1934 *Present :* **Macdonell C.J. and Dalton S.P.J.**

FRADD *v.* FERNANDO.

75—D. C. Colombo, 46,425.

Privy Council—Application for conditional leave—Service of notice—Notice on attorney of party irregular—Substituted service—Appellate Procedure (Privy Council) Order, 1921, rules 5 and 5A.

Notice of an application for conditional leave to appeal to the Privy Council must be served on the party personally or his proctor empowered to accept service.

Service on a person holding a power of attorney from a party is insufficient.

Where service cannot be effected on the party personally or his proctor, application for substituted service must be made under rule 5A of the Appellate Procedure (Privy Council) Order, 1921.

THIS was an application for conditional leave to appeal to the Privy Council.

E. F. N. Gratiaen, for defendant, appellant.

H. V. Perera (with him *H. E. Garvin*), for plaintiff, respondent.

October 4, 1934. MACDONELL C.J.—

In this case the defendant applied for conditional leave to appeal to the Privy Council against a judgment in favour of the plaintiff of July 30, 1934. The plaintiff resides in England but had executed a power of attorney in favour of a certain person in Colombo, which gives that person

full powers with regard to any proceedings that may be brought in the Courts here either as plaintiff or defendant, including appeals to the Privy Council. The defendant-appellant served the notice of his intended application to the Court for leave to appeal which is required by rule 2 of Schedule I. to Ordinance No. 31 of 1909, upon the plaintiff's attorney within the fourteen days from the date of judgment required by the said rule 2, and the question before us was whether this service upon the plaintiff's attorney was sufficient. The matter would seem to be regulated by the orders to be found in the *Handbook of the Supreme Court of Ceylon* at p. 105 *sq.*, called "The Appellate Procedure (Privy Council) Order, 1921". The relevant rules in that order are 5 and 5A, the latter being an amending order which came into force on August 3, 1928, and they are as follows :—

"5. A party who is required to serve any notice may himself serve it or cause it to be served, or may apply by motion in Court before a single Judge for an order that it may be issued by and served through the Court; and in the latter case he shall within two days after obtaining the order, lodge in the registry a notice in duplicate, prepared for the Registrar's signature and duly stamped. The notice may be served either on the party or on his proctor.

5A. If after reasonable exertion it is found that service of any notice cannot be duly effected upon a party personally or upon his proctor empowered to accept service thereof, it shall be competent for the Court, which may consist of a single Judge, on being satisfied by evidence adduced before it that reasonable exertion to effect service has been made and that service cannot be effected, to prescribe any other mode of service. The service substituted by order of the Court shall be as effectual as if it had been made on the party personally or on his proctor. Whenever service is substituted by order of the Court, the Court shall fix such time for the appearance of the party as the case may require."

These two rules have to be read in conjunction with rule 2 in the Schedule I. to Ordinance No. 31 of 1909. The would-be applicant must give the notice of his intended application within fourteen days and these additional rules 5 and 5A say to whom he must give the notice. It was conceded that the plaintiff who will be respondent upon the appeal to the Privy Council, had appointed an attorney in Ceylon with full powers to act for her, but it was argued that under the rule 5A of the Appellate Procedure Order service of the notice could not be effected upon her attorney. A very full argument was addressed to us upon the point, but the matter to be decided seems to lie in a very small compass, namely, what is the meaning of service upon "a party personally", (rule 5A) and I think, after due consideration of the authorities that were quoted to us, this must mean the party who is to be made a respondent, him or herself, and that it does not include an attorney under a power of attorney. In this case the applicant-defendant was certainly in a difficult position. The actual party, the plaintiff, was not in the Island and there was not at the moment when the required notice would have to be served any proctor within the Island "empowered to accept service"

(rule 5A) of such notice on her behalf. The applicant therefore had no one upon whom apparently he could serve the required notice, if the law did not allow him to serve it upon the attorney of the plaintiff. It will be seen however that rule 5A does provide a sufficient remedy in such a case as this. In the absence of the party, him or herself, and in the absence of a proctor empowered to accept service for that party, the applicant can go before a single Judge and obtain an order as to how service is to be effected, and order 5A expressly says that "The service substituted . . . . shall be as effectual as if it had been made on the party personally or on his proctor". The applicant in this case has not availed himself of these rights given him by rule 5A and he is out of time unless he can show that the words "party personally" include the attorney of that party. It must, I think, be conceded that the powers of the Supreme Court with regard to giving leave to appeal against one of its judgments to the Privy Council are powers outside the scope of the Civil Procedure Code. Various sections of that Code were cited to us, notably sections 6, 7 and 8, 24, 25 and 26, but they all, it seems to me, refer to actions to be brought in a District Court with a possible appeal thereafter to the Supreme Court, and they cannot on any fair interpretation of the language used be held to extend to those other powers which the Supreme Court has with regard to granting leave to appeal to the Privy Council. Those powers must be found, it seems to me, in Ordinance No. 31 of 1909 and the rules in Schedule I. thereto and in the Appellate Procedure Order of 1921. Those powers are judicial powers of the Court but nowhere in them do we find anything saying that service of any notice required would be a good service if it were made not on the party himself or upon his proctor, duly authorized, but upon the holder of his power of attorney. It would almost seem that the present case had been foreseen in rule 5A. You are there given the choice of serving a notice on the party personally or the proctor duly authorized, or of applying to a Judge for substituted service if for any reason you cannot effect service on the party personally, and if there is no proctor empowered to accept it. Some meaning must surely be given to the word "personally", and the most natural meaning seems to be that it refers to the party himself and not to any representative of his however fully equipped with a power of attorney.

For these short and simple reasons I think that the service upon the plaintiff's attorney was insufficient. Confessedly, the fourteen days allowed by the rules in Schedule I. to Ordinance No. 31 of 1909 which have statutory force have been exceeded and, if that is so, the applicant is out of time and his application for leave to appeal must be refused with costs. He presumably has a right to apply to the Privy Council itself for special leave to appeal, if he is so advised.

DALTON S.P.J.—

I agree that this application must be refused, since the applicant has failed to comply with the provisions of rule 2 of Schedule I. of the Appeals (Privy Council) Ordinance, 1909. He has failed to give the opposite party notice of his intended application, as required by the amended rules.

Rule 5A was added to the Appellate Procedure (Privy Council) Order, 1921, in 1928, to meet such cases as might arise from the party to be served purposely avoiding service or from his or her absence from the Island, and applicant, if he was aware that plaintiff was still in England, should have applied to the Court under that rule to direct some mode of service other than upon the plaintiff personally.

I am unable to agree with Mr. Gratiaen's principal argument based upon the provisions of the Civil Procedure Code that the provisions of section 26 of the Code apply here. It is sufficient to say that in my opinion the notice in question is not process of the Court. It did not issue from the Court, nor was it served through the Court. No request was made for that to be done here.

I agree that the application must be refused with costs.

Application refused.