1931

Present: **Macdonell C.J., Garvin S.P.J., Drieberg and Akbar JJ.**

IN THE MATTER OF THE ELECTION FOR THE GAMPAHA DIVISION ELECTORATE.

MENDIS *v.* JAYASURIYA.

Election petition—Original security for costs—Cash or recognizance—English law—Election (State Council) Order in Council, 1931, rules 12, 13, 14, 19, 21, and 41

In an election petition the original security for payment of costs for the first three charges shall be given by recognizance with sureties not exceeding four in number or by deposit of money in manner prescribed in rules 13 and 14 or partly in one way and partly in the other.

Where objection is taken to original security it may be determined under rule 19, the terms of which are identical with the corresponding section of the English Act of 1868, even if the language of the rule be considered to apply to the case of additional security only.

THIS was a matter referred by Akbar J. to a Bench of four Judges regarding the interpretation of certain rules under the Ceylon (State Council Elections) Order in Council, 1931, as to whether under rule 12 (2) the original security for respondent's costs in an election petition in the sum of Rs. 5,000 means a deposit of cash or whether it could be given in any other form.

Soertsz, for respondent, objector.—In rule 12 (2) the words "shall be given refer only to cases where there are additional charges. In respect of the first three charges, security must be by cash. "Not less than Rs. 5,000" means "in a sum of Rs. 5,000." No other manner is indicated, therefore security must be by cash. Though words suggest that security may be in any form, yet in view of second part of rule 12 (2) it is clear that, in respect of the Rs. 5,000, cash must be deposited because an option is given only where there are more than three charges. Only two forms of security are contemplated, cash and recognizance. There has been a deliberate change in the law by the Order in Council of 1931, in relation to rule 12 of the Order in Council of 1924. There is no provision made for testing the security in respect of the first three charges, because there would be no practical difficulty where security is by a cash deposit. Absence of such provision supports my argument.

H. V. Perera (with *Gratiaen*), for petitioner.—If the Legislature's intention was that security for the first three charges should be by cash, it could have said so. That no provision is made for testing any security other than a recognizance may be due to an omission. Court has an inherent power to test any security in the ordinary way, and if it finds security is insufficient, petition may be dismissed under rule 12 (3). If the rule of construction that the punctuation does not form part of a statute is applied here [1], all difficulties disappear. Regard the words "if the number" to

[1] *Maxwell, Interpretation of Statutes, 6 ed., 75, 76. (Devonshire v. Connon) (1890) 24 Q. B. D. 468 at 478. 19 N. L. R. 433 at 438.*

" in excess of the first three " in rule 12 as a parenthesis. In the old rule, security might have been given either by recognizance or by a cash deposit. Rule 12 (2) only provides a sliding scale, and does not alter the form of security to be given. Rule 19 contemplates possibility of all security being given by recognizance. Words " not less than " in rule 12 (2) are appropriate to a security to cover an obligation not to a deposit of cash. No provision for testing original security, but that does not mean it should be by cash. If two constructions are possible, Court should incline towards interpretation less onerous to petitioner. Form of security is immaterial, what is material is that it should be good and real security for Rs. 5,000. Security includes every document or transaction by which recovery of money is secured. (Wood Renton's *Encyclopaedia of Laws of England, Vol. 13,208.*) Also *vide* Order 15, Rule 58, " deposit or other security ".

L. M. D. de Silva, D. S.-G., for Attorney-General.—This Order in Council follows the old one on all points except rule 12. Rule 12 (3) does not occur in English Acts or English rules. Objections under English Act may be classified into (1) objections under section 8 of the Parliamentary Elections Act, 1868 (corresponding to rule 19 of our Order in Council), (2) other objections. Provision is made in section 9 for dealing with objections under section 8. No provision for dealing with other objections. *In Cobbet v. Hibbert* [1], Willes J. recognized that this was an omission in English law, and held that the objection should be made within a reasonable time. *Peas v. Norwood* [2] makes it clear that section 9 of the English Act applies only to objections of sufficiency under section 8. Our rules 21-24 are parts of section 9 of English Act, *i.e.*, rule 24 will not apply to other objections. Rules 18-24 form branch of rules standing by themselves, to that extent they supersede rule 12 (3) which applies only to residual objections, *i.e.*, other than sufficiency . . . . .

" To an amount of " in rule 12 (2) defines only extent, not nature of security. To interpret rule 12 (2) by ignoring punctuation would be to do violence to language. Taking rule by itself, does not call for insertion of brackets. Where no special provision is made in law, security should be given by a reasonable method. Ordinary method is hypothecation of property. But then petitioner cannot avail himself of rules 18-24. It must be regarded as *casus omissus*. That it is an omission follows clearly from the fact that provision is made for testing the security in respect of the additional charges . . . . Article 83 of Order in Council applies.

Soertsz, in reply.—Article 83 (4) really refers to *casus omissus* in respect of procedure. This is not a question of procedure.

October 20, 1931. The judgment of the Court was delivered by MACDONEL C.J. as follows:—

This matter has been referred by Mr. Justice Akbar to a Full Bench of four Judges in the following terms:—

" Whereas a doubt has arisen with regard to the interpretation of rules 12, 13, 14, 19, 21, and 41 of the Election (State Council Elections)

[1] *(1869) 19 L. T. 501.* [2] *(1869) L. R. 4, C. P. 235.*

Order in Council, 1931, and whether the words in rule 12 (2) ' The security shall be to an amount of not less than five thousand rupees ', mean a deposit of cash or whether it could be given in any other form.

" I hereby in pursuance of the powers conferred on me by section 52 of the Courts Ordinance, No. 1 of 1889, reserve these questions for argument before a Bench of Four Judges of this Court."

The most important of the rules mentioned in the above reference is rule 12, which reads as follows:—

" 12. (1) At the time of the presentation of the petition, or within three days afterwards, security for the payment of all costs, charges, and expenses that may become payable by the petitioner shall be given on behalf of the petitioner.

" (2) The security shall be to an amount of *not less than* five thousand rupees. *If the number of charges in any petition shall exceed three, additional security to an amount of two thousand rupees shall be given in respect of each charge in excess of the first three* and shall be given either by recognizance in the form in rule 16 set forth, with two sureties, or by a deposit of money, or partly in one way and partly in the other.

" (3) If security as in this rule provided is not given by the petitioner, no further proceedings shall be had on the petition, and the respondent may apply to the Judge for an order directing the dismissal of the petition and for the payment of the respondent's costs."

Save for the portions in italics, this rule is textually the same as rule 12 in " The Election (Legislative Council) Petition Rules, 1924," made under " The Ceylon (Legislative Council) Order in Council, 1923 ". Rules 13 to 24 again are textually identical with rules 13 to 24 of " The Election (Legislative Council) Petition Rules, 1924 ", save for necessary alterations *e.g.*, " State Council " for " Legislative Council ", and are themselves derived from the Parliamentary Elections Act, 1868 [1], and the rules made thereunder.

Hitherto, then, the sole security required of a petitioner on an election petition was one to an amount of five thousand rupees and could be given either by recognizance, or by deposit of money, or partly in one way and partly in the other. The present rule 12 has introduced a new requirement, viz., additional security where the petition contains charges in excess of three, a requirement not occurring in the rules of 1924, nor in the English Statutes and rules of 1868 from which they were derived. The second sentence of rule 12 (2) makes it clear that the additional security of two thousand rupees, that is required on each charge in excess of the first three, may be by recognizance or by deposit of money or partly in one way and partly in the other, but the first sentence of that rule 12 (2) does not say how the security for the five thousand rupees required on the first three charges is to be given, and this is the point which we have to decide.

It was argued to us for the respondent that the security to an amount not less than five thousand rupees—the security on the first three charges, that is—must be in cash. It was argued for the petitioner that whether

[1] *31 & 32 Vict. c. 125.*

we took account of the punctuation of rule 12 (2) or not, it could be read as allowing security on the first three charges to be given either by recognizance, or in cash, or partly in one way and partly in the other.

Mr. de Silva, appearing for the Attorney-General, argued for an interpretation of this rule on the following lines. He first pointed out that special provisions in regard to a special class of objection would supersede any general provisions thereon, and that while rule 22 applied only to objection as to the sufficiency of a security given, a special objection, rule 12 (3) was wide enough to apply to objections other than the sufficiency of the security given. He pointed out further that rule 12 (3) was a provision not to be found in the English enactments, either Act or rules, on the matter but contended that the law would be the same without it, in view of the imperative requirement in rule 12 (1) as to giving security within three days of the presentation of the petition. Now we had had an amendment of the law, the italicized portions of rule 12 (2); did that rule 12 (2), as now worded, make express provision as to how what one might call the original security—that on the first three charges—must be given ? It would appear not. " To an amount of not less than five thousand rupees", these words showed the extent of the security required but not its nature. There was express provision how additional security was to be given, and in this connection he drew attention to the words " additional security to an amount of two thousand rupees " as contrasted with the provision in the first sentence of rule 12 (2) that the original security must be to an amount of *not less than* five thousand rupees. He concluded than that rule 12 (2) did not contain any express provision as to how security on the first three charges was to be given. Did rule 12 (2) say by implication how such original security was to be given ? No authority had been cited to show that the security mentioned in the first sentence of the rule must be by deposit of money. Then, it could be argued that, in the absence of any express provision, it could be implied that security was to given in any reasonable, *i.e.*, usual, method. What was the usual method of giving security ? Hypothecation of immovables would be the usual method rather than the deposit of money. But if it were held that rule 12 (2) impliedly stated that the method of giving the original security, that referred to in the first sentence, must be reasonable, *i.e.*, usual, and so by hypothecation of immovables, then the person so giving security would gain no advantage from the only rules, that is rules 18 to 24, which provided a procedure for determining the adequacy or otherwise of security given, since they referred to the adequacy or otherwise of security by recognizance only but made no mention of security by hypothecation and consequently provided no procedure for deciding upon the adequacy or otherwise of security by hypothecation. Therefore a person giving security by hypothecation of immovables, to which security objection had been taken, would not find in the rules any procedure available for determining that question. He argued further that the test of reasonableness was apt to make for indefiniteness, and said that he was driven to regard this as *casus omissus*, something which the draftsman of these rules had not provided for. But, if so, section 83 (4)

of the Ceylon (State Council Elections) Order in Council, 1931, provided in terms for the difficulty. This section 83 (4) reads as follows:—

> " 83. (4) If any matter of procedure or practice on an election petition shall arise which is not provided for by this order or by such rules, the procedure or practice followed in England on the same matter shall, so far as it is not inconsistent with this order or any such rules and is suitable for application to the Island, be followed and shall have effect."

It would be necessary then to apply the English rule on the point and this is to be found in section 6 (5) of the Parliamentary Elections Act, 1868.

> " 6. (5) The security . . . . shall be given either by recognizance to be entered into by any number of sureties not exceeding four, or by a deposit of money in manner prescribed, or partly in one way and partly in the other."

We are inclined to adopt the argument of Mr. de Silva and we hold, accordingly, that this is *casus omissus* as to which, in accordance with section 83 (4) just quoted, the English law must be applied, consequently that it will be sufficient if the original security on an election petition be given either by recognizance with sureties not exceeding four in number, or by deposit of money in the manner prescribed in rules 13 and 14, or partly in one way and partly in the other.

The application of this provision of English law to the original security will not interfere with those provisions for the additional security contained in rules 12 (2), 13, 16, 17, and 18, for they provide definitely that on an additional security being given the sureties must be two in number It has been ruled in this Court that a recognizance must be signed by the petitioner as well as by the sureties. We think that this requirement should be enforced with regard to a recognizance on an original security. That the principal must sign is the general rule, and its application to security given on an original election petition under rule 12 (2) will not, we apprehend, contravene the direction given in the Order in Council, section 83 (4), since the requirement of signing, being the general rule here, is one " suitable for application to the Island ", while a contrary rule, namely, that signing should not be required, would be unsuitable or at least less suitable.

If objection be taken by the opposing party to the sufficiency of any original security offered, then this objection can be determined under rule 19, if it be held that that rule is in its wording wide enough to apply not merely to security offered on additional charges but also to security offered on an original charge. If however it be considered that the wording of rule 19 is only wide enough to cover the case of additional security, then the sufficiency of an original security can be determined by applying English law, namely, the Act of 1868, section 8, which is to the same effect as and in almost identical terms with rule 19.