1936 *Present :* **Maartensz J.**

In re ELECTION PETITION AGAINST THE RETURN OF G. G. PONNAMBALAM AS MEMBER FOR POINT PEDRO.

VINAYAGAMOORTHY *v.* PONNAMBALAM

Election petition—Security for costs—Recognizance entered into by petitioner and sureties—Validity of form—Number of charges—Amount of security —Appointment of agent—Necessity for writing and stamp—Validity of notice given by agent—Ceylon (State Council Elections) Order-in-Council 1931, Schedule VI, rules 9, 16, 18—Stamp Ordinance, No. 22 of 1909.

An election petition is not an instrument chargeable with stamp duty within the meaning of section 3, sub-section (14), of the Stamp Ordinance.

Where, in proceedings arising out of an election petition, a recognizance is entered under rule 16 of the rules in Schedule VI of the Ceylon (State Council Elections) Order-in-Council, 1931, whereby the petitioner and

[1] *(1898) 4 N. L. R. 242.*

his sureties bound themselves jointly and severally to the King and the condition of the recognizance was that it should become void if the petitioner and the sureties or any one of them paid all the costs, charges, and expenses payable by the petitioner in respect of the election petition,—

Held, that the terms of the recognizance were sufficient to satisfy the requirements of rule 16 of the rules in Schedule VI of the Ceylon (State Council Elections) Order-in-Council, 1931.

Wijeywardene v. Jayawardene (*26 N. L. R. 193*) followed.

Allegations in the petition that the candidate and his agent were guilty of undue influence and treating amount to no more than charges made against the candidate and they constitute two and not four charges for the purposes of Article 74 of the Order-in-Council.

A notice that security for costs has been given by a recognizance executed by the petitioner and his sureties is sufficient.

An appointment under rule 9 by which a person is authorized by the petitioner to act as his agent must be in writing and must be stamped.

A notice given under rule 18 by a person, whose appointment has not been duly stamped is bad.

Retrospective effect cannot be given to the letter of appointment by supplying the stamp as the rule requires notice to be given within a prescribed time.

THIS was an election petition filed on March 27, 1936, to have the election of the respondent for the Point Pedro electoral district declared void on the ground that the respondent and his agent were guilty of the following corrupt practices :—

(*a*) Undue influence on the day of the election and before that date.
(*b*) Treating.
(*c*) Bribery.

On the same day the petitioner filed a writing appointing a Proctor of the Supreme Court his agent with reference to the election petition to be filed against the respondent.

An instrument purporting to be a recognizance in the sum of Rs. 5,000 executed by the petitioner and two sureties was filed on March 31, 1936.

Notice of the filing of the petition and that the required security had been given by a recognizance executed by the petitioner and two sureties was published in the *Government Gazette*. The notice which was sent for publication was signed by the Proctor, as agent for the petitioner.

The respondent prayed for the dismissal of the petition on the following grounds :—

(1) That the petition was not duly stamped.
(2) That the recognizance was not in conformity with the rules 12 (2), and 16 of the rules in Schedule VI of the (State Council Elections) Order-in-Council.
(3) The recognizance was limited to Rs. 5,000, although the petitioner alleged more than three charges.
(4) The notice published in the *Government Gazette* was not in compliance with rule 18 as the writing appointing the Proctor was not duly stamped and the notice did not set out the nature of the security given.

H. V. Perera, K.C. (with him *N. Nadarajah, E. B. Wikramanayake, D. W. Fernando, Thambidurai,* and *Soorasangaran*), for respondent.—Security is not given as in rule 12 (2). This cannot be cured. See rule 12 (3). The recognizance under rule 16 makes the surety primarily liable for costs. The bond given makes them liable as sureties under the Roman-Dutch law. The form of the recognizance may be altered but not the character. A recognizance is a debt due to the Crown (*Brown v. Packeer* [1]). It is not a mere obligation. It is the acknowledgment of a debt. The bond here is given by a principal and sureties as such. The sureties make a general renunciation. Such a renunciation is insufficient (*Wijeywardene v. Jayawardene* [2]; *Ameresinghe v. Perera* [3]; *Pandithan Chettiar v. Singappuhamy* [4]). Even if they have sufficiently renounced the privileges they are still sureties and the recognizance requires that they shall be principal debtors. Whatever equities are available would still be due to them as sureties. This is a fatal objection (*Silva v. Karaliadde* [5]). See *Wijesekere v. Corea* [6]. The objection may be taken at any time (*Cobbet v. Hibbert* [7]). The rules in England are the same as our rules (*2 Rogers 407*). Rules 18 and 19 are contained in rule 8 of the Parliamentary Elections Act.

There are more than three charges. Corrupt practice under the Order-in-Council may be by the candidate himself or by someone with his knowledge and consent or by his agent. A charge of bribery merely in a petition would be incomplete. It must specify by whom the bribery was. The person must be placed in the proper category. Section 74. There are here five charges; of undue influence and treating by the respondent; undue influence and treating by the agent, and bribery by the respondent only. Under a charge of bribery by the candidate you can prove any number of instances of bribery by the candidate but not of bribery by the agent. It does not fall within the allegation. See *Tilekewardane v. Obeysekere* [8]. Definitions are not only for the purposes of the criminal law but for all purposes. To make a candidate liable for his agents' treating the agency must be *ad hoc* for that particular purpose (*Silva v. Coorey* [9]; *2 Rogers 172*). The allegation in the petition must be a statement of fact, not a charge. Article 74 provides three different categories. Instances must be covered by the allegation. The petition must be dismissed if the sum given as security is insufficient (*Silva v. Karaliadde* (*supra*)).

The petition is not duly stamped. In England the practice is to stamp petitions. This is an instrument. The definition in section 3 (14) of the Stamp Ordinance is not exhaustive. Section 4 introduces documents. Schedule B, Part I, catches up this document and it is not contained in the exemptions. Instrument is defined in *Stroud* as any document of a formal legal kind. This is caught up by item 28.

The notice has not been given as required by rule 18. The proxy is not stamped. This is an instrument and in any event comes under item 28. It may come under item 35. Agent is appointed only to accept notices.

[1] *26 N. L. 379.*
[2] *19 N. L. R. 449.*
[3] *35 N. L. R. 306.*
[4] *37 N. L. R. 310.*
[5] *33 N. L. R. 85.*
[6] *5 C. L. W. 56.*
[7] *19 L. T. 501.*
[8] *33 N. L. R. 65.*
[9] *33 N. L. R. 25.*

(Rule 9.) Rule 18 speaks of the giving of notice. It must be by the petitioner and not by an agent. Notice presupposes some person giving notice. It is not a mere publication. Notice if published must show who gives the notice. There is no notice of the nature of the proposed security. The object of this notice is to put the candidate on inquiry as to the sufficiency of the security. (*Williams v. Mayor of Tenby* [1].) Nature of security must be distinguished from the form of the security. (*Heely v. The Thames Valley Railway Co.* [2]) Nature of security means such information as would give the substance of it. A defective notice is no notice at all (*In re Serl* [3]). See *Aron v. Senanayake* [4].

F. de Zoysa, K.C. (with him *Kumarasingham, Tiruchelvam* and *Curtis*) for petitioner.—Sureties bind themselves jointly and severally. Description of themselves as sureties does not matter. That will affect only the principal and sureties as among themselves. These defences are not open against the Crown. It will have the force of a judgment and the petitioner can sell the property. (*Goonetileke v. Abeygoonesekera* [5].) See the condition of the recognizance. Section 12 says there must be two sureties. Therefore the persons must describe themselves as such. (*Walter Pereira 701.*) Even if the sureties are not bound the petitioner is bound and to that extent it is a recognizance. (*Anson on Contracts, p. 60.*)

Charges of undue influence and treating are two charges. Charge of treating, *e.g.*, under section 52 is an offence whether the charge is against the candidate or the agent. The charge is under section 74 (*a*). Sections 52 and 53 are merely definitions. The charge is not that it was done at a particular time but that it was done during the whole campaign. The word general is not used but that does not matter. Respondent can ask for particulars of general charges. A charge against the candidate and one against the agent is only one charge although it may be material for the purposes of a criminal case who did it.

Appointment of agent need not be stamped. There is no provision in the Order-in-Council that the authority should be given in writing. It is only necessary to inform the Registrar that some person has been appointed. The proxy may be treated as such a writing. There is no provision that such a writing should be stamped. The defect, if any, is merely a technical defect.

Nature of the security is the form of the security, that is, whether in cash or by recognizance. Sufficient notice was given to put the respondent on inquiry. The fact that the petition is with the Registrar is specifically mentioned. The bond was with the Registrar. No prejudice has been caused to respondent. Section 18 is the only section that provides for notice through the *Gazette*. Only the fact that a petition has been presented need be stated. The notice need not be signed by anybody. The respondent is only entitled to know that a certain person has filed a petition. All other particulars he must get from the Registrar.

E. A. L. Wijeyewardene, K.C., S.-G. (with him *Tambyah, C.C.*), for the Attorney-General.—The election petition is not an "instrument" within the meaning of item 28 of Part I. of Schedule B of Ordinance No. 22 of

[1] *(1879) 5 C. P. D. 135.*
[2] *11 L. T. 268.*
[3] *(1898) 1 Ch. 652.*
[4] *5 C. L. W. 51.*
[5] *17 N. L. R. 368*

1909. Ordinance No. 3 of 1890, section 4, gave a very extensive meaning to "instrument" defining it to "mean and include every written document". This meaning was found to be too extensive and it was restricted when the later Ordinance No. 22 of 1909 was enacted and section 3 (14) of that Ordinance gave it a limited meaning. As the meaning of "instrument" in section 3 (14) of Ordinance No. 22 of 1909 was felt to be too limited, Ordinance No. 16 of 1917 was passed in order to bring certain documents within the scope of section 4 of Ordinance No. 22 of 1909. To interpret "instrument" as argued by the respondent's Counsel is to restore the meaning given in Ordinance No. 3 of 1890 and to ignore the reasons which led to the passing of the subsequent Ordinances.

The document left with the Registrar under rule 9 is stampable. This rule is identical with rule 9 of the Parliamentary Election Petition Rules. This document comes under item 35 of Part I, Schedule B, of Ordinance No. 22 of 1909.

Cur. adv. vult.

November 25, 1936. MAARTENSZ J.—

This is an application by the respondent for the dismissal of the petition against his election on the grounds stated in his statements of objections dated April 7 and May 25, 1936.

The petitioner in his petition filed on March 27, 1936, avers that the election of the respondent is void by reason of corrupt practice in that "the said Ganapathypillai Gangesar Ponnambalam and his agent were guilty of—

(*a*) undue influence on the day of the election, viz., February 22, 1936, and before the said date,

(*b*) treating on the said date and before and after the said date.

The said Ganapathypillai Gangesar Ponnambalam was also guilty of bribery".

Apparently, on the same day the petitioner filed a writing appointing Mr. Victor Austin Perera Nanayakkara, a proctor of the Supreme Court, his agent with reference to the election petition to be filed against the respondent. The writing is a proxy form only partly adapted for the purpose for which it was used. It still contains clauses quite inappropriate to a writing contemplated by rule 9 of the rules in Schedule 6 of the Ceylon (State Council Elections) Order-in-Council, 1931 (hereafter referred to as the Order-in-Council).

An instrument purporting to be a recognizance in the sum of Rs. 5,000 executed by the petitioner and two sureties was filed on March 31.

Notice of the filing of the petition and that the required security had been given by a recognizance executed by the petitioner and two sureties was published in the *Government Gazette*. The notice which was sent for publication was signed by Mr. Nanayakkara as agent for the petitioner.

The grounds on which the respondent prays for a dismissal of the petition, shortly stated, are :

1. That the recognizance is not in conformity with rules 12 (2) and 16 of the rules as the executants other than the petitioner have not made themselves primarily liable for the payment of all costs, charges and expenses.

2. That the recognizance given by the petitioner is limited to Rs. 5,000 though the petitioner alleges more than three charges.
3. That the sureties are insufficient.
4. That the notice published in the *Government Gazette* purporting to be signed by Mr. Nanayakkara is not in compliance with the provisions of rule 18, as the writing appointing him agent is not duly stamped and the notice does not set out the nature of the security in sufficient detail.
5. That the petition is not duly stamped.

The recognizance which is the subject of the first objection is an adaptation of the model prescribed by rule 16 and is as follows :—

"Be it remembered that on the 30th day of March, in the year of Our Lord One thousand Nine hundred and Thirty-six, before Ramalingam Damodarampillai, a Justice of the Peace, we (1) Erampu Vinayagamoorthy of Point Pedro as principal, and (2) Sinnathangam, wife of V. Eliathamby Rajaratnam with the consent of her husband hereinbelow signified, and (3) V. Eliathamby Vaithialingam, both of Valvetty as sureties bind and acknowledge ourselves jointly and severally to Our Sovereign Lord the King in the sum of Rupees Five thousand (Rs. 5,000) to be levied of our property movable and immovable to the use of Our Lord the King, his heirs and successors, I the said Sinnathangam, wife of Rajaratnam, hereby specially renouncing the *beneficium senatus consulti velleiani* and *beneficium authenticate si qua mulier* and we the said Sinnathangam, wife of Rajaratnam, and the said V. Eliathamby Vaithialingam hereby renouncing all right and benefits whatsoever to which we as sureties are by law entitled.

"The condition of this recognizance is that if the said Erampu Vinayagamoorthy and Sinnathangam, wife of Rajaratnam, and V. Eliathamby Vaithialingam or any of them shall well and truly pay all costs, charges and expenses in respect of the Election Petition signed by the said Erampu Vinayagamoorthy relating to the Point Pedro Electoral District which shall become payable by the said Erampu Vinayagamoorthy under the Election (State Council) Petition Rules 1931 to any person or persons then this recognizance to be void otherwise to stand in full force.

"I the said V. Eliathamby Rajaratnam of Valvetty do hereby consent to my wife the said Sinnathangam giving security as aforesaid.

Sgd. (In Tamil).
Sgd. (In Tamil).
Sgd. V. E. Vaithialingam.
Sgd. V. E. Rajaratnam.

"Taken and acknowledged by the above-named (1) Erampu Vinayagamoorthy, (2) Sinnathangam, wife of V. Eliyathamby Rajaratnam, (3) V. Eliathamby Vaithialingam, and (4) V. Eliathamby Rajaratnam, on the 30th day of March, 1936, at Valvetty.

Before me :
R. Damodarampillai,
Justice of the Peace."

Rule 16 enacts that the recognizance "may be" in the form set out in the rule and petitioner's Counsel contended that the recognizance need not be an exact copy of the model, and that all that is necessary is that it should have the same legal effect.

He argued that the person described as sureties as well as the petitioner were in terms of the recognizance principal debtors and that the mere use of the term sureties did not change the character of the obligation (*Wijeywardene v. Jayawardene* [1]). In support of this argument he pointed out that the petitioner and his sureties bound themselves jointly and severally and that the condition of the recognizance was that it should become void if the petitioner and the sureties or any of them paid all the costs, charges and expenses in respect of the election petition which shall become payable by the petitioner under the rules.

For the respondent it was submitted that the fact that the sureties have agreed to be bound jointly and severally did not render them principal debtors and that even if their renunciation of the privileges of a surety were effective they would not be liable equally with the petitioner.

It was also contended that a recognizance is an acknowledgment of a debt due to the Sovereign and that the bond contains no such acknowledgment.

I am of opinion that both objections to the recognizance must fail.

The persons described as sureties in the document do not bind themselves as collateral security for the debt but bind themselves as debtors equally with the petitioner, and as was held in the case of *Wijeywardene v. Jayawardene* (*supra*) the use of inappropriate words cannot alter the nature of the obligation.

The second objection is based on the fact that the words "to owe" are omitted after the word "severally" and before the words "to our Sovereign". I was at first inclined to the opinion that this was a fatal defect; but on reconsideration I am of opinion that the liability is implied by the fact that the executants bind themselves in the penal sum of Rs. 5,000 which is to be recovered by a levy of their property and by the terms of the condition of the recognizance that the obligation is to be in force unless the costs and charges payable by the petitioner are paid.

The second objection depends on whether the petition sets out five charges or three. The contention for the respondent is that the allegations that the candidate and his agents were guilty of undue influence and treating form four charges. This contention necessitates an examination of Articles 51 to 55 of the Order-in-Council relating to corrupt practices and Articles 73 and 74 which specify the grounds on which an election of a candidate shall be declared void.

By the Order-in-Council treating, bribery, and undue influence are "corrupt practices". Sections 52 and 53 of the Order say what acts amount to treating, bribery, and undue influence and declare that any persons committing any of the acts described shall be guilty of the offence of treating or undue influence. In the case of *Silva v. Cooray* [2], which was tried under the Order-in-Council of 1923 it was held that the accused, who was the candidate, could not be convicted of bribery unless he authorized or connived at the acts of the agent who committed acts of

[1] *(1924) 26 N. L. R. 193.* [2] *(1931) 33 N. L. R. 25.*

bribery. It was argued that the *ratio decidendi* of this case was applicable to the case of a person charged with treating or exercising undue influence, and that a charge of treating and undue influence against a candidate differed from a charge of treating and undue influence by an agent which under Article 74 (c) are grounds for avoiding an election.

Article 74 enacts that the election of a candidate shall be declared to be void on an election petition on its being proved to the satisfaction of an election Judge *inter alia* that a corrupt or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent or by any agent of the candidate (Article 74 (c)).

It was contended, and I think the contention is sound, that an election is liable to be declared void on proof that an agent of the candidate committed a corrupt or illegal practice in connection with the election, even if the agent acted without the knowledge or consent of the candidate.

It was accordingly argued that an allegation of corrupt practice by a candidate and an agent comprised two charges, that is to say, a charge of corrupt practice by the candidate and a charge of corrupt practice by the agent. In support of this argument it was submitted that evidence of corrupt or illegal practice by an agent could not be led in support of such a charge against the candidate ; and *vice versâ* that evidence of a corrupt or illegal practice by a candidate could not be led where a charge was made against the agent only.

I do not think this contention is sound. The charges made in an election petition need not be formulated with the precision and exactness of a charge in criminal proceedings. The petition must state the facts and grounds on which the petitioner relies to sustain the prayer of his petition—rule 4. Rule 5 provides that evidence need not be stated in the petition but the Judge may on application in writing by a respondent order such particulars as may be necessary to prevent surprise and unnecessary expense and to ensure a fair and effectual trial.

In the case of *Tillekewardene v. Obeyesekere* [1], the election petition alleged three offences : bribery, treating, and paying or contracting for the payment for conveyance of voters, and security was given in a sum of Rs. 5,000. In the particulars filed under rule 5 a number of cases under each charge were stated and the respondent contended that the security was inadequate. Drieberg J. in the course of his judgment said, " the word 'charges' in rule 12 (2) mean the various forms of misconduct coming under the description of corrupt and illegal practices ; for example, whatever may be the number of acts of bribery sought to be proved against a respondent the charge to be laid against him in a petition is one of bribery " and held that the security was not inadequate.

I am of opinion that this decision is an authority for the proposition that when a charge of bribery is made against a candidate instances or cases could be given of bribery by an agent.

For the purposes of Article 74, the candidate is responsible for the act of his agent and the charge must be laid against the candidate. Therefore the allegations in the petition that the candidate and his agents were

[1] *(1931) 33 N. L. R. 65.*

guilty of undue influence and treating amount to no more than charges against the candidate and in my opinion they constitute two charges and not four. I accordingly overrule the objection as to the adequacy of the security.

The fourth and fifth objections raise two questions: (1) whether the petition and the writing appointing Mr. Nanayakkara the petitioner's agent are chargeable with stamp duty, (2) whether the notice published in the *Government Gazette* gave the respondent notice of the nature of the security as required by rule 18.

The petition, it was urged, was chargeable with stamp duty payable on a deed or instrument not otherwise charged in Part I, of Schedule B of the Stamp Ordinance, No. 22 of 1909 (item 28). This contention is based on the definition of the term "instrument" in section 3, sub-section (14), of the Ordinance which enacts as follows :—

> "Instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished, or recorded.

It was argued that the use of the word "includes" instead of the word "means" in the definition gave an extended meaning to the term instrument and that an instrument was not limited to a document by which a right or liability is created, transferred, &c. The argument that the word "includes" gives the term defined an extended meaning is right. But the question is whether the meaning of the term instrument is so extended as to make it applicable to the petition filed in these proceedings. I am of opinion that it does not. The word includes in a defining clause means that the term defined shall have the meaning given to it in the Ordinance in addition to its popular meaning. (*Ludovici v. Nicholas Appu*[1].) I am not aware of any authority nor has any been cited to me where it was held that a petition of the nature filed in these proceedings was an instrument in the popular meaning of the word.

The Solicitor-General who appeared on behalf of the Attorney-General did not support the contention of the respondent that the petition was chargeable with stamp duty. I agree with him that the definition of instrument if given the extended meaning contended for by the petitioner would have the meaning given to it in section 4 of the Stamp Ordinance, No. 3 of 1890, which provides that an "instrument" shall mean and include every written document. He argued that the alteration of the definition in Ordinance No. 22 of 1909 was introduced to give the term instrument a more limited meaning.

I certainly agree with this argument and unless the Ordinance clearly provides that petitions of the nature of the petition filed in these proceedings are chargeable with stamp duty, which it does not, I am not prepared to hold that they are so chargeable by reason of an inference to be drawn from the terms of the definition of the term instrument.

For these reasons I overrule the objection to the petition on the ground that it has not been stamped.

[1] *(1900) 4 N. L. R. 12.*

The importance of the question whether the writing by which Mr. Nanayakkara was appointed the petitioner's agent is chargeable with stamp duty arises from the fact that the notice in the *Government Gazette* purports to be signed by him. It was argued that if Mr. Nanayakkara's appointment as agent is bad because it was not stamped the notice published by him is not a notice given by the petitioner as required by rule 18.

The respondent's contention is that the appointment is chargeable with duty either as a letter or power of attorney under Part I. of Schedule B to the Stamp Ordinance or as an appointment of an agent to accept process under Part 2 of the Schedule.

The second branch of the contention cannot succeed. The agent to receive process referred to in Part 2 is an agent appointed in pursuance of the provisions of section 30 of the Civil Procedure Code which enacts that "Besides the recognized agents described in section 25, any person residing within the jurisdiction of the Court may be appointed an agent to accept service of process". The process referred to is process issued under the provisions of the Civil Procedure Code.

The first contention must, in my opinion, prevail; Part 1 of the schedule item 34 imposes a duty of six cents on a letter or power of attorney for the purpose of appointing a proxy to vote at a meeting, and item 35 imposes a duty of five rupees on a letter or power of attorney, whether executed in Ceylon or elsewhere for any other purpose whatsoever

The terms of item 35 are in my judgment wide enough to include an appointment of agent made under the provisions of rule 9.

The petitioner 's Counsel, however, argued that the writing by which the petitioner appointed Mr. Nanayakkara his agent was not chargeable with duty because such a writing was not necessary under the provisions of rule 9. It was urged that all the petitioner had to do under this rule was to leave at the office of the Registrar a writing signed by him, giving the name of some person entitled to practice as a proctor of the Supreme Court whom he authorizes to act as his agent. In short that the writing was not chargeable with stamp duty because the law did not require it. But the petitioner has not left such a writing at the office of the Registrar and the petitioner must rely on the document he has filed. There might have been some force in the argument if the petitioner had left such a writing at the office of the Registrar in addition to the document by which he appointed Mr. Nanayakkara his agent. But that is not the case and the petitioner must rely on the document which is chargeable with duty in proof of the fact that Mr. Nanayakkara was his agent.

I cannot accede to the argument that a formal document is not necessary for the appointment of an agent.

Rule 9 is a verbatim copy of rule 9 of the Parliamentary Election Petition rules made on November 21, 1868, pursuant to the Parliamentary Elections Act, 1868, printed as Appendix III. in vol. II. of *Rogers on Elections*. There is on page 524 of this volume a form of appointment. It is certainly not a statutory form, but there would have been no necessity for appending one if it was not the practice in England to appoint an agent

by a formal document in writing and I doubt whether such a practice would have arisen if a formal appointment was not considered necessary under the provisions of rule 9.

The form is in these terms :—

APPOINTMENT OF AGENT.

In the High Court of Justice, King's Bench Division.

The Parliamentary Elections Act, 1868, and The Corrupt and Illegal Practices Prevention Acts, 1883 and 1893.

In the matter of the Election Petition for the County (or as the case may be) of .....

Between

A. B. ....., *Petitioner.*

And

C. D. ....., *Respondent.*

I, A. B. (or C. D.) the above-named petitioner (or respondent) do hereby appoint and authorize X. Y. of solicitor, to act as my agent herein.

And I hereby give notice that the address, at which notices addressed to me may be left, is aforesaid.

Dated this day of , 19 .

(Signed) A. B. (or C. D.).

It will be observed that except for necessary variations no distinction is made between an authorization under rule 9 and an appointment under rule 10.

Rule 10 provides that "any person returned as a member may at any time after he is returned send or leave at the office of the Registrar a writing signed by him (or) on his behalf appointing a person entitled to practise as a proctor of the Supreme Court to act as his agent . . . ."

There can be no question but that a formal appointment in writing is necessary under this rule, and I can see no reason why such a writing should be dispensed with in the case of an agent appointed by the petitioner.

Apart from these reasons there must in my judgment be an appointment of an agent for rule 43 requires an agent immediately on his appointment to leave written notice thereof at the office of the Registrar.

For these reasons I hold that the writing referred to in rule 9 is one by which a person is authorized by the petitioner to act as his agent, and not merely an intimation to the Registrar that so and so is authorized to act as agent.

I accordingly hold that a written appointment is necessary and that it must be stamped.

A subsidiary question with regard to the notice is whether the statement in the notice that "security for costs has been given by a recognizance executed by the petitioner and two sureties" is sufficient notice of the nature of the proposed security. It was submitted on behalf of the respondent that the notice should have also stated the names of the sureties and their addresses.

All that is required is that the notice should state whether the security has been given by deposit or by recognizance with sureties, so that in the latter case the respondent might if so advised take steps as provided by rule 19. See the case of *Williams v. The Mayor of Tenby and others*[1].

[1] *(1879-80) 5 Common Pleas Div. 135.*

I overrule the objection that the notice does not sufficiently specify the nature of the proposed security.

The notice was given by an agent whose authority to do so was not duly stamped. The question arises whether the notice was for that reason not *de jure* given or whether the defect can be remedied by having the authority stamped under the provisions of section 36 of the Stamp Ordinance, No. 22 of 1909. It is not chargeable with a duty of five cents and is therefore not excluded by the terms of proviso A to that section. Against this procedure it was urged that rule 18 prescribes the time within which notice must be given and it was submitted that retrospecive effect cannot be given to the letter of appoinment.

I do not think the provisions of section 36 apply. In *Peiris v. Saravanamuttu* [1], where the question was whether a recognizance is liable to stamp duty and it was contended that the recognizance was not liable to stamp duty on the ground that an election petition was a *quasi*-criminal proceeding, Drieberg J. said, "Nor, as I shall point out, is the question affected by the nature of the proceedings for the fact that they are criminal would only be relevant if it was sought to admit the recognizance in evidence, in which case it could be admitted though not duly stamped, under section 36 (c) of the Stamp Ordinance, 1909. But it is not sought here to have the recognizance admitted as evidence". Similarly in these proceedings the petitioner does not seek to have the letter of authority admitted in evidence and neither section 36 (*a*) nor section 36 (c) applies.

In the case of defective proxies filed by proctors an amendment of the proxy was allowed in the cases of (1) *Treaby v. Bawa* [2], where the proctor's name had not been inserted in the proxy; in this case the objection to the proxy was taken in the answer (2) *Tillekeratne v. Wijesinghe* [3], where the plaintiff appellant had omitted to sign the proxy. Here objection was taken to the proxy in appeal. Hutchinson C.J. held that the proxy could be rectified at this stage by the plaintiff signing it.

In the case of *Le Mesurier v. the Attorney-General* [4], the proctor whose costs were taxed was not the proctor on the record and it was held that a party who has recognized the appearance of a proctor as representing another party to the suit cannot afterwards object to the taxation of costs due to such proctor on the ground that he had no authority to appear. In the case of *Fernando v. Perera* [5], the petition of appeal was signed by a proctor who had acted as proctor for the appellant although he was not the proctor on the record and this Court allowed the proctor on the record to sign the petition of appeal *nunc protunc*.

In the case of *Velappa Chetty v. Meydin* [6], the plaint was filed in the name of Kolentah Velan Chetty (one of the payees of the note sued on) by his attorney Velappa, on August 15. The plaint was accepted. On October 14, the defendant moved that the plaint be taken off the file on the ground that the power of attorney executed in India was not duly stamped as required by the Stamp Ordinance then in force—Ordinance No. 3 of 1890. The motion apparently came on for discussion on October 17, by which date the power of attorney had been duly stamped.

[1] *33 N. L. R. 229.*
[2] *(1903) 7 N. L. R. 22.*
[3] *(1908) 11 N. L. R. 270.*
[4] *(1906) 10 N. L. R. 67.*
[5] *(1909) 1 Cur. Law Rep. 51*
[6] *(1895) 1 N. L. R. 333.*

The District Judge made the following order:—

"Had I known the imperfection of the power of attorney under which the plaint was presented and filed, I should have rejected it. I do now what I should have done then. I put matters in *statu quo*. I will now entertain it as the power of attorney is effectual for use in the Colony, but the action must be considered as instituted from this date, the 17th October".

Withers J. appears to have thought that, the plaint having been accepted the District Judge would not necessarily have rejected it, but might have declined to issue summons until the power had been duly stamped. It was conceded at the argument in appeal that had the Judge known the power of attorney to be ineffectual for local use for want of being stamped according to local law he would have rejected it.

Browne J. observed that had the defendant called for inspection of the power of attorney at the outset he might very possibly have succeeded in having the plaint rejected, but as the result of his delaying to take such action the plaintiff was able to remedy this defect in the power by October 17, and the District Judge's order was therefore wrong.

In that case however the power of attorney was executed in India and under section 31 of Ordinance No. 3 of 1890 the Commissioner of Stamps could have affixed upon it a stamp of the proper amount of duty and in terms of the section the power of attorney had the like force and validity in law as if it had been properly stamped. Section 42 of the Stamp Ordinance contains similar provisions. Section 17 of the Ordinance requires a time limit of three months within which an instrument executed out of Ceylon may be stamped.

I do not think that section 34 of the Stamp Ordinance of 1890 referred to by Brown J. is applicable as it refers to instruments specified in Part II of Schedule B to the Ordinance.

The nearest case I can find to the question I have to decide is *Arumugam Chetty v. Silva* [1]. The plaintiffs in that case who were away in India sent a proxy from there to their proctor stamped with Ceylon stamps. The proxy was not sent to the Commissioner of Stamps within three months for him to stamp it as required by the Stamp Ordinance (sections 17 and 42). Objection was taken to the proxy at the trial, and defendant moved that the action be dismissed. The Supreme Court allowed the plaintiffs to give a proper and sufficient proxy ratifying, if necessary, what the plaintiffs proctor had so far done in the action.

De Sampayo A. C. J. who delivered the judgment said, "It appears that the plaintiffs in India drew up a proxy in favour of Mr. Bartholomeusz, and stamped it with the Ceylon stamps of the value required for the purpose of this action. The objection is founded on the provisions of sections 17 and 42 of the Stamp Ordinance, No. 22 of 1909, the effect of which is to require that an instrument such as this, when executed abroad, should, within three months of their arriving in Ceylon, be sent to the Commissioner of Stamps, and he should stamp the instrument with the stamps required. The objection, if it is to be dealt with, is a good one so far as it went. But the defendant wishes to have the whole action dismissed, with costs, because of the imperfecton in the stamping of the

[1] *(1923) 25 N. L. R. 31.*

proxy of the proctor. I thing it was possible for the District Judge to have made a proper order to put matters straight. But the actual order he made was that a certain person, who appears to hold a power of attorney from the plaintiffs, should sign the proxy and put on a new set of stamps, and thus enable the proctor to continue the action. I think the proper course would have been to allow the plaintiffs, through their attorney, to give a proper and sufficient proxy to the proctor, ratifying, if necessary, what the plaintiff's proctor had hitherto done in the action. I refer to this matter of ratification, because up to the date of trial when the objection was argued, the defendant's proctor did nothing to prevent the action going on. I think it is unjust now to put the plaintiff's to the expense of bringing a fresh action".

It appears to me from the dicta of the Judges in the last two cases referred to that the plaintiffs in the two cases would have been compelled to bring fresh actions if the objection to the instruments referred to, on the ground of their not being stamped had been taken in limine.

I would emphasize the concluding words of the passage cited from the judgment of de Sampayo A. C. J. beginning, "I refer to this matter of ratification . . . ."

In the first of the two cases there can be no doubt that the District Judge could have refused to accept the plaint on the ground that the power of attorney had not been stamped. The power having been executed out of Ceylon it was possible to supply the omission. But in this case the omission cannot be supplied as one month has elapsed from the date of its execution. Section 43 which provides that an instrument may be certified as duly stamped by the Commissioner of Stamps if it is brought to him within one year of its execution and the stamp duty leviable is duly paid to him and he is satisfied that the omission to stamp the instrument has been occassioned by accident, mistake or urgent necessity—cannot apply as there is no suggestion that the omission to stamp the letter of appointment was occasioned for the reasons stated in the section. Moreover no application has been made to the Commissioner of Stamps for such a certificate.

I am of opinion that the agent had no authority to give the notice published in the *Government Gazette* and I hold that the notice required by section 18 of the rules has not been served on the respondent.

I accordingly dismiss the petition with costs on the authority of the case of *Aron v. Senanayake* [1] decided by Akbar J.

Petition dismissed.