1960 *Present :* **Basnayake, C.J., and de Silva, J.**

GOONASEKERA, Appellant, *and* DE JOODTH and another, Respondents

S. C. 170—D. C. Avissawella, 7488

Appeal—Application for typewritten copies—Due steps not taken—Abatement of appeal—Civil Appellate Rules of 1938, Rule 4—Validity thereof—Courts Ordinance, s. 49 (1).

Rule 4 (*b*) of the Civil Appellate Rules, 1938, providing for abatement of appeals in the circumstances stated therein is not *ultra vires* of the rule-making powers conferred on the Supreme Court by section 49 (1) of the Courts Ordinance.

APPEAL from a judgment of the District Court, Avissawella.

G. T. Samarawickreme, for Defendant-Appellant.

H. W. Jayewardene, Q.C., with *S. J. Kadirgamar* and *Ralph de Silva*, for Plaintiffs-Respondents.

June 30, 1960. BASNAYAKE, C.J.—

A preliminary objection is taken to the hearing of this appeal on the ground that the application for typewritten copies has not been made in accordance with the provisions of the Civil Appellate Rules, 1938. Learned counsel for the appellant does not contend that there is an application for typewritten copies as required by the Civil Appellate Rules, 1938, and he is unable to satisfy us that there is such an application, but he submits that Rule 4 (*b*) of the Civil Appellate Rules, 1938, is *ultra vires* of the rule-making powers of this Court, in that the rule is inconsistent with the provisions of section 756 of the Civil Procedure Code. The rule reads :—

> " 4. (*a*) Where the appellant fails to make application for typewritten copies in accordance with the requirements of these rules ; or
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> (*b*) fails to pay the additional fees due under rule 2, sub-rule (4), within one month from the date of the order requiring him to do so, or before the expiry of the time allowed by rule 2, sub-rule (7), whichever is later, the appeal shall be deemed to have abated."

This rule which was made by the Judges of this Court in 1938 replaced Rule 5 of the earlier Civil Appellate Rules which came into force in 1914 when for the first time an appellant was required to furnish typewritten copies of the record of the case for the use of the appellate Judges. The repealed rule was as follows :—

> " Where the appellant fails to make application for typewritten copies in accordance with the requirements of these rules, the appeal shall, subject to the provisions of the Civil Procedure Code, be dismissed forthwith, unless it appears to the Court to be reasonable that further time should be allowed."

This rule came up for consideration by this Court on numerous occasions, but it is sufficient to refer to the case of *Perera v. Sinno*[1] where Wood Renton, C.J., after explaining how it should be worked, stated :

> " I have thought it right, in view of what Mr. E. W. Jayawardene has kindly said, to make these observations with the double object of showing the importance of the Rules in question to the Supreme Court and to the public interests which it has to secure, and also that they do not create practical hardship, in so far as individual litigants are concerned."

[1] *Bulasingham's Notes of Cases p. 40.*

Rule 5 was always acted on and its validity was never questioned. The departure in 1938 from the form of that rule must be presumed to be by design because it was completely recast. Since then, so far as reported decisions go, the validity of the rule appears to have been questioned only in the case of *Abdul Cader v. Sittinisa* [1] where it was held that it was *intra vires*. We are in entire agreement with the following remarks of Pulle J. in that case :—

> ". . . it is difficult to maintain that a body empowered to enact rules of practice to supplement the Civil Procedure Code is barred from laying down what the consequences would be if a step in the procedure is not complied with."

The section of the Courts Ordinance under which both the earlier rule and the present rule were made reads :—

> "49. (1) It shall be lawful for the Judges of the Supreme Court or any five of them, of whom the Chief Justice shall be one, from time to time to frame, constitute, and establish such general rules and orders of court as to them shall seem meet, for regulating all or any of the following matters :—
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> (*a*) the form and manner of proceeding to be observed in the Supreme Court at civil and criminal sessions, and in all courts subordinate to it, and the keeping of all books, entries, and accounts to be kept in all such subordinate courts, and for the preparation and transmission of any returns or statements to be prepared and submitted by such courts ;
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> (*b*) the pleading, practice, and procedure where not specially provided for by the Civil Procedure Code, or the Criminal Procedure Code, upon all actions, suits, prosecutions, and other matters, civil and criminal, to be brought in the Supreme Court and in all courts subordinate to it ;
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> (*c*) the proceedings of Fiscals and other ministerial officers of the said courts, and the process of the said courts and the mode of executing the same ;
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> (*d*) the mode of summoning, empanelling, and challenging of assessors and jurors ;
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> (*e*) proceedings on arrest in *mesne* process or in execution ;
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> (*f*) the taking of bail ;
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> (*g*) the duties of jailers and others charged with the custody of prisoners in so far as respects the making due returns to the respective Judges of the Supreme Court of all prisoners in their custody ;
>
> (*h*) the mode of prosecuting appeals,
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> and generally to frame, constitute, and establish all such general rules and orders as may be necessary for giving full and complete effect to the provisions of this Ordinance, and for regulating any matters

[1] *(1951) 52 N. L. R. 536.*

relating to the practice and procedure of the said courts not specially provided for by the Civil Procedure Code, or the Criminal Procedure Code, or to the duties of the officers thereof, or to the costs of proceedings therein, and to frame forms for any proceeding in the said courts for which they think a form should be provided ; and all such rules, orders, and forms to revoke, annul, alter, amend, or renew, as occasion may require :

Provided always that no such rules, orders, or forms shall be repugnant to or inconsistent with any of the provisions in this or any other Ordinance contained."

Apart from the wide powers granted by its general words paragraph (*h*) of the section confers express power to regulate the mode of prosecuting appeals. The powers granted by the section are wide enough to enable rules such as that in Rule 4 to be made. We do not think that the rule is *ultra vires* of that section, nor is it repugnant to or inconsistent with any of the provisions of the Courts Ordinance or any other Ordinance.

The right of an appellate Court to refuse to entertain an appeal or to strike an appeal off for failure to provide a proper brief is well recognised in all jurisdictions. In the South African case of *Kahn v. Radyn* [1] Herbstein J. ordered an appeal to be struck out because the appellant had failed to comply with the rule requiring him to supply copies of the whole record with a complete index of papers indicating at what page each document and the evidence of each witness will be found. He said : "There is no 'index', no exhibits and no pleadings." In the later case of *Mashaba v. Engbelbrecht* [2] where no notice of appeal appeared in the copies of the record nor the Magistrate's reasons nor any notice set down as required by rule 97 of the rules of Court the appeal was struck off the roll. In the case of *Bekker v. Dawkins Steenmakery* [3] appearing in the same volume at p. 32 a civil appeal was struck off the roll where the record was neither correct nor complete in that none of the exhibits of a documentary nature had been copied.

We are of opinion that the rule is *intra vires* and that it is capable of being easily observed by those who are diligent and not remiss about their duties in regard to appeals. It is being observed in the vast majority of appeals. By way of reinforcing what has been said above I wish to point out that the provision in one form or another has been unquestioned for nearly half a century, and carries the imprimatur of all the Judges constituting this Court at the time it was made.

The appeal is rejected.

DE SILVA, J.—I agree.

Appeal rejected.

[1] *1949 (4) S. A. L. R. 552.*

[2] *1959 (1) S. A. L. R. 34.*

[3] *1959 (1) S. A. L. R. 32.*