1939 *Present :* **Abrahams C.J., Hearne and Keuneman JJ.**

KADIJA UMMA *v.* MOHAMED SULAIMAN.

8—D. C. Colombo, 25,701.

Privy Council—Application for final leave to appeal—Security in landed property—Bond hypothecating land attested before Registrar—Validity of bond—Ordinance No. 31 of 1909, Schedule I, Rule 3 (a).

Where, in an application for leave to appeal to the Privy Council, the appellant was permitted to give security in landed property, the bond hypothecating the land must comply with the requirements of section 2 of Ordinance No. 7 of 1840 or of Ordinance No. 17 of 1852.

***Held, further,* that the Supreme Court had no power to grant relief to the appellant to enter into a proper bond after the expiration of the period except in accordance with the terms of Rule 3 (*a*) of the First Schedule of Ordinance No. 31 of 1909.**

***Queen's Advocate v. Thamba Pulle* (*3 Lorensz 303*) distinguished; *Mohamadu Tamby v. Pathumma* (*1 C. L. Rec. 26*) not followed.**

THIS was an application for final leave to appeal to the Privy Council. The appellants were permitted to give security for respondents' costs in landed property. Objection was taken by the second respondent that the bond by which the appellants hypothecated the property tendered as security was attested before the Registrar and was therefore not valid. The objection was taken before Soertsz and Nihill JJ. who ordered that the question should be referred to a Divisional Court.

N. E. Weerasooria, K.C. (with him *E. F. N. Gratiaen*), for plaintiffs, petitioners. When we made our application for conditional leave, the Supreme Court expressly directed hypothecation with the Registrar. We accordingly informed the Registrar regarding the form of the hypothecation, namely, that it would be in favour of the Registrar. No objection was at any time taken as to the form of the security although the respondents had been given notice of it. The only objection taken was not regarding the form, but that the title to the immovable property was not good. That objection was referred by the Registrar to the Supreme Court and on November 29, 1938, the Court ordered "Security tendered to be accepted". Rule 3 (*a*) of Schedule I. of Ordinance No. 31 of 1909 does not specify the form of the security. It is sufficient if it is to the satisfaction of the Court. All things directed to be done have been done. The certificate of the Registrar is to that effect. Under Rule 4 of the same Schedule, the Court can make further direction, if necessary. See also Rule 21.

The form of the security which has been tendered is good. The bond in question is not governed by section 2 of Ordinance No. 7 of 1840—*Queen's Advocate v. Thamba Pulle*[1]. That case was decided in 1859 and was followed in later cases—*Mohamadu Tamby v. Pathumma*[2], *Menikhamy v. Pinhamy*[3], *Fernando v. Fernando*[4]. In *Queen's Advocate v. Thamba Pulle* (*supra*) the provisions of Ordinance No. 7 of 1840 were considered.

[1] (*1859*) *3 Lorensz 303.*
[2] (*1918*) *1 C. L. Rec. 26.*
[3] (*1921*) *23 N. L. R. 189.*
[4] (*1921*) *23 N. L. R. 453.*

N. Nadarajah (with him *W. W. Muttṭurajah*), for third to sixteenth defendants, petitioners.—The difficulty of Soertsz and Nihill JJ. who have referred the question to a Divisional Bench is that Ordinance No. 31 of 1909 supersedes section 4 of the Civil Procedure Code, of 1889. Under sections 757 and 783 of the Civil Procedure Code, the form of the security for appeals to Supreme Court and Privy Council respectively were identical. Note in particular Forms No. 129 and 131. Ordinance No. 31 of 1909 retains the provisions of section 783 of the Civil Procedure Code and does not say anything new regarding the form of security. Thus the interpretation placed upon the provisions of section 757 of the Civil Procedure Code should still hold good—*27 Halsbury (1st ed.) pp. 142 and 143.*

Consistently from 1859, "judicial bonds" have been placed on a footing of their own. The bond under consideration is a judicial bond. The *cursus curiae* should not be departed from—*Boyagoda v. Mendis et el*[1], *27 Halsbury (1st. ed.), para. 266.*

The Registrar can enforce the bond in question—*Moldrich v. Cornelis et al*[2].

Even if the bond is bad, we are ready to execute another. The Court can extend the time under Order 18 of the Appellate Procedure (Privy Council) Order of 1921, read with Rule 4 of Schedule I. of Ordinance No. 31 of 1909.

H. V. Perera, K.C. (with him *Peri Sunderam* and *Rajapakse*), for second defendant, respondent.—The Supreme Court cannot extend the time with regard to this matter. Order 18 bears no application to this case as it is one of the Rules and Orders made by virtue of section 5 of the main Ordinance. It is Rule 3 (*a*) of Schedule I. of the main Ordinance which governs this case exclusively and, according to it, security has to be furnished within one month. Rule 4 can be applicable only where the security has already been accepted and upon cause shown. So far, in this case, the security has not yet been accepted. We were consulted only as regards the sufficiency of the security. This is the first opportunity we have of challenging the validity of the security.

Rule 3 (*a*) requires good and sufficient security to be given. For the security to be good, it has to be valid according to the law of the land. The usual practice has been to deposit money. Where land is hypothecated, section 2 of Ordinance No. 7 of 1840 has to be complied with. There is only one instance where the hypothecation was before the Registrar, and one case cannot establish a *cursus curiae.*

Any practice that might have grown up regarding bonds given in the District Court in connection with appeals to the Supreme Court shculd not be taken into consideration in the present case. Appeals to the Privy Council are governed by their own rules which should be strictly complied with—*Pate v. Pate*[3].

Judicial or legal hypothec arises only out of operation of law—*Lee on Roman-Dutch law (1st ed.), 164; 2 Maasdorp (5th ed.), 270*—and is distinct from a conventional mortgage. A bond given to the Registrar is obviously a conventional mortgage. A limited interpretation cannot

[1] *(1929) 30 N. L. R. 321.* [2] *(1910) 14 N. L. R. 97.*

[3] *(1915) 18 N. L. R. 289 at p. 293.*

be given to section 2 of Ordinance No. 7 of 1840 or Ordinance No. 17 of 1852. A close examination of *Queen's Advocate v. Thamba Pulle* [1] reveals that the *ratio decidendi* was that the bond in question in that case was valid under the Rules and Orders which were in operation at the time. The meaning given to judicial hypothec in that case was *obiter*. The Civil Procedure Code took the place of the old Rules and Orders. *Queen's Advocate v. Thamba Pulle* (*supra*) was followed in later cases, but reluctantly, because Form 129 which is embodied in section 757 of the Civil Procedure Code has not definitely stated before whom and how the bond in favour of the Secretary has to be executed; the old practice was, therefore, followed owing to the *casus omissus* and by virtue of the provisions of section 4 of the Code. In *Fernando v. Fernando* [2], *Kanapathipillai v. Kannakai* [3] and *Fernando v. Ranhamy* [4], the Supreme Court definitely discouraged the extension of the ruling in *Mohomadu Thamby v. Pathumma* [5]. As regards appeals to the Privy Council, however, the Ordinance of 1909 does not conserve the practice which obtained prior to 1909. There is no section similar to section 4 of the Civil Procedure Code. The hypothecation should, therefore, be notarially executed—*de Silva v. de Silva* [6], which is exactly in point in the present case.

N. E. Weerasooria, K.C., in reply.—Section 2 of Ordinance No. 7 of 1840 refers to contracts between parties as distinguished from something done in pursuance of an order of Court. In *Queen's Advocate v. Thamba Pulle* (*supra*) the very point now urged by the respondent was taken and dealt with.

N. Nadarajah, in reply.—Section 52 rule 9 of the Charter of 1833 speaks of "bond". The full Bench ruling of 1859 decided that bonds incidental to judicial proceedings need not be notarially executed, and neither the Civil Procedure Code nor Ordinance No. 31 of 1909 introduced any change in the law as laid down in that decision. "When you find legislation following a continuous practice and repeating the very words on which that practice was founded, it may be inferred that the Legislature in re-enacting the Statute intended those words to be understood in their received meaning"—*dictum* of Lord Macnaughten in *Commissioners for Special Purposes of Income Tax v. Pemsel* [7].

Cur adv. vult.

March 18, 1939. KEUNEMAN J.—

In this case two applications for leave to appeal to the Privy Council on the part of the plaintiffs and the third to the twenty-sixth defendants respectively have been consolidated. Application for final leave to appeal has now been made to us. The appellants have previously been permitted to "give security in landed property". The objection is now taken on behalf of the second defendant, respondent, that the bond by which the appellants hypothecated the property tendered as security is attested before the Registrar of this Court, and not in the manner

[1] (1859) 3 *Lorensz* 303.
[2] (1921) 23 *N. L. R.* 453.
[3] (1921) 23 *N. L. R.* 455.
[4] (1921) 23 *N. L. R.* 456.
[5] (1918) 1 *C. L. Rec.* 26.
[6] (1927) 28 *N. L. R.* 350.
[7] (1891) *A. C.* 531 at p. 591.

required by section 2 of Ordinance No. 7 of 1840, or by Ordinance No. 17 of 1852. This objection was taken before Soertsz and Nihill JJ., who have ordered that the question involved be referred to us as a Divisional Court.

Admittedly, the bond has not been executed in the form required by section 2 of Ordinance No. 7 of 1840, viz., before a Notary and two witnesses, nor before the District Judge and two witnesses, as required by Ordinance No. 17 of 1852. The bond is before us, and is one which has been signed and executed before the Registrar of the Supreme Court. The point for decision is whether this is a valid security under Ordinance No. 31 of 1909, and the Appellate Procedure (Privy Council) Order of 1921 made thereunder which relate to appeals from this Court to the Privy Council.

On November 10, 1938, in consequence of an application by the petitioners, the Supreme Court made order that the two appeals be consolidated, and that it was open to the appellants to give security in landed property. In the first place the security was to be tendered to the Registrar. If the Registrar was not satisfied with the security tendered, he could refer the matter to the Supreme Court for further directions.

In pursuance of that order, on November 23, 1938, the petitioners tendered as security a certain property to the Registrar. The matter was apparently referred by the Registrar to the respondent, and his Proctor took the objection that the title was not good, as some of the title deeds were not tendered, and a certain mortgage had not been cancelled at the Land Registry. Otherwise there was no objection to the title. The matters mentioned were apparently rectified, and at any rate there is no objection made now that the title is bad, or the security insufficient. The appellants thereafter entered into the bond in question in this case.

On November 27, 1938, and on November 30, 1938, the Registrar issued two certificates to the two sets of appellants, certifying that the appellants have complied with the conditions imposed under Rule 3 (*a*) of the Scheduled rules, *inter alia,* that they had mortgaged and hypothecated by bond certain specified properties. These are not certificates which are required to be given under either the Ordinance or the Order but were apparently issued as a result of the Supreme Court Order of November 10, 1938.

I mention these facts because it has been argued before us that the Supreme Court delegated to the Registrar the right of determining not only the sufficiency of the security tendered, but also the form in which the bond should be executed.

I am unable to see that any more was delegated to the Registrar, than the right of deciding or of advising this Court on the sufficiency of the security. I can nowhere find any indication that this Court delegated to the Registrar the right of determining the validity as regards form of the bond, and I think it would not have been proper for the Court to have delegated any such power to the Registrar.

Under Rule 3 (*a*) of Schedule I of Ordinance No. 31 of 1909, the appellant is required within the period prescribed to " enter into good and sufficient

security", to the satisfaction of the Court, in a sum not exceeding Rs. 3,000 for the due prosecution of the appeal and the payment of such costs as may become payable to the respondent.

The question to be determined by us is whether the appellants have entered into "good" security. If the security is "good" as regards form, there is no question now as to its sufficiency.

It is abundantly clear that since Ordinance No. 31 of 1909 came into operation, the ordinary and almost invariable practice has been to call upon the appellant to deposit the required security in cash. In fact, on inquiry made by this Court in 1927, it was discovered that in the previous ten years there had only been one instance where the security accepted was by the hypothecation of immovable property (vide *de Silva v. de Silva* [1]). In this case it was held that this Court had power to accept security by way of hypothecation of immovable property. Since 1927 there have been further instances where this kind of security has been accepted. It was however stated by Counsel for the respondent and not contradicted, that in only one previous instance has this form of security, viz., by executing the bond before the Registrar, been employed. In the case of *de Silva v. de Silva* (*supra*) the Court specifically ordered that the bond should be duly executed before a Notary Public, and that appears to be the only authority of this Court available as to the form in which the bond may be executed.

Counsel for the respondent argued that the only form of bond relating to immovable property which has legal validity is a bond which is in accordance with section 2 of Ordinance No. 7 of 1840 or Ordinance No. 17 of 1852, and that the bond in the form employed in the present case is of no force or avail in law. He contended that this was a "mortgage" or at any rate "a promise bargain contract or agreement . . . . for establishing a security" within the terms of section 2 of Ordinance No. 7 of 1840. He further contended that this was in effect a conventional mortgage between the appellant on the one side and the Registrar on the other, and that the fact that it was made in favour of a public officer, on order of the Court, did not take it outside the scope of that section.

Apart from authority, I think it is impossible to disagree with that contention. The language of section 2 is very wide, and purports to cover all mortgages. It is to be noted that under the Charter of 1833 clause 52 (Ninthly) security required to be given in case of an appeal to His Majesty in Council when the security related to immovable property was to be "by way of *mortgage*, &c." Nor can this form of mortgage be regarded in the strict sense as a "judicial mortgage". Maasdorp in his *Institutes of South African Law* (*5th ed.*), *vol. II., p. 270* says "a judicial mortgage is at the present day established by an attachment or seizure of goods made by the Sheriff or Messenger of Court". Apparently there had been other forms of judicial mortgage under the Roman law which had become obsolete. Further this bond cannot be regarded as a legal or tacit mortgage "arising by mere force of law"—vide *Maasdorp, vol. II, p. 272.*

There is however an authority, *Queen's Advocate v. Thamba l'ulle* [2], which counsel for the appellants argues that we are constrained to follow.

[1] *28 N. L. R. 350.*

[2] *(1859) 3 Lorensz 303.*

It is clear, I think, that this is a decision of three Judges, and that number of Judges at the period in question constituted a full Bench. The question decided was the validity of a bond relating to immovable property given in 1843. The bond was given by way of security in favour of the Secretary of the Court and was attested by the District Judge.

It was argued by the appellant in that case—

(1) that this was a judicial security created by an act of Court.

(2) that the object of Ordinance No. 7 of 1840 was "to prevent frauds and perjuries", and where the bond was signed and attested by the presiding Judge of the Court, it was not intended that attestation by a Notary and two witnesses was needed in such a case,

(3) that the Rules and Orders prevailing at the period in question only required that bonds of this character should be "signed, sealed and delivered *in Court*", and made no mention of notarial attestation.

The judgment of the Court was delivered by Morgan J. as follows :—

"It appears, however, to the Supreme Court that the bond in question creates a valid mortgage over the property. The provisions of section 2 of the Ordinance No. 7 of 1840 evidently refer to conventions of parties, and not to judicial hypothecs constituted as this by order of the Court . . . . The forms referred to and embodied in the Rules (*see Form 9 p. 101, and Form 2 p. 104*) make express reference to mortgages of property, and these Rules were declared valid by an Ordinance enacted long after the Ordinance No. 7 of 1840, to wit, the Ordinance No. 8 of 1846".

It is argued that there is a clear finding in this case that the language of section 2 of Ordinance No. 7 of 1840 does not apply to a mortgage of this character. I cannot agree with this contention. There can be no doubt that during the argument considerable emphasis was laid upon the Rules and the fact that these Rules have received the sanction of the Legislature after Ordinance No. 7 of 1840. It is to be noted that the second point raised by Counsel for the appellant was not dealt with at all by the Court, and I incline to the opinion that when the Court said that the provisions of section 2 of Ordinance No. 7 of 1840 "*evidently* referred to conventions of parties and not to judicial hypothecs" such as the bond in question, the *evidence* on which the Court depended was the Rules which had received legislative sanction in 1846. At any rate, I am of opinion that the positive finding on that point was a sufficient ground on which to rest the decision of the Court, and that no necessity arose to decide the other question.

I accordingly am of opinion that we are not fettered in any way in consequence of that decision in our determination of the question before us.

These Rules were repealed by the Civil Procedure Code of 1889, which however by section 4 enacted that "in every case where no provision is made in the Ordinance, the procedure and practice hitherto in force shall be followed." The Code provided not only for appeals to the Supreme Court (sections 753 to 760) but also for appeals to the Privy

Council (sections 779 to 789). Section 757 related to security for costs of appeal in the case of appeals to the Privy Council. Section 757 provided *inter alia* for security "by way of mortgage of immovable property", and a similar provision appeared in section 783. The forms applicable were forms No. 129 and 131 in the Second Schedule, and make no further reference to the form of the bond, beyond the instruction "Follow the ordinary form of bond" and the setting out of certain words to be employed in the body of the deed. There is no precise reference to any particular form governing the bond, such as were present in the repealed rules.

Finally Ordinance No. 31 of 1909 repealed sections 779 to 789 of the Civil Procedure Code, and contained no section corresponding to section 4 of the Code.

It has been argued that a certain practice which has grown up in respect of appeals to the Supreme Court and has obtained the sanction of the Supreme Court, should be applied by analogy to appeals to the Privy Council. In *Mohamadu Tamby v. Pathumma* [1] in an appeal to the Supreme Court a bond hypothecating immovable property was signed by the obligor before the Chief Clerk of the District Court, and objection was taken that it did not conform with the requirements of section 2 of Ordinance No. 7 of 1840 or of Ordinance No. 17 of 1852. Bertram C.J. held against the objection. He stated "It is a bond substantially executed in accordance with the practice that had always prevailed in the District Courts of this Colony. We should hesitate very long before giving a decision contrary to that general practice". He suggested as a possibility that this bond came within the exception created by section 20 of Ordinance No. 7 of 1840, and referred to the *dictum* of Morgan J. in *Queen's Advocate v. Thamba Pulle* [2] that section 2 of Ordinance No. 7 of 1840 evidently referred to conventions between parties and not to judicial hypothecs of that character. He dealt specifically with the argument of Counsel which differentiated the earlier case, as the bond was not executed in the presence of the Judge, but of the Chief Clerk of the Court, and held that the objection failed.

A similar objection was taken to a bond executed in the presence of the Secretary of the Court in *Menikhamy v. Pinhamy* [3] but was overruled. Ennis J. followed the case of *Mohamadu Tamby v. Pathumma (supra)* "with some diffidence" as he was not sure that section 4 of the Civil Procedure Code was "sufficient to carry forward the practice which is in direct conflict with the express terms of Ordinance No. 7 of 1840 and Ordinance No. 17 of 1852".

Shortly after in certain cases, the Supreme Court resolutely set its face against the extension of the decision in *Mohamadu Tamby v. Pathumma (supra)*.

In *Fernando v. Fernando* [4] Bertram C.J. himself refused to "extend the exception to cover a case in which a Proctor acting on behalf of his client executed a bond in his office and afterwards filed it in Court". He also definitely held that a bond such as the one in question did not fall within the exception created by section 20 of Ordinance No. 7 of 1840.

[1] *1 C. L. Rec. 26.*
[2] *(1859) 3 Lorensz 303.*
[3] *23 N. L. R. 189.*
[4] *23 N. L. R. 458.*

In *Kanapathipillai v. Kannakai*[1] a bond hypothecating immovable property, executed before a Justice of the Peace was held not to have been properly executed. Ennis C.J. dealt there with the question whether *Queen's Advocate v. Thamba Pulle* (*supra*) established the principle that "judicial hypothecs" did not fall within the provisions of Ordinance No. 7 of 1840. "In my opinion that case did not go so far, because it expressly stated that a bond signed before the Secretary of the Court fulfilled the requirements of certain rules and orders which were then in force, and which had received statutory recognition after Ordinance No. 7 of 1840 came into operation". He also mentioned the case of *Mohamadu Tamby v. Pathumma* (*supra*) as a special exception.

Again in *Fernando v. Ranhamy*[2] an objection was upheld by Ennis J. in a case where the bond had been signed before a Proctor without any other witnesses.

I cannot think that this current of authority commencing in 1918 can be regarded as establishing the proposition that "judicial hypothecs" of the nature of the bond in the present case are not governed by the terms of Ordinance No. 7 of 1840 and Ordinance No. 17 of 1852. I think the inference to be drawn is to the contrary. If such bonds fell outside the two Ordinances, and the special form required by the Rules in existence before the Civil Procedure Code of 1889 was swept away by that Ordinance, it is difficult to resist the conclusion that a bond in any such form should have been regarded as good. Clearly the Supreme Court did not agree with that view. I accordingly cannot regard the decision of Bertram C.J. in *Mohamadu Tamby v. Pathumma* (*supra*) as doing more than giving judicial sanction to a practice of respectable antiquity in the case of appeals to the Supreme Court.

We are not called upon in this case to decide whether that decision is right or wrong. But I think we should resist the application to extend that decision by analogy to appeals to the Privy Council. There is no evidence that there has been a well established practice to regard as valid bonds dealing with immovable property executed before the Registrar of the Supreme Court, or that the Supreme Court has recognized the validity of such bonds. The only decided case may afford an argument to the contrary. In any event the cases in which security by way of hypothecation of immovable property has been allowed in the case of appeals to the Privy Council, were of such infrequent occurrence, that it can hardly be contended that any *cursus curiae* has been established.

I accordingly hold that the bond in this case is invalid, as it does not conform with the requirements of section 2 of Ordinance No. 7 of 1840, or of Ordinance No. 17 of 1852.

One further question remains for determination, viz., whether we have any power to grant relief to the appellants in this case by permitting them to enter into a proper bond at this time. Counsel for the appellants contended that such a power is implied in Rule 4 of Schedule I. of Ordinance No. 31 of 1909. We are however confronted with the peremptory terms of Rule 3 (*a*) of that Schedule which runs as follows:—

"Upon the condition of the appellant within a period of one month from the date of the hearing of the application for leave to appeal,

[1] *23 N. L. R. 455.* [2] *23 N. L. R. 456.*

unless the Court shall, on the ground of the absence of the appellant from the Colony or for some other special cause, on application made to it, before the expiration of such period have granted an extension thereof, entering into good and sufficient security, to the satisfaction of the Court, &c."

The period of time fixed has now expired, and no application for extension of time was made or allowed before that period expired. If we give relief now, it will be in contravention of Rule 3 (*a*), and I am of opinion that we have no power to do so.

I also think that in the circumstances of this case, in giving such relief we cannot be regarded as making further directions "on cause shown" under Rule 4. In this appeal the appellants contended that the form of the security given was valid in law and a sufficient compliance with the requirements of Ordinance No. 31 of 1909. It was suggested for the first time in the argument of Counsel before us that as an alternative, in the event of our finding being against the appellant on the point referred, we should exercise our powers under Rule 4. No such application appears to have been made to Justices Soertsz and Nihill, nor has this matter been referred to us by them.

The application for final leave to appeal to the Privy Council is refused with costs.

ABRAHAMS C.J.—I agree.

HEARNE J.—I agree.

Application refused.