1957 *Present :* **K. D. de Silva, J., T. S. Fernando, J., and Sinnetamby, J.**

S. SEEBERT SILVA, Appellant, *and* F. ARONONA SILVA and 4 others, Respondents

S. C. 182—D. C. Panadura, 3,189/134A

Civil Procedure Code—Section 92—Journal entries—Presumption as to their correctness—Evidence Ordinance, s. 114.

The Court is entitled to presume that the journal entries made in a case in compliance with the requirements of section 92 of the Civil Procedure Code set out the sequence of events correctly.

APPEAL from a judgment of the District Court, Panadura.

Sir Lalita Rajapakse, Q.C., with *B. Senaratne* and *D. C. W. Wickremasekera*, for the plaintiff-appellant.

G. P. J. Kurukulasuriya, with *C. Chellappah*, for the 1st, 2nd and 5th defendants-respondents.

Cur. adv. vult.

December 3, 1957. K. D. DE SILVA, J.—

The question of fact which comes up for determination on this appeal is whether or not the plaint in this action which is one instituted under section 247 of the Civil Procedure Code was filed in Court on September 11, 1951. The plaintiff-appellant who is the judgment-creditor in D. C. Kalutara Case No. 577 took out a writ of execution against Seemel the present 3rd defendant who was the judgment-debtor in that case to recover a sum of Rs. 1,026 the amount due on the decree and seized the land called Panwilakumbura belonging to the 3rd defendant. Thereupon the 1st and 2nd defendants who are the wife and minor son respectively of the 3rd defendant claimed the property as belonging to them. This claim was upheld on August 31, 1951. Thereafter the plaintiff instituted this action. The 5th defendant is the guardian-ad-litem of the 2nd defendant. At the trial the objection was taken that this action was not instituted within fourteen days as contemplated by section 247.

The learned District Judge after hearing the Counsel for both parties upheld the objection and dismissed the plaintiff's action with costs. This appeal is from that order.

Sir Lalitha Rajapakse who appeared for the plaintiff-appellant contended that the plaint which on the face of it bears the date September 11, 1951, was in fact tendered to Court on that day although it bears the date stamp of November 29, 1951. If that contention is correct it is conceded by Mr. Kurukulasooriya the Counsel for the 1st, 2nd and 5th respondents that the action was instituted within time. But Mr. Kurukulasooriya submitted that this plaint was presented to Court only on November 29, 1951. At the trial this question was tried as a preliminary issue but neither party called any witnesses although certain documents were marked in evidence. The learned District Judge held that this plaint was in fact filed in Court only on November 29, 1951.

Mr. Tudor A. Perera the Proctor for the plaintiff filed in Court the motion P2 dated September 11, 1951, which reads, "I file my power of appointment as Proctor for S. Seebert Silva together with plaint, petition supported by an affidavit and for the reasons stated therein move that Franciscudura Aronona Silva the 2nd respondent be appointed guardian-ad-litem over the minor Sandradura Sumanasena Silva the 1st respondent for all purposes of this action". This motion has been journalised under the date 11 September, 1951. This journal entry which is very relevant reads as follows :—

> "Mr. Tudor A. Perera files appointment and plaint together with petition and affidavit and moves that F. Aronona Silva be appointed as guardian-ad-litem over the minor Sandradura Sumanasena Silva."

Against this entry appear the words " enter and issue O/N on respondents for 24.10.51". These words were presumably written by an officer of the Court for the purpose of obtaining the signature of the District Judge to the proposed order. But the District Judge—he is not the same Judge who tried the case—deleted the words "on respondents for 24.10.51" and substituted therefor in his own hand writing the words " if draft plaint is filed ". It is important to observe that this journal entry is made on a form in which the words " files appointment and plaint together with documents marked " appear in print and of these the last two words " documents marked " have been scored off by drawing a line over them in ink. This too appears to have been done by the officer who made the journal entry. The next journal entry is dated November 29, 1951, and is in the following terms :— " Proctor for plaintiff files draft plaint and moves for a date to issue Order Nisi". This motion has been allowed by the District Judge. This journal entry as originally written had the word " amended " but it has been scored off and the word " draft " has been entered above it.

This same alteration occurs in the corresponding motion also. It would appear that an officer of the Court made this correction. The draft plaint which is stated to have been filed on November 29, 1951, is

not present in the record now. There are two factors in support of the submission made by Mr. Kurukulasooriya. The first is the date-stamp on the plaint and the second is the absence of the draft plaint filed on November 29, 1951. The learned District Judge also thought that the first journal entry which directed that the decree nisi be issued after the draft decree is filed was also a point in favour of the respondent. In one sense it is so but the fact that the District Judge who corrected the minute made by the clerk did not strike off the printed word " plaint " is a point in favour of the appellant. It is not possible to say why exactly the learned Judge directed that a draft plaint be filed. Section 493 of the Civil Procedure Code which governs the appointment of a guardian-ad-litem does not require that a draft plaint should accompany the application for such appointment. It may be possible that the District Judge erroneously believed that a draft plaint too was necessary even though the plaint itself had been filed.

As against the points in favour of the respondents there are, on the other hand, several facts and circumstances which clearly support the contention that the plaint was filed in Court on September 11, 1951. They are (1) the first journal entry in the case and the connected motion, (2) the date of the cancellation of the stamps on the plaint and the affixing of the stamp for binding fee on it (3) the journal entry of November 29, 1951, and the motion on which it is based, and (4) the entry in the record of the stamp duty.

The first journal entry which is dated September 11, 1951, clearly states that the plaint was filed on that day together with all papers. This entry is supported by the motion tendered to Court by the plaintiff's Proctor. It is most unlikely that if the plaint was not tendered on that date the Record-keeper and the subject clerk would have failed to detect it. That the learned District Judge did not lightly sign the journal is borne out by the fact that he altered the minute made by the clerk. He must have done so after going through the papers filed by the Proctor. If in the course of checking, the Judge found that the plaint had not been filled, he would certainly have struck off the printed word " plaint " in the journal.

The stamps affixed to the plaint have been cancelled on September 11 1951. If, as the learned District Judge thought, that this plaint was tendered to Court only on November 28, 1951, how is it that the binding fee stamp is affixed to it and not to any paper which was admittedly filed on September 11,1951 ? It has not been sugges ted that when a case is instituted the Court would accept the papers even though the stamp for binding fee is not tendered. The presence of this stamp on the plaint and the absence of it on any other paper filed on September 11, 1951, is very strong evidence that the plaint was in fact filed on September 11, 1951.

The journal entry of November 29, 1951, and the connected motion also confirm the plaintiff's case. The words " amended plaint " in that motion indicate that the plaint had already been filed. The alteration of the

word " amended " to " draft " both in the motion as well as in the journal is very significant. If in fact it was the stamped plaint that was tendered on that day it is hardly likely that any Court clerk would describe it as a draft plaint.

In regard to the entry in the record of stamp duty the learned District Judge having stated that it was made on September 11, 1951, dismissed it as being of not much consequence because, there was " nothing to show that the stamp register was entered by reference to the documents". But this entry has in fact been made not on September 11, 1951, but on September 13, 1951. If it had been dated September 11, 1951, one could even say that it was a mechanical entry made with reference only to the date of the institution of the action. But, in view of the fact that the entry was made two days later it is almost impossible to say that the clerk who was responsible for it did not check up the stamps before making the entry. The learned District Judge has held that this stamped plaint was filed only on November 11, 1951. If this view is correct then the entry in the record of stamp duty should have been made on or after that date and not before.

The learned District Judge commented on the fact that Mr. Tudor A. Perera the Proctor for plaintiff did not give evidence. But unfortunately he has failed to consider the significance of section 92 of the Civil Procedure Code. That section provides that with the institution of the action the Court shall keep a journal in which shall be minuted, as they occur, all the events in the action and that the journal so kept shall be the principal record of the action. A journal has been maintained in this action and the Court is entitled to presume that it was regularly kept. This presumption which arises under section 114 of the Evidence Ordinance is based on the maxim " Omnia praesumuntur rite et solemniter esse acta ". This presumption is of course rebuttable but the respondents, on whom is the burden, have not placed before the Court sufficient material to rebut it. The relevant journal entries in the case support the contention that the plaint in this case was filed on September 11, 1951. The date-stamp on the plaint is by no means conclusive. Although date-stamping is extremely desirable and must be accurately done, yet I must observe that there is no provision in the Civil Procedure Code which requires it. The draft plaint filed on November 29, 1951, may well have been misplaced.

For the reasons given above I allow the appeal with costs in both Courts. The case is remitted to the District Court for trial on the other issues arising between the parties.

T. S. FERNANDO, J.—I agree.

SINNETAMBY, J.—I agree.

Appeal allowed.