Present : Wood Renton J. and Grenier J. *June 30, 1911*

In the Matter of an Application for the Reinstatement of Appeals in D. C. Ratnapura, 1,776.

APPUHAMY *v.* APPUHAMY.

Appeal dismissed for non-appearance—Verbal application by counsel for reinstatement of appeal—Second application by appellant by another counsel—Civil Procedure Code, s. 769.

A verbal application to reinstate an appeal which was dismissed for want of appearance was made by counsel for the appellant immediately after the dismissal of the appeal and was refused. Subsequently the appellant, on affidavit and petition, made a new application by another counsel, instructed by another proctor, and it was contended for the appellant that the first application was an informal one, and not the one contemplated by section 769.

Held, that the first application was a bar to the second application

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WOOD RENTON J.—" It will be observed that that proviso (to section 769) says nothing about any notice to the respondent, or any formal motion for reinstatement supported by affidavit being made, and within my own experience the practice has been for the counsel who are actually retained on behalf of the appellants to apply themselves, at the earliest possible moment, for the reinstatement of the dismissed appeal..... I am far from saying that, so long as a decree has not passed the seal of the Supreme Court, it is not within our power to reinstate, on fresh materials, cases in regard to which a motion for reinstatement has already been made and disallowed."

THE facts material to this report are set out in the judgment of Wood Renton J. (See also the judgment reported at page 255.)

Elliott, for the petitioner.—Section 769, Civil Procedure Code, enacts that where there is no appearance for the appellant, " the appeal may in the discretion of the Court be dismissed." The Supreme Court did not exercise its discretion when it dismissed the appeal. (Wood Renton J.—The section does not say that the Court should consider the appeal.) The words used in the Ceylon Code are different from the Indian Code ; section 556 of the Indian Code says " shall be dismissed." (Wood Renton J.—This is a renewal by another counsel of an application which we have already refused.) That was an application by counsel ; he offered a personal explanation for his absence. It was not a formal application of the appellant himself on affidavit and petition. Section 769 contemplates a formal application.

The appellant should have a right to offer his explanation apart from his counsel. It is possible to contemplate cases where counsel fradulently keeps away. The mere fact that counsel's application was refused is no reason for declining to hear the appellant.

(His Lordship reserved his order till 2 o'clock.)

June 30, 1911. WOOD RENTON J.—

This is a renewal by another counsel, on the instructions of a proctor, who was not the proctor for the purpose of the appeals of the application made to my brother Grenier and myself on the 26th instant, for the reinstatement of these two cases. In the judgment of the Court dealing with the original application for reinstatement the facts are fully stated, and I do not propose to repeat them in detail. It may suffice to say that the appeals were called in their proper order ; that there was then an appearance on behalf of the respondents, but no appearance on behalf of the appellants ; that, on a suggestion made to us from the Bar, we allowed both cases to stand at the foot of our list ; that they were called again when every other available appeal had been disposed of ; and that, in the continued

absence of counsel for the appellants, they were then, in accordance with what has been the uniform practice of the Supreme Court ever since I have been in the Island, dismissed with costs. The next case on our list was also one that had been allowed to stand down for a similar reason. It was called in its turn, and was just about to be dismissed when counsel for the appellant appeared. After that appeal had been argued and disposed of, the counsel who had argued it referred to the two cases with which we are now concerned, and made a formal motion for their reinstatement. That motion was supported by a leading member of the Bar, who informed us that he was senior counsel in support of both appeals, and that he had requested his junior to be in attendance. There can be no doubt but that, even in the absence of any such request, it was the duty of the junior to be in attendance by virtue of his retainer in the case. We were referred to an alleged ruling by Hutchinson C.J., which was said to be a precedent for the motion of reinstatement, and accordingly, after having heard both counsel fully in support of that motion, we postponed the delivery of judgment till after the usual adjournment, for the double purpose of putting the facts before His Lordship the Chief Justice and my brother Middleton, and of considering the precedent on which the appellant's counsel relied. That precedent was considered by every member of the Bench of the Supreme Court. It is quite clear that it constitutes no authority for the reinstatement of cases like the present, which had already been postponed for the convenience of counsel and in which two counsel were actually retained. The motion for re-in statement was therefore refused. It is renewed to-day, as I have said, by another counsel, on the instructions of a proctor, whose name is not on the record. If it were necessary to consider the point, it might well be open to argument whether such a motion is competent at all. Although the appeals have been dismissed, they have not yet been disposed of. There are incidental matters of taxation that still have to be dealt with. I do not propose, however, to express any opinion upon that point just now, and I will assume in favour of the motion that no exception could be taken to it on the ground that I have just mentioned. We were referred to section 769 of the Civil Procedure Code in support of the second motion for reinstatement.

It is the first time that I have heard the point with which I am about to deal taken, and for that reason a few words ought to be said about it. Section 769—I will quote only the material parts—provides that if the appellant does not appear either by counsel or in person when the appeal comes on for hearing, the appeal may in the discretion of the Court be dismissed ; but that, on sufficient cause being shown, it shall be lawful for the Supreme Court to reinstate, upon such terms as the Court shall think fit, any appeal that has been dismissed for non-appearance. It appears to me that

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the interpretation of that section is quite clear, and the construction that I put upon it is supported by what, so far as my experience goes, has been the uniform practice in Ceylon. The Court has undoubtedly a discretion as to whether or not an appeal shall be dismissed, when it is first called on for hearing, on the ground of non-appearance, and we exercise that discretion every day. It is in the exercise of that discretion that, either on the application of the appellant's counsel, or even on the suggestion of some member of the Bar, who may in no way be concerned with the appeal, we allow cases to stand at the bottom of the list. We have gone further than that, for we have postponed, and we daily postpone, cases so as to enable counsel to meet the various duties incumbent upon them—the existence of which we fully recognize—if the name of the appellant's counsel has even been mentioned to the Registrar. In the cases with which we are here concerned we exercised that discretion in the appellant's favour. It was only when we were face to face with the alternative of having to adjourn the Court altogether, leaving cases which were on the list undisposed of, that the appeals were dismissed with costs. In my opinion that dismissal was right, and, speaking for myself, I will be no party to the adjournment of the Court before its proper hour on such grounds as were placed before us in regard to these two appeals. I have spoken of the circumstances which justify the dismissal of appeals under section 769 when they are first called on for hearing. We come now to the proviso. It enables the Supreme Court on sufficient cause shown (that is to say, sufficient cause for the non-appearance) to reinstate any appeal that has been dismissed, when it was first called for argument, on the ground that counsel or the client did not appear. It will be observed that that proviso says nothing about any notice to the respondent, or any formal motion for reinstatement supported by affidavit, being made, and within my own experience the practice has been for the counsel who are actually retained on behalf of the appellants to apply themselves, at the earliest possible moment, for the reinstatement of the dismissed appeal. It was suggested that that was done as a matter of courtesy towards the Bench. I have no doubt that that is so. There can be no question in the mind of any one who has had the honour and privilege of being a Judge in this Colony as to the respect and courtesy and consideration which are paid to the Bench by the Bar. But there is more involved than a matter of mere courtesy. It is a matter of necessity that such motions should be made if dismissed appeals are to be reinstated, and it is obvious that the sooner such motions are presented to the Court, the more likely they are to be successful. The proviso to section 769, however, contemplates only a single motion for reinstatement. In the cases before us such a motion was made. It was fully considered, and it was dealt with in a judgment in which we at least endeavoured to set out the grounds of our decision as clearly as possible. I am

far from saying that, so long as a decree has not passed the seal of the Supreme Court, it is not within our power to reinstate, on fresh materials, cases in regard to which a motion for reinstatement has already been made and disallowed. Such reinstatement ought not, however, to be granted unless facts are set forth which were not within the knowledge of the parties at the time of the original motion, and which disclose a strong case for interference. In my opinion no such facts are disclosed in the affidavit filed in support of this renewed motion for reinstatement. The substance of the affidavit is merely an allegation by the appellant that he personally did all in his power to secure the attendance of counsel in time for the argument of the appeals. It is quite right that the interests of private litigants should be carefully considered in all matters of this kind. But they are not the only points with which the Court has to deal. We have to consider the interests of the public as a whole, and I entertain no doubt but that if applications like the present were acceded to, there would be a chronic condition of deadlock in the work of the Supreme Court, and a very speedy accumulation afresh of a heavy burden of undisposed of appeals, such as that from which within the last eighteen months we have just succeeded in delivering ourselves. On the grounds that I have stated, I think that this application should be refused.

GRENIER J.—

I entirely agree with what has fallen from my brother in regard to the scope and object of section 769 of the Civil Procedure Code, and I also agree with him in the interpretation that he has placed on that section. As I pointed out to Mr. Elliott during the argument, the motion that is now made before us is simply a repetition of the application which we, after consideration, disallowed. We cannot, therefore, consistently entertain Mr. Elliott's application. I agree to its dismissal.

Application refused.