1938 *Present :* **Moseley, Keuneman, and de Kretser JJ.**

MUTTUCARPEN CHETTIAR *v.* MOHAMED SALIM *et al.*

*293—D. C. Colombo, 50,221.*

*Privy Council—Leave to appeal—Application under rule 5 to serve notices on the respondents through Court—Applicants' proxy signed by attorney—Validity of proxy—Appellate Procedure (Privy Council) Order, 1921, rule 6.*

**A proxy given to a Proctor by the duly appointed attorney of a party to an application for conditional leave to appeal to the Privy Council complies with the requirements of rule 6 of the Appellate Procedure (Privy Council) Order, 1921.**

THIS is an application for conditional leave to appeal to the Privy Council. With the motion to serve notice of the intended application for leave to appeal, under rule 5 of the Appellate Procedure (Privy Council) Order, 1921, was filed a proxy in favour of Proctor Somasunderam by the person holding the petitioner's power of attorney. In pursuance of this motion, which was allowed, notices signed by the Proctor were posted to the respondents, who contended that the proxy was bad under the rules and that the notices were not valid.

*H. V. Perera, K.C.* (with him *S. J. V. Chelvanayagam*), for petitioner.—The word "document" in rule 6 of the Appellate Procedure (Privy Council) Order, 1921, is not defined. The expression "a party . . . . shall . . . . file" means his filing or causing the document to be filed. It does not say that he should sign it. The rules do not say what a valid appointment of a Proctor is and, as the Civil Procedure Code, 1889, is also silent, the general law of agency is applicable. It would be highly inconvenient if the party had to sign it himself, specially if he is outside Ceylon. If the Proctor has been appointed by the attorney, it would be sufficient.

The cases *Fradd v. Fernando*[1] and *Annamalay Chetty v. Thornhill*[2] do not apply.

*N. Nadarajah* (with him *E. F. N. Gratiaen* and *M. M. I. Kariapper*), for first respondent.—The question is whether the word "applicant" in rule 2 of Schedule I. to the Appeals (Privy Council) Ordinance, 1909, is to be interpreted as "the applicant or his recognized agent". But for section 24 of the Civil Procedure Code, 1889, all appearances in Court has to be by the party himself. Even then there are certain things which could be done by the party only, for example see section 445 of the Civil Procedure Code. If the applicant is outside the Island an extension of time can be obtained under rule 3 (*a*) of the Appeals (Privy Council) Ordinance. An attorney cannot act without the authority of the applicant.

[1] *(1934) 36 N. L. R. 182.*

[2] *(1935) 36 N. L. R. 413.*

The words of the Ordinance are clear and effect must be given to them as held in *In re Prince Blucher, ex parte The Debtor v. Official Receiver* [1]. See also *Hyde v. Another* [2]. Acts which could be done by an agent are stated in Article 6 of *Boustead on Agency (8th ed.), p. 9.*

Under rule 5A of the Appellate Procedure (Privy Council) Order, 1921, notice cannot be served on the attorney, then it follows that it cannot be served on the Proctor appointed by the attorney. *Tarrant & Co. v. Ibrahim Lebbe Marikkar* [3] and *Weerakoon Appuhamy v. Wijesinghe* [4] were cited.

*M. S. A. Marikar,* for second to seventh respondents, adopted the arguments of the Counsel for first respondent.

*H. V. Perera, K.C.,* in reply.—A party can appear in person, but an attorney cannot. Further, when all the necessary steps have been taken, then, if the rules of Court require only a solicitor to appear, a person having authority can do everything to appoint a solicitor in order to exercise the power given to him. It is not a limitation by the general law, but it is a rule of Court showing how a thing could be done. See *26 Halsbury (1st ed.) Art. 1203, p. 730* and *Boustead on Agency, Art. 6, Illus. 7.*

*Cur. adv. vult.*

December 14, 1938. KEUNEMAN J.—

This matter came before us as a Divisional Court upon a reference by Poyser S.P.J. and Wijeyewardene J. The facts are as follows:—

The judgment of the Supreme Court was delivered on June 28, 1938. Under rule 5 of the Appellate Procedure (Privy Council) Order, 1921, application was made for a notice to be served on the respondents of the petitioner's intended application to appeal to the Privy Council. This was accompanied by a proxy dated June 29, 1938, in favour of Proctor Somasunderam by the person holding the petitioner's power of attorney for the purpose. This was filed under rule 6.

Both the application and the proxy were received in the Supreme Court Registry on July 1, 1938.

On July 4, 1938, the application was allowed, but on notice issuing, the Fiscal reported that the respondents were evading service. A further application was then made to the Supreme Court for substituted service on the respondents under rule 5 (*a*). This was allowed and substituted service was effected on July 9, 1938.

In addition notices were posted to the respondents on July 2, 1938. These notices were signed by Proctor Somasunderam.

It is not contended that these steps are out of time, but Counsel for the respondents argued that the proxy filed was bad under the rules, as it was signed by the plaintiff's attorney, and not by the plaintiff himself.

In the case of *Annamalay Chetty v. Thornhill* [5] a Bench of two Judges held that where an application for conditional leave to appeal to the Privy Council was made by a duly authorized attorney of the applicant through a Proctor to whom the attorney had granted a proxy for the purpose, that the application was not regularly made.

[1] *(1930) 144 L. T. 152.*
[2] *(1836) 2 Bing. N. S. 776.*
[3] *(1934) 14 Ceylon Law Rec. 47.*
[4] *(1929) 30 N. L. R. 256.*
[5] *36 N. L. R. 413.*

Poyser S.P.J. and Wijeyewardene J. had doubts as to the correctness of this decision and have referred the matter to us for determination.

Counsel on both sides agreed before us that the matter is not governed by the sections of the Civil Procedure Code, notably sections 24, 25, 26, and 27. There is also a finding to this effect in the case of *Fradd v. Fernando* [1], where the effect of these sections was restricted to actions in the District Court and appeals to the Supreme Court. Our decision on this matter must depend upon our interpretation of the rules contained in the Appellate Procedure (Privy Council) Order, 1921, only.

The rule that is relevant in this case is rule 6, the material portion of which is as follows:—

> "A party to an application under the Ordinance, whether applicant or respondent, shall unless he appears in person, file in the Registry a document in writing appointing a Proctor of the Supreme Court to act for him in connection therewith".

Under rules 5 and 5 (*a*) it has been held that notice of an application for conditional leave to appeal to the Privy Council must be served on the party personally or on his Proctor empowered to accept service, and that service on a person holding a power of attorney from a party is insufficient, see *Fradd v. Fernando* (*supra*). The correctness of this decision has not been disputed before us. It was argued that the present case is the converse of that decision, and that was the view taken by the Judges in *Annamalay Chetty v. Thornhill* (*supra*). I think however that the language of these rules is not similar to that of rule 6. Rule 5 states that the notice may be served on the party or his Proctor, and rule 5 (*a*) states that where service of the notice cannot be duly effected upon a party personally or upon his Proctor empowered to accept service thereof, it shall be competent to the Court to prescribe any other mode of service. In *Fradd v. Fernando* (*supra*) emphasis was laid on the word "personally", and it was held that the most natural meaning to be given to that word was that "it refers to the party himself and not to any representative of his however fully equipped with a power of attorney".

If we examine the language of rule 6 it certainly does appear that in the absence of the "document in writing appointing a proctor" filed in the Registry, the party must appear "in person". If we apply the decision in *Fradd v. Fernando* (*supra*), the appearance in Court will be recognized only of the party himself or of his Proctor authorized thereto, and not of a person holding the party's power of attorney. Does rule 6 go further and require that the proxy to the Proctor should be given by the party himself and not by his attorney? I am of opinion that the language of rule 6 does not warrant such an interpretation. The party to the application, unless he appears in person, must file "a document in writing appointing a Proctor". Counsel for the respondent argued that this means "a document in writing in which he appoints a Proctor" and that on this construction the party alone and not his attorney can give the proxy. I do not think that these words can be read into the rule. I think the words in the rule imply nothing more than "a document which

[1] *36 N. L. R. 132.*

appoints a Proctor"—a loose but sufficiently precise phrase. It is of significance that the rule nowhere states that the document must be signed by the party himself, and in the absence of such words to that effect I do not feel compelled to place any restriction on the right which a party would have under the common law to do any act through his lawfully appointed attorney.

It has been argued that it is anomalous that the party's attorney should not be allowed to enter appearance in these proceedings, but should be permitted to appoint a proctor to enter appearance. I do not however think such a position is unreasonable, and in any event I am of opinion that the interpretation of rule 6 leads to that result.

In the case of *Annamalay Chetty v. Thornhill* (*supra*), stress was laid on the wording of rules 5 and 5 (*a*). With deference, I do not agree that the language of those rules is of assistance in the interpretation of rule 6 which deals with a different situation. I may add in passing that the words in rule 6 "unless he appears in person" as far as I can discover, were not inserted as an amendment, but appeared in the Original Order.

Counsel for the respondent referred us to the case of *In re Prince Blucher, ex parte The Debtor v. Official Receiver* [1]. Here the interpretation of the words "signed by him" appearing in section 16 of the Bankruptcy Act, 1914, was in question. In this connection Lord Hanworth M. R. said, "We have to consider the explicit and very simple terms of the Statute. The words in the statute are 'signed by him'. Where a statute intends that the authorization may be by a person on behalf of a debtor the Legislature knows how to provide it". It was held that only a proposal in writing signed by the party was in contemplation, and not a writing signed by a lawfully authorized agent. Reference was also made to *Hyde v. Johnson* [2]. I do not think that these decisions are of assistance in this case. I may however refer to the comment made in this connection by *Boustead* (*Agency, 8th ed., p. 12*). "As a general rule where the signature of a person is required by statute, it is sufficient if the name of that person is signed by a duly authorized agent, unless a contrary intention plainly appears".

In this case I have already pointed out that no such words as "signed by him" are to be found in rule 6 in connection with "the document in writing" appointing the proctor, and I do not think we are entitled to read in such words.

I am of opinion that conditional leave to appeal should be allowed subject to the usual terms and conditions. The petitioner is entitled to the costs of the argument of this matter.

MOSELEY J.—I agree.

DE KRETSER J.—I agree.

*Application allowed.*

[1] *144 L. T. 152.*

[2] *2 Bing. N. C. 776.*