1942 *Present :* **Howard C.J. and Soertsz J.**

WANIGASEKERE *et al v.* LOUISZ *et al.*

369 and 110—D. C. Matara, 11,892.

Public holiday—Dies non—*Service of notice of security—Public Holidays Ordinance (Cap. 135) s. 4—Civil Procedure Code, s. 365—Appointment of next friend—Irregularity is no ground for dismissal of action.*

Service of notice of security on the respondent to an appeal may be made on a public holiday.

Where an application for the appointment of a next friend to a minor plaintiff was made ex-parte and was not accompanied by a copy of the plaint and where the defendants made no objection to the acceptance of the plaint on the ground of any irregularity in the appointment of the next friend,—

Held, that the irregularity was no ground for the dismissal of the action.

Held, further, that application by the minor in the course of the action to proceed with it in his own name under section 487 of the Civil Procedure Code must be taken to have cured the irregularity in the appointment of the next friend.

APPEAL from a judgment of the District Judge of Matara.

L. A. Rajapakse, for the respondents, took preliminary objection.—The appeal is not properly constituted. The service of notice of tender of security on the 3rd defendant, respondent was not made "forthwith" as required by section 756 (1) of the Civil Procedure Code. It was served on May 12, 1941, but that day was a public holiday, and any process served on that day would be void and invalid. The question is whether *dies non* are limited to the days mentioned in section 365 of the Civil Procedure Code or whether they include all public holidays referred to in section 4 of the Holidays Ordinance (Cap. 135). It has been held in *Georgina v. Ensohamy* [1] that every public holiday is a *dies non* and that execution of civil process on such a day would not be valid. Vide also

[1] *(1903) 7 N. L. R. 129.*

Appacutty v. Aysa Umma [1] and section 8 (4) of the Interpretation Ordinance (Cap. 2). The allusion to the meaning of *dies non* in *Kulantaivelpillai v. Marikar* [2] was merely *obiter*.

We took this objection before the District Judge, but it was not upheld. Hence the present interlocutory appeal.

The preliminary objection was overruled.

H. V. Perera, K.C. (with him, *N. E. Weerasooria, K.C.*, and *F. C. W. Van Geyzel*), for the plaintiffs, appellants in No. 369 and the plaintiffs, respondents in No. 110.—The plaintiffs, who are three brothers, sued the defendants for declaration of title to a certain land, each to a 1/3 share. The District Judge, although he holds in our favour in regard to legal title and prescription, has dismissed the whole action on the sole ground that the third plaintiff, who was a minor at the date of the institution of the action, was not properly before Court. He did so on the authority of *Fernando v. Fernando* [3], where it was held that an application for the appointment of a next friend must be accompanied by the plaint of the action intended to be brought. There is no statutory rule that a person seeking appointment as next friend of a minor should accompany his application with the plaint to be filed in the action. Even if there was an irregularity the action should not have been summarily dismissed—*Sinnapillai et al. v. Sinnatangam* [4], *Chitaley and Rao's Commentary on the Indian Civil Procedure Code (2nd ed.)*, *pp. 2288, 2297*. Further the election by the minor, when he attained majority pending the action, to proceed with the case cures all irregularity.

L. A. Rajapakse, for the defendants, respondents in No. 369 and the defendants, appellants in No. 110.—*Fernando v. Fernando* (*supra*) was followed in *Mohamado Umma v. Mohideen* [5]. Not only was no plaint submitted along with the petition for appointment as next friend, but also the imperative provisions of section 481 of the Civil Procedure Code were not complied with; *i.e.*, the defendants were not made respondents to the petition. Even if the first and second plaintiffs are entitled to succeed regarding 2/3 of the land the action of the third plaintiff has to be dismissed.

H. V. Perera, K.C., in reply.—The irregularity, if any, in the appointment of third plaintiff's next friend is not fatal to the proceedings. See *D. C. Kandy, 38,477 (S. C. No. 111)* [6] and *Walian v. Banke Behari Pershad Singh* [7].

In an application for the appointment of a next friend for a minor for the purpose of instituting an action on behalf of the minor, the intended defendant need not be made respondent to the petition ; section 481 of the Civil Procedure Code applies only to cases where a petition for a minor to be represented by a next friend is made in the course of, or as incidental to, an action—*Mohammado Umma v. Cader Mohideen* [8].

Cur. adv. vult.

[1] *(1890) 9 S. C. C. 121.*
[2] *(1918) 20 N. L. R. 471.*
[3] *(1892) 2 C. L. Rep. 82.*
[4] *(1916) 2 C. W. R. 73.*
[5] *(1892) 1 S. C. R. 302.*
[6] *S. C. Minutes of 2nd March, 1942.*
[7] *I. L. R. 30 Calc. 1021.*
[8] *(1892) 2 C. L. Rep. 163.*

October 23, 1942. HOWARD C.J.—

This is an appeal by the plaintiffs from a judgment of the District Judge of Matara dismissing the plaintiffs' action with costs. A preliminary objection to the hearing of the appeal has been taken by Mr. Rajapakse on behalf of the respondents on the ground that service of notice of security on the third defendant was not made in time. It appears that such notice was served personally on the Proctor for the third defendant—Mr. C. A. Solomons—on May 12, 1941. It is conceded that serivce on the third defendant's Proctor would be good if the latter was given notice forthwith on the petition of appeal being received by the District Court. It is maintained, however, that the service of notice of security was not made forthwith inasmuch as May 12, 1941, was a public holiday and service was therefore invalid. Subsequent service on the third defendant and Mr. Solomons, made not personally, but by being affixed to the front doors of their respective houses, was not good inasmuch as it was not made "forthwith".

In contending that service on a public holiday was invalid, Mr. Rajapakse relies on section 4 of the Holidays Ordinance (Chapter 135). This section is worded as follows :—

> "The several days mentioned in the Second Schedule (in this Ordinance referred to as 'public holidays') shall, in addition to Sundays, be *dies non*, and shall be kept (except as hereinafter provided) as holidays in Ceylon".

The 12th May, 1941, was the full moon day of the Sinhalese month Wesak and therefore a Public Holiday. The only question that arises is whether the classification of May 12, 1941, as a Public Holiday, renders service on that day invalid. The phraseology of section 365 of the Civil Procedure Code (Chapter 86) suggests that service between the specified hours on any day except a Sunday, Good Friday or Christmas Day would be valid. This provision is worded as follows :—

> "Process in civil cases, whether at the suit of the Crown or individuals, shall not be served or executed between the period of sunset and sunrise, nor on a Sunday, Good Friday, or Christmas Day, nor on any minister of religion while performing his functions in any place of public worship, nor upon any individual of any congregation during the performance of public worship at any such place."

Although this provision would seem to imply that service on a Public Holiday other than those specified therein would be valid, this Court held in *Georgina v. Ensohamy*[1] that, although section 365 of the Civil Procedure Code mentions only Sunday, Good Friday and Christmas Day, as days on which process in civil cases shall not be served or executed, its effect is not to render valid the execution of civil process on other public holidays declared *dies non* by section 4 of the Ordinance No. 4 of 1886. A sale in execution held by the Fiscal on a public holiday is bad. In coming to this conclusion, Wendt J., following a decision of Clarence J., in *Appa Cutty v. Aysa Umma*[2], held that, although the matter might perhaps have been made clearer, the intention of the Legislature must have been that the scheduled days should be days not available

[1] *7 N. L. R. 129.*

[2] *9 S. C. C. 121*

for service or execution of civil process, under section 30 of the Ordinance No. 4 of 1867. This section corresponded to section 365 of the Civil Procedure Code. In *Appa Cutty v. Aysa Umma* (*supra*) it was held that a valid arrest for execution against the person could not be made on a public holiday, that is to say, a day scheduled in the Holidays Ordinance. The decisions in the two cases on which Council for the respondent relies are, however, in conflict with the law as formulated by Bertram C.J., and De Sampayo J., in *Kulantaivelpillai v. Marikar* (*supra*). In that case it was held that a Judge may accept a plaint in a civil case in Chambers at his residence. This act was not rendered invalid by being performed on a Sunday. In the course of his judgment, Bertram C.J. considered the effect of the declaration of a day as a public holiday and *dies non* by the Holidays Ordinance in the following passage :—

> "The effect, therefore, in my opinion, of the declaration of a day as a public holiday and *dies non* by Ordinance No. 4 of 1886, is twofold. In the first place, it excuses judicial officers and their subordinate ministerial officers from the necessity of attending Court, or of performing any judicial or ministerial acts, on that day ; in the second place, it protects any member of the public from being forced to attend Court, or to attend any judicial proceeding held elsewhere than in Court, on that day. It does not, in my opinion, affect any judicial act or proceeding which may be validly done or taken in the absence of a party, and which, consequently, does not involve his personal attendance. Further, it does not preclude a judicial officer, or any of his ministerial subordinates, from waiving his privileges if he so decides, and from doing any act or taking part in any judicial proceeding on a day declared to be a holiday. There is nothing either in the Ordinance or in the principles laid down by *Voet*, which declares null and void any judicial act which a judicial officer voluntarily elects to do, and which does not inolve the compulsory attendance before him of any party affected."

The conclusions of the learned Chief Justice were based on the proposition that the question must be considered from the point of view of Roman-Dutch Law. In this connection, I might mention that the expression *dies non* is foreign to English Law. Bertram C.J. then proceeds to discuss the division of holidays by *Voet* into two classes, *feriae divinae* and *feriae humanae* and arrives at the conclusion that the days mentioned in the Schedule to the Holidays Ordinance must be all alike considered as holidays of human institution or *feriae humanae*. With regard to this class of holiday, the principle governing them was that no one shall be compelled to take part in litigation against his will. *Voet* does not declare that any judicial act done upon a holiday of human institution is *ipso facto* void. What he does say is that any judicial act by which it is sought to compel anyone to take part in litigation on such a holiday against his will is void. The service of a writ upon a person cannot be said to be compelling that person to take part in litigation. It is true that the passage cited by me from the judgment of Bertram C.J. was *obiter*, but I am satisfied that it correctly formulates the significance that must be attached to the expression *dies non* and it is to be preferred to the decisions in *Appa Cutty v. Aysa Umma*

(*supra*) and *Georgina v. Ensohamy* (*supra*), which are based on speculations as to the intentions of the Legislature and contrary to the plain meaning of the phraseology employed in section 365 of the Civil Procedure Code. In these circumstances, the preliminary objection is overruled.

With regard to the appeal, the learned District Judge has found in favour of the plaintiffs except as to issue 6. With regard to this issue he found that the plaintiffs' appointment as next friend of the minor. that is to say the third plaintiff, was bad in law, inasmuch as when application was made by the first and second plaintiffs for the appointment of the first plaintiff as next friend of the third plaintiff, no copy of the plaint was filed in support. In coming to this conclusion the learned District Judge relied on the case of *Fernando v. Fernando* (*supra*). In that case an application was made for the appointment of a next friend to institute an action on behalf of minors against the respondent. The latter resisted the application on the ground that administration of the estate should first be taken out. The Court, constituted by Burnside C.J. and Withers J., held that it is contrary to practice to prosecute a claim on behalf of minors unless the libel itself is before the Court in order that the Court could exercise its own judgment as to whether it was to the interest of the minors that the action should be brought. The decision in *Fernando v. Fernando* (*supra*) seems to have no relevance to the facts of the present case. Formal order on the application for the appointment of the first plaintiff as next friend over the third plaintiff was made on June 21, 1937. It is true the application was made *ex parte* and was unaccompanied by a copy of the plaint. On June 25, 1937, however, the same Judge accepted the plaint. It must be presumed that by such acceptance he deemed that the action was being instituted in the interest of the minor. A further objection relating to the validity of the appointment of the next friend was taken at the trial and in this Court on the ground that the defendants were not named in the application nor the cause of action as against them set out therein.

It would appear that the respondents did not make objection to the acceptance of the plaint on the ground of any irregularity in the appointment of the next friend. If such an objection had been made at the time, it would have been the duty of the Judge to have suspended the proceedings to give the plaintiffs an opportunity to rectify such irregularity, vide *Sinnapillai v. Sinnatangam* (*supra*). Such irregularity would not be a gound for dismissal of the action. The commentary in *Chitaley on Order 32, Rule 2 of the Indian Civil Procedure Code*, which provision is similar to section 478 of our Code, indicates that the Indian Courts have adopted the same view: In this connection, the following passage in *Volume 3 of Chitaley* (*2nd Edition*) on *page 2297* is also in point:—

> "A defect or irregularity in procedure in the appointment of a guardian *ad litem* is also only an irregularity and will not be a ground for setting aside the decree unless it had the effect of causing prejudice to the minor. In *Walian v. Banke Behari* (*supra*) their Lordships of the Judicial Committee, after impressing upon the Courts in India the importance of following strictly the rules laid down by the Code,

proceeded to observe at *page 1031*: 'But it is quite another thing to say that a defect in following the rules is necessary fatal to the proceedings'."

There is also a further point that is in my opinion fatal to the respondents' contention. Any irregularity in the appointment of the next friend was in respect of the omission to take certain steps to safeguard the interests of the minor. By virtue of section 486 of the Civil Procedure Code the minor could, on coming of age, elect whether he will proceed with the action. On February 12, whilst the action was partly heard, the minor, that is to say the third plaintiff, moved that he be added as third plaintiff and be allowed to proceed with the case in his own name. This motion was allowed and the caption amended as prescribed by section 487 of the Civil Procedure Code. Such action on the part of the minor must be taken to have cured any irregularity in the appointment of the next friend. For the reasons I have given I am of opinion that issue 6 should have been answered in favour of the plaintiffs. Counsel for the respondents has also contended that the findings of the learned Judge on the other issues should have been answered in favour of the respondents. There is no substance in this contention.

The appeal must be allowed. The order of the District Court is set aside and judgment entered for the plaintiffs as claimed, together with costs in this Court and the District Court.

SOERTSZ J.—I am in complete agreement.

Appeal allowed.