortgage bond identical in terms with the plaint filed of record and similarly purported to confer upon him authority to execute a warrant of attorney to confess judgment identical in terms with the warrant tendered with the plaint. It is impossible, therefore, to conceive of a case in which a principal could have had clearer and fuller knowledge of the nature of the authority he purported to vest in the person he selected to be his attorney. As a general rule a person may appoint an agent to do any act on his behalf which he might himself execute or do and, where the act involves the signature of a document by a person, it is generally sufficient if the name of that person is signed by a duly authorized agent, but this rule is subject to the exception that the act is not one which the principal is required by law to do in his own proper person. The question, therefore, is whether a warrant or power of attorney to confess judgment under section 31 of the Civil Procedure Code can be given and executed for a person and in his name by the agent of that person or whether, on the other hand, it is one of those acts which a person is required to do in his own proper person. The law in England relating to the giving, the granting and the execution of warrants of attorney to

confess judgment is substantially the same as in Ceylon. I have not been able to discover any case in which this point was taken or considered, but there is a passage in *Archibald's Practice of the Queen's Bench Division, vol. II., page* 1305, in which the view is expressed that such a warrant must be executed by the party himself and that execution by an agent in his absence will not suffice. An examination of the provisions of section 31 of our Code leads me to the same conclusion. The execution of a warrant is hedged round by various safeguards designed to ensure that the person who grants such a warrant of attorney has the fullest knowledge of the consequences of his act before he executes a power of attorney.

The section runs as follows :—

> A warrant or power of attorney to confess judgment in any action may be given by any person to a proctor in the form No. 12 in the second schedule hereto, but no such warrant or power of attorney shall be of any force, unless there is present at the execution thereof some proctor of the Supreme or District Court on behalf of such person expressly named by him, and attending at his request to inform him of the nature and effect of such warrant or power before the same is executed, which proctor shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be proctor for the person executing the same, and state that he subscribes as such proctor. Every such proctor so subscribing shall state in such declaration that he read and explained the contents of such warrant or power to the person executing the same, and that such person appeared to understand the nature and effect thereof ; and no such warrant or power not executed in manner aforesaid shall be rendered valid by proof that the person who executed the same did in fact understand the nature and effect thereof, or was fully informed of the same.

There can, I think, be no doubt that the person who gives the power is the person who is required to execute it and who is to receive information as to the nature and effect of his act before he signs and executes the document containing the power and who is to be advised in regard to those matters by a proctor of his own choosing.

The declaration made and signed by Mr. van Langenberg illustrates the impossibility of construing this action so as to admit of the execution of such a warrant of attorney by an agent in the absence of the principal.

That declaration is as follows :—

> Signed by the said George Gill in my presence, and I hereby declare myself to be the proctor for the said George Gill and that I subscribe my name as such, his proctor, and that I have read and explained the contents of the above-written warrant of attorney to James Aubrey Maartensz, the duly appointed attorney in Ceylon for the purpose of the said George Gill and that he appeared to understand the nature and effect thereof.

In the sense that an agent may generally write the name of his principal in a document which he executes on his behalf, it may perhaps be said that the document was signed by George Gill and in the same sense that Mr. van Langenberg was the proctor for George Gill, but the unreality of declaring that the warrant was read to George Gill and the contents thereof explained to him was realized and the declaration on that essential matter is that the warrant was read and explained to Mr. Maartensz, the attorney for George Gill.

The language of the section and the policy disclosed thereby leaves in my judgment no room for doubt that a warrant of attorney to confess judgment can only be given by a person subject to

the safeguards provided by the section and is not an act which can be done for him and in his name by an agent in his absence.

For these reasons the appeal fails. The main purpose of the appeal was to elicit a ruling in regard to the order of the District Judge requiring an affidavit in proof of the fact that the proctor attesting the signature of the person granting the warrant had in fact been chosen by him and that the debt is truly due. It is evident from the order of the learned District Judge that he insisted upon this affidavit not because his mind was affected by any doubts as to the facts but because he had, to use his own words, " made it a practice " to call for such an affidavit in every case in which a motion for judgment upon a warrant of attorney was before him.

The declaration which the Legislature requires the proctor named by the person executing a warrant of attorney to make is as solemn and just as effective as an affidavit. It contains all the averments which the Legislature has thought necessary and it is not within the power of a District Judge to make a " practice " or rather rule insisting on a supplementary affidavit in addition to the requirements prescribed by law. I must not however be understood to hold that when a District Judge is invited to act upon a certain basis of fact, he may not in any particular case in which his mind is affected with a doubt, call for further evidence whether by affidavit or otherwise.

JAYEWARDENE A.J.—

In 1880 the full Court held that a long course of procedure had established the right of a plaintiff, who has a warrant of attorney to confess judgment, to file by the attorney the defendant's admission of his claim, and to have judgment entered thereon (*D. C., Kandy*, 86,666—*S. C. M., November* 29, 1890). This case was followed in *Venaithirthan Chetty v. Jayetilleke Appuhamy*,[1] where the Supreme Court held without laying down any rules that certain safeguards should be adopted as in English law, from which our procedure had been borrowed, " to protect the obligor against unwittingly being betrayed into entering such stringent bondage ". Clarence J. observed that definite rules in a Code of Civil Procedure were desirable and should not much longer be delayed. In 1889 the Civil Procedure Code was passed, and in sections 31 and 32 well defined rules were laid down as to the execution and filing of warrants of attorney to confess judgments. These were from the English Debtors' Act of 1869 (32 & 33 Vict. c. 62) as modified by the effect of the Judicature Acts, 1873 and 1875. A proctor expressly named by the debtor had to attend at his request to explain the nature of the warrant to him and the proctor had to subscribe as a witness and append a declaration in the form No. 12 given in the second schedule of the Code. The proctor should declare himself to be the proctor of the obligor, that he subscribed his name as such his proctor, and that he read and explained the warrant to the obligor and that he appeared to understand it.

The learned District Judge has insisted on an affidavit that his proctor has in fact been chosen by the debtor and that the debt is truly due. He has made it a practice of the Court to call for such an affidavit. The effect of such a rule is to add a further requirement to section 31 of the Code. In *Ramanathan v. Don Carolis*,[1] de Sampayo J. thought that all the necessary safeguards have been provided by sections 31 and 32 of the Code, and where those requirements had been observed and the warrant of attorney was in accordance with form No. 12 in the schedule, he entered judgment in favour of the plaintiff on the warrant. An affidavit was not mentioned in that case as a necessary requirement.

I do not think the Judge is right in calling for an affidavit of this kind in every case, or in establishing such a

[1] (1884) 6 *S. C. C.* 105.

[1] (1917) 19 *N. L. R.* 378.

cursus curiae. In a case of doubt as to whether the debtor had exercised a free choice, he may require an affidavit, but in my opinion there is no reason for doubt in this case.

The warrant of attorney to confess judgment however was executed, not by the debtor but by his agent, who had been specially authorized to do so. The question arises whether this warrant is good, even though the attorney had special authority. Many cases on this subject are collected in the *Empire Digest, vol. IV., p.* 217-220, but I am unable to find any case where the warrant has been signed by an agent. The absence of cases may be due to the fact that in England warrants of attorney have become almost obsolete since the Acts for registering writs of execution. The provisions that exist were intended to guard against any imposition in procuring debtors to execute warrants of attorney or *cognovits* in ignorance of the effect of such instruments. (*Williams on Personal Property*, 13*th ed.*, *p.* 144.) A solicitor of the Supreme Court must attend at the request of the debtor to inform him of the nature and effect of the warrant and there must be an attestation in proper form.

In the present case the defendant had authorized his agent to sign the warrant to confess judgment and clearly knew its meaning and effect. The fact that the debtor was fully aware of the nature of the instrument has been held to be insufficient (*Deverell v. Thring* [1]). There must be a strict compliance with all the other requisites.

In this case the proctor was present at the request of the obligor's agent and informed the agent of the nature of the warrant, but the law seems to me to require that the debtor himself should be personally informed and protected. In *Archibald's Practice of the Queen's Bench Division, vol. II., p.* 1305 (14*th ed.*), it is stated that the warrant must be executed by the party himself or in his presence, and that an execution of it by an agent, in his absence, will not suffice.

On this second ground I think the learned Judge was right, and I would dismiss the appeal.

Appeal dismissed.

[1] (1839) 3 *Jur.* 1193.