1948 *Present :* **Canekeratne and Dias JJ.**

SILVA *et al.*, Appellants, *and* KAVANIHAMY *et al.*, Respondents.

S. C. 416—D. C. Matara, 15,477.

Civil Procedure Code—Application for writ more than one year after decree—Failure to serve notice on debtor—Irregularity—Section 347.

The provision as to service of notice in section 347 of the Civil Procedure Code is merely directory. The failure to serve this notice is only an irregularity.

APPEAL from a judgment of the District Judge, Matara.

N. K. Choksy, K.C., with *E. B. Wikramanayake, K.C.*, for plaintiffs, appellants.

N. E. Weerasooria, K.C., with *M. H. A. Azeez* and *W. D. Gunasekera*, for fifth defendant, respondent.

Cur. adv. vult.

September 23, 1948. CANEKERATNE J.—

This is an appeal by the plaintiffs from a judgment dismissing their action for a declaration of title to lot B of the land called Manamala Sayakkarage Jambisse Padinchiwasitiyawatta and for certain other relief.

The fourth defendant, Eramanis, was at one time entitled to an undivided one-fourth share of this land. He was indebted to one Babahamy, who sued him and obtained judgment in action No. 4,883 of the

same court. On September 17, 1928, Eramanis made a gift of the property to his three children, the first, second and third defendants, and when this share was seized in execution of the judgment on January 15, 1931, a claim was unsuccessfully preferred on their behalf. The children thereafter assisted by their mother, the fifth defendant, instituted an action against the judgment-creditor under section 247 of Chapter 86 of the Ceylon Legislative Enactments to obtain a declaration that the share was not liable to be sold in execution of the judgment. On the date of trial, May 5, 1933, a settlement was arrived at between the parties to this action No. 7,016 and the parties in action No.4,883, and the plaintiffs moved to withdraw their action. The Judge in sanctioning the withdrawal said " the plaintiffs are minors, but this settlement seems to be to their advantage and I approve it ". In action No. 4,883 an order was made on the same day that the defendant was to pay the sum due to the plaintiff by instalments of Rs. 20 per month, " in failure of instalment writ to issue and land to be sold ". On May 12, 1933, an action for partitioning the land was instituted and by the final decree, dated October 5, 1937, the first, second and third defendants were declared the owners of lot B in lieu of the undivided interests transferred by the father. For non-payment of costs due probably in the partition case lot B was sold on August 1, 1938, and purchased by one Fais who obtained conveyance 5 D 2, dated November 11, 1938 ; Fais on July 30, 1940, by deed No. 5 D 4, sold the lot to the fifth defendant, the mother of the first, second and third defendants. The debtor by about August 20, 1934, had paid twelve instalments, and obtained four months' time on March 28, 1935, to pay some other instalments ; on September 17, 1935, he obtained an order to pay by instalments of Rs. 6 a month " till one month after final decree is entered in the partition case ", in pursuance of this order he paid one instalment on October 17, 1935. The judgment-creditor having died an application for substitution was made thereafter, and after notice to the debtor, certain persons, one of whom was P. H. W. Edwin Singho, were substituted on January 13, 1937. On November 8, 1937, an application for execution was made to the Court by the substituted plaintiffs. It is in the form specified in the Code, Form 42 in the Schedule and is marked 5 D 5, the names of the plaintiffs and of the defendant are given in the application and the amounts paid are shown. The prayer is that the writ lying in the above case may be executed and be issued for execution to recover Rs. 691·83½ with further interest. It was allowed by the Judge. Lot B was seized on November 9, 1937, and sold on November 30, 1937, and the purchaser obtained Fiscal's conveyance P 3 dated March 15, 1938. The fifth defendant appears to have had notice of this sale, for on June 2, 1938, she sent a petition to the Court praying that she and her children be allowed to stay in the premises.

The plaintiffs' title to lot B is prior in point of date both of sale and conveyance and his right ought to prevail unless the respondents can show that the judgment-creditor had no right to sell lot B or that the seizure and sale were void transactions. The children of the judgment-debtor brought an action to establish their right to the land claimed by them. The order passed at the claim inquiry is made conclusive

subject to the result of the action (section 247 of the Code). The action was dismissed and thus the land became liable to be sold in execution of the writ. The learned Judge has held that the judgment-creditor was entitled to seize and sell lot B and there is evidence to support this finding.

A compulsory sale, *i.e.*, sale forced upon an unwilling vendor, and being one ordered by the Court, conducted by its officer and subject to its approval before being treated as final, may be attacked because the order on which it is founded is void or voidable. Void sales are sales which, as against the original purchaser, may without any proceeding to set them aside, be treated as not transferring the title of the property assumed to be sold. A voidable sale is one that is valid until it is set aside, there is an irregularity or some defect but the debtor may make an application or take steps to have the sale annulled. A judgment-creditor can obtain by execution only such property as belongs to the debtor. Generally execution can be levied without leave but in certain cases leave must be obtained, the most important instances being where a period of one year has elapsed since the judgment or order, or any change has taken place by death or otherwise of the parties entitled or liable to execution.

Section 347 of the Code, omitting immaterial words, is as follows:—

> "In cases where there is no respondent named in the petition of application for execution, if more than one year has elapsed between the date of the decree and the application for its execution, the court shall cause the petition to be served on the judgment debtor, and shall proceed thereon as if he were originally named respondent therein:
> "Provided that . . . . for execution".

It is contended that the provisions of the section as regards service on the judgment-debtor are imperative.

A statutory enactment passed for the purpose of enabling something to be done and prescribing the way in which it is to be done, may be either what is called an absolute enactment, or a directory enactment. If an enactment is merely directory it is immaterial, so far as relates to the validity of the thing to be done, whether the provisions of the statute are accurately followed or not. As Sedgwick says—Strict compliance with all the minute details which modern statutes contain is impossible, owing to the practical inconvenience likely to result from it, and consequently sagacious and practical men who desire to free the law from the reproach of harshness or absurdity are tempted not to enforce strictly all provisions contained in statutes, but to treat them as merely directory[1]. No universal rule can be laid down as to whether mandatory enactment shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of Courts of justice to get at the real intention of the legislature, by carefully attending to the whole scope of the statute to be construed. One must look to the subject matter, consider the importance of the provision and the relation of that provision to the general object intended to be secured by the Act[2]. The

[1] *Sedgwick—Statutory and Constitutional Law quoted on p. 231 of Craies, Statute Law.*

[2] *Craies—Statute Law (3rd Ed.), 230, 231.*

presence of the word " shall " is not decisive, it is a circumstance to be taken into consideration with other facts. A notice under this section stands upon a different footing from a summons or other notice which a party is bound to serve and it is the Court's duty to issue the notice [1]. The provision as to service of notice seems to me to be merely directory. It does far less harm to allow a sale held as this one was, with the opportunities there would be to pay the sum due on the judgment or to complain of the irregularity, to stand good, than to hold the proceedings null and void : so to hold would not of course, prevent the Court's setting aside the sale in cases where there was reason to think that prejudice had been caused to the debtor. The non-issue of a notice to the judgment-debtor is a material irregularity in proceedings which are anterior to the publishing or conduct of the sale.

It was contended by Counsel for the respondent that the omission to give the notice was by itself sufficient to render the sale null and void. He referred to *Ragunath Das v. Sundar Das Khetri* [2] and *Fernando v. Thambiraja* [3]. Counsel for the appellants contended that the Indian cases were decisions under the second part of section 248 of the old Indian Code of Civil Procedure (under part " b " of Order 21, rule 22 of the present Code), and that they are not applicable to a question arising under section 347 of our Code. He pointed out that section 341 of our Code makes provision for the death of the judgment debtor, the corresponding section of the old Indian Code being section 234, of the new Code section 50 and that section 248 of the old Indian Code makes provision for two cases, (*a*) and (*b*). He referred to the case of *Nanayakara v. Sulaiman* [4] as a direct decision on section 347, and also to the cases of *Latiff v. Seneviratne* [5] and *Wijewardene v. Raymond* [6]. He referred to the facts in *Fernando v. Thambiraja* [3] and contended that in deciding the case the Court had failed to take notice of the fact that two of the Indian cases referred to therein (*G. C. Chatterjee v. G. Dasi* and *Ragunath Das v. Sundar Das Khetri*) were decisions on part " b " of the Indian section. The cases quoted by him, he said, have not been quoted at the argument of *Fernando v. Thambiraja* [2] and that the latter decision does not bind this Court.

In Ragunath's case, on January 7, 1904, a mortgagee from the lessees obtained a decree against them. On June 22, 1904, the lessors obtained decree in the suit filed by them against the lessees and on July 13, 1904, they obtained thereunder an attachment against the colliery. On September 8, 1904, the lessees filed in the High Court their schedule in insolvency giving a list of their creditors under the Insolvency Act, 1848, and upon that date an order vesting the property in question in the official assignee was made. On September 10, 1904, the Judge in the execution proceedings stayed the sale therein directed until further orders. A notice was thereafter served on the official assignee but it was not a notice about substitution and he did not appear. Thereafter they obtained an order substituting the official assignee in the place of the judgment debtors, but this was not an order binding on them. The property was sold on March 6, 1905, and bought by the lessors ; it was

[1] *Sections 225, 347, Cap. 86, C.L.E.*
[2] *A.I.R. (1914) Cal. P.C. 129.*
[3] *(1945) 46 N. L. R. 81.*
[4] *(1926) 28 N. L. R. 314.*
[5] *(1938) 40 N. L. R. 141 at p. 142.*
[6] *(1937) 39 N. L. R. 179 at p. 181.*

confirmed on April 18, 1905, and a certificate dated April 25, 1905, was issued to the lessors. In the course of the judgment, Lord Parker said—"The judgment-debtors had no longer" (on and after September 8, 1904) "any interest which could be sold. As laid down in *G. C. Chatterjee v. G. Dasi* (1892) 20 C. 370 a notice under section 248 of the Code is necessary in order that the Court should obtain jurisdiction to sell property by way of execution as against the legal representative of a deceased judgment-debtor". Here a change had taken place, it was very similar to a change by death, the debtor having become insolvent the creditor could take no proceedings against him ; execution could not go as against the colliery because it no longer belonged to the debtor. In the present case there was a valid decree against the judgment-debtor, he was subject to the jurisdiction of the Court. The Court ordering execution is the same Court that passed the decree not as sometimes happens in India a different Court. The property was seized in execution of the writ against the defendant in 1930 and there is no evidence to show that this seizure was withdrawn or had lapsed. The Court had jurisdiction as regards the property that was sold in execution in this case. Mr. Weerasooria could not produce any decision of the Privy Council on the provisions of the Indian Code corresponding to our section 347 or one showing that the seizure was under a void order, but he contended that there are decisions of Indian Courts on this point and referred us to a passage in one of the Commentaries on the Indian Code. For reasons which will be given hereafter I have not thought it necessary to discuss the view in this Commentary.

In the case of *Perichchiappa Chetty v. Jacolyn*[1] to which reference was made by my Brother, the judgment-creditor made an application for execution of the decree after a year had elapsed and writ was issued without notice to the judgment-debtor ; the application made subsequently by the defendant to recall the writ was refused. Lawrie J. who delivered the judgment in appeal said—"It is proved that the debtor failed to pay the instalment due . . . . The issue of writ without notice to him was irregular but it was an irregularity which really did him no harm . . . . ." Withers J. agreed. In *Nanayakara v. Sulaiman*[2], Dalton J. came to the conclusion that the objection of the petition not being served on the judgment-debtor was a technical one : he declined to interfere as no injustice whatever had been done to the appellant. In *Fernando v. Thambiraja*[3], the defendant made an application to have a sale held by the Fiscal set aside ; writ of execution had been allowed on an application made under section 347 of the Code about eighteen months after the decree without the petition being served on the judgment-debtor. The Court undoubtedly had the right to set aside the sale, as there was a material irregularity but in giving judgment the learned Judge said that the sale in question was void and of no effect ; the dicta about the effect of section 347 were really not necessary for the decision of the appeal. It is probable that if there was as full and clear an argument with reference to the previous cases as we have had, the learned Judge may have modified some of the dicta contained in the judgment. The view taken in these two cases

[1] *(1893) 3 Ceylon Law Reports 91.* [2] *(1926)28 N. L. R. 314.*
[3] *(1945) 46 N. L. R. 81*

(of *Perichchiappa Chetty v. Jacolyn* [1] and of *Nanayakara v. Sulaiman* [2]) that a Court ought not to interfere where the party had shown no prejudice appears very reasonable. This view had stood unchallenged for a period of little over fifty years. It is especially important for the proper and expeditious conduct of judicial business that the rules of procedure should be stable. Hence it is almost an invariable rule to adhere to former decisions settling the rules of procedure, when they are generally known and acted on, and when they have been established for such a length of time as to make a change injudicious, even though it may have become apparent that they were wrongly decided, or although the Court would have reached a different conclusion if the case were before it for the first time. A mere matter of practice, once settled by the decision of a Court of appeal and unchallenged for years, ought not to be disturbed except in case of "glaring and dangerous error". The decisions of Indian Courts are not binding on our Courts, though they are useful as showing the view of the law held by a qualified body of men. There is a rule of practice in Ceylon on this matter and further our section differs to some extent from the Indian section.

I set aside the judgment of the District Court and declare the plaintiffs entitled to the land as prayed for. The defendants will pay the plaintiffs the costs of the trial in the District Court and the costs of appeal.

DIAS J.—I agree.

Appeal allowed.