Present : Ennis and Schneider JJ. 1924.

BROWN *v.* PACKEER.

633—P. C. Kandy, 12,049.

Bail bond—Forfeiture against surety—Notice to accused in default—Criminal Procedure Code, s. 341.

Where a surety has entered into a bond conditioned for the appearance of an accused person to abide the judgment in appeal, and where the accused had absconded and could not be served with notice of the judgment.

Held, that the surety's bond may be forfeited, although the accused had not been served with notice of the judgment.

Murugiah v. Muttiah [1] overruled.

THIS case was referred by Ennis J. to a Bench of two Judges. It was an appeal by a bailsman who had entered into a recognizance for the release of an accused person pending an appeal from his conviction. After the judgment in appeal unsuccessful attempts were made to serve the accused with notice; thereafter a warrant was issued against him several times and was unexecuted. The surety's bond was then forfeited by the Police Magistrate, and it was contended on his behalf that such forfeiture could not be effected until the accused has been served with notice of the decision in appeal.

Garvin, for appellant.

M. W. H. de Silva, C.C., for Crown.

November 21, 1924. ENNIS J.—

This was an appeal by a bailsman whose bond had been forfeited. He entered into a recognizance for the release of an accused person pending an appeal. It was argued that a bond could not be forfeited without notice to the accused, and it was also argued that in default of such notice the accused had committed no default. This argument was founded on the case of *Murugiah v. Muttiah* (*supra*). In view of that case I referred this appeal to a Court of two Judges. A closer examination of that case seems to indicate that the headnote is too wide. In that case the fact that no notice had been served on the accused was merely one detail, among others, to show that there had been no wilful default by the accused.

[1] *Wijewardene Reports 9.*

1924.

ENNIS J.

Brown v. Packeer

The present case is not on all fours with it. In this case two attempts were made to serve the accused with notice, and five attempts made to arrest him on a warrant, all of which were unsuccessful. The learned Magistrate took this as showing that there was a wilful default. We have now been referred to the case of *Modder v. Ismail Lebbe* [1] which seems to show that the custom of the Court has been to forfeit the bond of the principal without notice, and to forfeit the surety's bond on giving the surety notice and giving him an opportunity of showing cause against the forfeiture. In this case the appellant himself is the surety and has had notice. By inference from the custom it would seem that the principal commits a default by not abiding by the judgment of the Appeal Court, and the fact that he has not been noticed has no bearing on a consideration of that bond. Since the case has come up on appeal, Mr. Garvin, for the appellant, has found another argument, namely, that the bond is not in order under section 341 of the Criminal Procedure Code. With that contention I am not in accord. Section 341 provides that an accused may be released on bail in entering into a recognizance in one or more sureties. A recognizance according to *Wharton's Law Lexicon* is an acknowledgment of a debt owing to the Crown with a condition to be void, if the recognizor shall do some particular act, as if he or the party for whom he is surety, shall appear at the assize to prosecute a person, or to come up for judgment when called upon, or shall prosecute an appeal. In other words a recognizance can be entered into by a surety. The bond in the present case is in the prescribed form, and is entered into both by the accused and the surety, and under that bond they both incurred a particular obligation. A recognizance is not the same as security in a civil case, and there is no provision in the Criminal Procedure Code that the property of the accused shall be discussed before forfeiture of the bond.

I would dismiss the appeal.

SCHNEIDER J.—I agree.

Appeal dismissed.

[1] *(1905) 8 N. L. R. 104.*