

Present: Lascelles C.J. and De Sampayo A.J.

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CHARLES v. JANDRIS.

98—D. C. Matara, 1,853.

Appeal—Security for costs—Notice to respondent not served—Conditional acceptance of security irregular—Civil Procedure Code, s. 756.

The decree in this case was entered on May 9. The petition of appeal was filed on May 23, and notice of security was issued on the same day, returnable on May 31. On the 31st the notice was returned for an extension, which was allowed for June 4. On June 4 notice was returned unserved for want of time. On June 4 security was tendered by the appellant's proctor, and was accepted by the Court subject to any objection by the respondent.

Held, that the conditional acceptance was bad, as notice had not been served on the respondent.

THE facts appear from the judgment.

Drieberg (with him *Wadsworth*), for the appellant.

A. St. V. Jayewardene, for the respondent.

July 19, 1912. LASCELLES C.J.—

In this case a somewhat technical objection has been raised to the entertainment of this appeal. The order appealed from was dated May 9. The appellant had then, under section 756 of the Civil Procedure Code, twenty days within which to perfect his security. The petition of appeal was filed on May 23, and a motion was made on that day that the giving of security should be fixed for the 31st, and notice of security and stamps were tendered at the same time. The notice was issued on the same day, returnable on the 31st. On May 31 the notice on the respondent was returned for an extension, which was allowed for June 4. On June 4 the notice was returned unserved for want of time. On June 4 security was tendered by the appellant's proctor, and was accepted by the Court subject to any objection by the respondent. The respondent now contends that the conditional acceptance of the security by the District Judge was no such acceptance as is contemplated by section 756, because notice had not been served on the respondent. The objection is no doubt highly technical, but I am of opinion that it must nevertheless prevail. Section 756 provides that when the petition of appeal has been received by the Court of first instance, the petitioner shall forthwith give notice to the respondent that he will on a day specified in the notice, and within a period of twenty

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days, tender the security for the respondent's costs of appeal. Then, the respondent is allowed to be heard to show cause, if any, against the acceptance of the security, and if the security is accepted and the deposit is made, the Court again issues notice of appeal for service on the respondent. It is clear that the object of this procedure is to give the respondent an opportunity of objecting to any security if he deems it insufficient. The provision is an important and necessary one for the protection of respondents to appeals, and it is beyond our power to say that this portion of the section can be ignored. The case of *Kandappen v. Elliott*¹ is an authority for the proposition that section 756 of the Code must be strictly enforced. Although the present case may be a hard one, it is impossible for us to make any exception in favour of the appellant, and I think it is clear that the conditional acceptance of the security when no notice had been served on the respondent amounted to no acceptance at all, and that the provisions of section 756 have not been complied with. I think the objection prevails and the appeal abates.

It may be that the appellant may have grounds on which he may be able to obtain leave to appeal notwithstanding lapse of time, but on that I desire to express no opinion now. The appeal abates. The respondent is, I think, entitled to have the costs of the appeal.

DE SAMPAYO A.J.—

I entirely agree. I wish, however, to add that this case is one more illustration of the mischief caused by the failure on the part of practitioners to take advantage of the facilities provided in the Civil Procedure Code for service of notice. The respondent was represented by a proctor in the Court below, and it was quite open to the appellant to have served the notice of appeal on that proctor. If that had been done, I have no doubt the notice would have been served quite in time so as to observe the provisions of section 756.