1963 *Present :* Sansoni, J.

D. WIJESINGHE, Appellant, *and* THE INCORPORATED COUNCIL OF LEGAL EDUCATION, Respondent

S. C. 28 of 1961—C. R. Colombo, 73821/R. E.

(1) *Action instituted by a corporation—Plaint signed only by the proctor representing the corporation—Sufficiency of such signature—Civil Procedure Code, ss. 24, 25, 46 (1), 470—Council of Legal Education Ordinance (Cap. 276).*

When a Corporation is represented by a proctor, a plaint filed on behalf of the Corporation would be sufficiently signed as required by section 470 of the Civil Procedure Code if it is signed only by the proctor ; the plaint need not be subscribed by anyone else on behalf of the Corporation.

(2) *Proctor's appearance for a party—Proxy—Presumption of validity and regularity attaching to its execution—Proxy given by Council of Legal Education—Should one of the attesting witnesses be called to prove due execution ?—Burden of proof—Courts Ordinance (Cap. 6), Second Schedule, Rule 4—Evidence Ordinance, s. 68.*

Once the Court accepts and acts on a proxy filed in favour of a proctor, presumably because no defect appears on the face of the proxy, any party who desires to question the authority of that proctor has the onus of showing the want of authority. Accordingly, once the Court accepts and acts on a proxy given to a proctor by the Incorporated Council of Legal Education, when it is plaintiff in an action, the Court is entitled to assume, in the absence of evidence led to the contrary by the defendant, that the common seal of the Council was affixed to the proxy after due compliance with the requirements of Rule 4 of the Second Schedule to the Courts Ordinance. In such a case it cannot be contended that, under section 68 of the Evidence Ordinance, the plaintiff must call at least one of the attesting witnesses to prove the execution of the proxy.

3) *Landlord and tenant—Premises let by Incorporated Council of Legal Education—Notice to quit sent by Council's proctor—Validity—Acceptance by landlord of rent from overholding tenant—Effect—Acceptance of late payments of rent from statutory tenant—Effect—Applicability of equitable principle of promissory estoppel—Rent Restriction Act, No. 29 of 1948, s. 13 (1) (a).*

In an action instituted by the Incorporated Council of Legal Education to have a tenant ejected from certain premises let on a monthly rent, the authority of the Council's proctor for having given the tenant notice to quit need not be proved if his authority to represent the Council in the action is not questioned.

When a landlord accepts money sent to him as rent, from a tenant who overholds after receiving a notice to quit, a new contractual tenancy is not thereby created, unless it can be shown that the parties intended to and in fact created a new tenancy. If, for example, in every receipt issued it was stated that the payment was received " without prejudice to the notice to quit already given and the cause of action already arisen ", it is clear that the payments of rent were not accepted in respect of a new tenancy.

A monthly tenant (the defendant), before he became a statutory tenant, had been paying rent once in two months! After he became a statutory tenant, he could have lawfully relied on the tacit permission given by the landlord (the plaintiff) to continue to pay in that way. He did pay in that way until June 1954. But, from July 1954 the delay in making payments became longer and longer until there was gross and inexcusable delay just before the present action was filed for ejectment of the tenant in terms of section 13 (1) (*a*) of the Rent Restriction Act. Moreover, throughout the period of the statutory tenancy, the late payments of rent were accepted by the landlord without prejudice, which meant that they were not to affect the notice to quit.

Held, that the tenant had clearly failed to perform his obligation as a statutory tenant and was, therefore, liable to be evicted under section 13 (1) (*a*) of the Rent Restriction Act. In such a case, the equitable principle of promissory estoppel cannot provide the tenant with a defence.

APPEAL from a judgment of the Court of Requests, Colombo.

Colvin R. de Silva, with *C. G. Weeramantry*, *D. R. P. Goonetilleke*, and *N. S. A. Goonetilleke*, for the Defendant-Appellant.

H. V. Perera, Q.C., with *G. F. Sethukavaler* and *S. Nandalochana*, for the Plaintiff-Respondent.

Cur. adv. vult.

February 19, 1963. SANSONI, J.—

The Plaintiff in this action is The Incorporated Council of Legal Education and the Defendant is a Proctor. It is common ground that the Defendant was a tenant of the Plaintiff prior to October 1952 in respect of premises No. 250/6, Hulftsdorf Street, on a monthly rent of Rs. 32·08. On 31st October, 1952, Messrs Julius & Creasy, claiming to act on behalf of the Plaintiff, gave the Defendant notice to quit the premises on or before 31st January, 1953. In that notice they also stated that the premises were required for the purpose of their clients. In spite of that notice the Defendant continued to occupy the premises and he is still there.

This action was filed by Messrs Julius & Creasy as proctors for the Council on 31st July, 1959, to have the Defendant ejected from the premises. It was alleged in the plaint that the rent was in arrear for the period July 1958 to February 1959 for over one month after it had become due within the meaning of proviso (*a*) to Section 13 (1) of the Rent Restriction Act No. 29 of 1948, and that the Plaintiff was therefore entitled to institute this action for ejectment. It was further alleged in the plaint that on or about 10th February, 1959, the Defendant paid a sum of Rs. 192·48 being the rent due for the period 1st July 1958 to 31st December 1958, but had not paid the rent for the period from January 1959 to July 1959. The Plaintiff prayed for ejectment, a sum of Rs. 224·56 as damages for the period January to July 1959, and further damages at Rs. 32·08 for the period from 1st August 1959. No claim was made under proviso (*c*) that the premises were required for the purposes of the business of the landlord.

The Defendant in his original answer pleaded that he was not in arrears of rent as payments had been made according to the practice accepted by the parties; and that since the Plaintiff had regularly accepted payments in lump sums for several months at a time without protest from the commencement of the tenancy, it was precluded from stating that the Defendant was in arrears. He also pleaded that the Plaintiff had accepted payments after the notice to quit. In his amended answer he pleaded that Messrs. Julius & Creasy had no right to institute this action as they had not been duly appointed to act for the Council.

At the trial issues were framed covering the points I have mentioned. A fresh proxy was thereafter filed by the Plaintiff's counsel but the earlier proxy was not withdrawn. The learned Commissioner after inquiry held that Messrs Julius & Creasy had the right and authority to institute this action and to act for the Council. After trial on the other issues judgment was given for the Plaintiff as prayed for, and the Defendant has appealed.

For the appellant Mr. de Silva raised four points, viz. (1) the plaint was bad because it had not been signed as required by Section 470 of the Civil Procedure Code, (2) Messrs Julius & Creasy have not shown that they were duly appointed to appear for the Council, (3) there is no proof that the notice to quit was given with the authority of the Council, (4) the Plaintiff has failed to establish that the rent was in arrear. I shall deal with these points in that order.

(1) The Plaintiff Council is a body corporate created by Chapter 276. The argument was that under Section 470 of the Code the plaint must be subscribed on its behalf by a member or other principal officer, and it is not sufficient for the Proctors representing it to subscribe the plaint. The relevant provisions of Section 470 provide that " the plaint *may* be subscribed on behalf of the Corporation..... by any member, director, secretary, manager or other principal officer thereof who is able to depose to the facts of the case ; and in any case in which such Corporation..... is represented by a proctor, *shall* be subscribed by such proctor."

Mr. de Silva argued that the earlier part is mandatory even though it has the word " may ", and that the signature of the proctor is only an additional requirement where the Corporation is represented by a proctor. He relied on *The Singer Sewing Machine Co. v. The Sewing Machines Co. Ltd.*[1] and *Delhi & London Bank v. Oldham*[2] and argued that Section 470 alone applied to Corporations. I ought to say that the *Singer Sewing Machine Company case* does not deal with the question whether a plaint or an answer on behalf of a Corporation represented by a proctor is sufficiently subscribed, if it is subscribed by such proctor. It is not easy to discover the true *ratio decidendi* of that case, though it does seem to decide that a Corporation cannot take advantage of Section 24 of the Code as to recognised agents. In so far as it seems to hold that Section 25 of the Code does not apply to Corporations it has not been followed—see *The Bank of Chettinad Ltd. v. Thambiah*[3]. But even the decision regarding Section 24 is hardly satisfactory, because Withers J. in the latter part of his judgment has considered what the position would be if that section did apply to Corporations. It has certainly been the practice for pleadings filed on behalf of Corporations who are represented by proctors to be signed only by the proctors, and they are never, as far as I know, subscribed by anyone else on behalf of the Corporation.

Mr. Perera relied on Section 46 (1) of the Code which states that " every plaint presented by a proctor on behalf of a plaintiff shall be subscribed by such proctor. In every other case in which a plaint is presented, it shall be subscribed by the plaintiff." He also cited the case of *Calico Printers Association Ltd. v. A. A. Karim & Bros.*[4], which explained the Privy Council decision cited by Mr. de Silva. Beaumont C.J. in the Bombay case held that the Indian section corresponding to Section 46 (1) of our Code applied to Companies, and that the earlier Privy Council decision in the *Delhi & London Bank case* was decided on its special facts, which did not bring it within the terms of that section. With respect I would follow the judgment of Beaumont C.J.

It seems to me, on reading Section 470, that there can be no doubt that under the final clause of the Section the plaint in this action was sufficiently signed when it was signed only by the proctors representing the Council, and that the earlier clause relates only to a case where the Corporation is not represented by a proctor.

(2) There are two proxies in the record, purporting to have been executed by the Council in favour of Messrs. Julius & Creasy. The first proxy bears the seal of the Council and alongside it are two signatures which read M. Tiruchelvam and David E. Maartensz. The second proxy also has the seal of the Council, and above and alongside it appear these words " The said Council hereby ratifies what has been done in its name by the said Proctors and all steps taken and all acts done by the said Proctors up to date in this case and in connection with this case. ..... The Common Seal of the Incorporated Council of Legal Education was affixed hereto at Colombo this 21st day of June 1960 in pursuance of a

[1] *(1893) 2 C. L. R. 200.*
[2] *(1893) 21 Cal., 60, P. C.*
[3] *(1933) 35 N. L. R. 190.*
[4] *(1930) A. I. R Bombay, 566.*

Resolution passed by the Council and in the presence of us Members of the Incorporated Council of Legal Education who have hereunto subscribed our names." There appear two signatures which read N. K. Choksy and David E. Maartensz.

The argument for the appellant is that evidence should have been led to satisfy Section 68 of the Evidence Ordinance, by calling at least one of the attesting witnesses to prove the execution of each proxy, because of the provisions of Rule 4 of the Second Schedule to the Courts Ordinance, Cap. 6. That rule provides that the Common Seal of the Council shall not be affixed to any instrument except in pursuance of a Resolution passed by the Council and in the presence of two Members who shall attest the document sealed. The argument was that since the rule requires attestation, a proxy is not proved unless one attesting witness at least has been called.

Mr. Perera's reply to this was that there is a presumption of validity and regularity attaching to the execution of the proxies, and anyone who asserts the contrary must prove it. Further, he argued, the due representation of a party to an action filed by a proctor is a matter which concerns the Court, and so long as there is a proxy which is regular on its face, the Court will not call for further proof unless there is evidence which will put the Court upon inquiry.

Now there is evidence that Messrs Julius & Creasy acted for the Council in two applications made by the Council to the Rent Control Board; that when the notice to quit was sent to the Defendant by Messrs Julius & Creasy on behalf of the Council the Defendant sent a reply to that notice addressed to Messrs Julius & Creasy. Rents were collected from the Defendant by Messrs Pope & Company on behalf of the Council and receipts were issued by them as Treasurers, and they always acted on instructions given to them by Messrs Julius & Creasy.

But all this apart, there is the all-important fact that the plaint was filed along with a proxy in favour of Messrs Julius & Creasy. The Court accepted both the plaint and the proxy and ordered that summons do issue. When the Court later held an inquiry into the question whether Messrs Julius & Creasy had the right to represent the Council, not a scrap of evidence was led on behalf of the Defendant to throw doubt on the authority of the proctors. It seems to me that once the Court had accepted and acted on the first proxy filed, presumably because no defect appeared on the face of that proxy, any party who desired to question the authority of Messrs Julius & Creasy had the onus of showing the want of authority. The ordinary rule, that a party who wants the Court to revoke any action taken by the Court must first satisfy the Court that such action was wrong, would apply here. This rule is based on the presumption *omnia praesumuntur rite et solemniter esse acta*. Prima facie the position was that the summons had been properly issued by the Court on the motion of proctors who had the right to present the plaint and move for the issue of summons. The Defendant did not produce any evidence to rebut that position.

This is not a case where a party, who is seeking to produce in evidence a document which requires attestation, is met with an objection that its execution must be proved as required by Section 68 of the Evidence Ordinance. The document in such a case will not be admitted until proof has been adduced. Here the proxy had already been accepted by the Court and acted upon. The Court was entitled to assume the authority of the proctors, as it did, until that authority had been shown not to exist. A Court cannot function on any other basis.

In my view, the second proxy was not necessary. It is in fuller terms and states expressly what appears by implication in the first proxy, but that does not mean that the first proxy was defective. In any case I have already shown why, in my view, the Defendant had the burden of showing that it was defective, but he failed to discharge it.

(3) As I understood Mr. de Silva, the argument was that the authority of Messrs Julius & Creasy to send the notice to quit had not been proved. As I have already found that they must be regarded as properly representing the Council in this action, this question does not arise. The objection has no substance, and the Defendant would know that better than anybody else. He was one of several tenants who wrote to the Council on receiving notices to quit, in an attempt to get the notices withdrawn. No relief was obtained on this letter. Can it be seriously argued in these circumstances that this particular notice was not authorised by the Council ?

(4) The last point raised by Mr. de Silva is based on the following circumstances. After the notice to quit dated 31st October 1952 was sent to the Defendant, rent was accepted from time to time by Messrs Pope & Co., on behalf of the Council, and it is urged that a new contractual tenancy was thereby created. In the alternative, it is argued that even though payments of the rent that fell due after the notice to quit were not made promptly, the Council is estopped from pleading that the rent is in arrear, because it had been the practice to accept payments that were made by the Defendant once in several months.

Mr. de Silva argued that when a landlord accepts money sent to him as rent from a tenant who overholds after receiving a notice to quit, a new contractual tenancy is created. He relied on *Croft v. Lumley* [1]. I do not accept this argument and I need only cite *Clarke v. Grant* [2], which decided that acceptance of rent after a notice to quit is different from an acceptance of rent after a notice that a forfeiture has been incurred. In the latter case acceptance of rent operates as a waiver of a breach that gives rise to the forfeiture. But acceptance of rent after expiry of a notice to quit will only operate in favour of the tenant if it can be shown that the parties intended to and in fact did create a new tenancy. The question then is, *quo animo* the rent was received. There can be no question in this case that payments of rent after the notice to quit were received on behalf of the Council, but it is equally clear that they were not accepted in respect of a new tenancy,

[1] *(1855) 5 E. & B. 648.* [2] *(1950) 1 K. B. 104.*

because in every receipt issued for those payments it was expressly stated that the payment was received " without prejudice to the notice to quit already given and the cause of action already arisen. "

The alternative argument was that payments of rent were not regularly made at any time by the Defendant; consequently the Plaintiff could not take advantage of a failure to pay rent promptly unless it first gave the Defendant notice to pay promptly in future. This argument raises questions of waiver and estoppel, and was based on the South African Appellate Division cases of *Garlick Ltd. v. Phillip* [1] and *Myerson v. Osmond Ltd.* [2]

It is necessary to consider the facts of those cases. In *Garlick Ltd. v. Phillip* there had been leases between the parties, the last of which was terminated by six months notice which expired on 30th June 1947. The tenant then became a statutory tenant from 1st July 1947. The July rent should have been paid in advance on 1st July as stipulated in the leases, but it was not so paid. The question thus arose whether that condition had been modified by the course of conduct of the parties. The Court held that there had been a long continued failure by the lessee to pay his rent on the due date, and no objection had been taken to that by the lessor. Therefore the tenant's obligation to pay in advance was suspended or modified and he could pay his rent late. The Court also held that the tenant had been led to believe that permission had been given to pay the rent late and the landlord was estopped from denying that such permission had been given. Consequently the failure to pay the July rent in time did not deprive the tenant of the protection afforded by the statute.

In that case there was evidence of a long continued course of conduct between the parties for the period *prior* to the statutory tenancy, from which the Court drew the inference that the lessee had been led to believe that he could pay his rent late. We have no such evidence in this case. According to the evidence led, by letter P1 of 2nd August 1952, Messrs Pope & Co. informed the Defendant that the rent for July and August was outstanding and he was asked to settle it. He then sent the rent for those two months on 6th August. His next payment was on 11th October 1952 when he sent the rent for the months of September and October 1952. No evidence has been led with regard to any earlier payments, and the notice to quit was sent on 31st October 1952.

Subsequent to that notice the Defendant made payments of rent at first once in two months until 9th June 1954 when he paid the rent for May and June 1954. Since then the payments made by him were in general long after the rent fell due, and from September 1957 the payments were still further delayed. On 24th September 1957 he paid the rent due for the months of May, June and July 1957. On 2nd December 1957 he paid the rents for August, September and October 1957. On 12th August 1958 he paid the rent due for the five months from February to June 1958; and on 10th February 1959 he paid the rent due for the six months from July to December 1958. No further payment was made before this action was filed on 31st July, 1959.

[1] *(1949) 1 S. A. 121.*

[2] *(1950) 1 S. A. 714.*

Thus it will be seen that the Defendant's observance of his obligation to pay the rent became progressively more lax. In such a situation must the landlord warn the tenant that he should pay promptly, or can he without warning sue for ejectment on the ground that the tenant has committed a breach of his statutory obligation not to allow the rent to be in arrear for more than one month after it fell due? On this question—and it directly arises on this appeal—the case of *Myerson v. Osmond Ltd.* is illuminating. There too the tenant had been in occupation under several leases, the last of which expired on 31st December 1947. Although payment of rent should have been made in advance on the first of each month as agreed in the leases, the tenant had frequently defaulted. From 1st January 1948 he became a statutory tenant. For the first seven months thereafter he paid the rent before the 7th of each month. The August rent, however, was not paid to the lessor till the 6th of September 1958, and an action to eject him was filed on that ground. The Court ordered ejectment, holding that the tenant had not been misled by the previous conduct of the lessor under the leases in accepting late payments. Such earlier practice as there had been regarding late payments had been abandoned when the tenant paid the rent by the 7th of each month. When he defaulted in respect of the August rent, he lost the protection of the statute. Very much in point is the view expressed by the Court on the latitude to which the lessee, after he became a statutory tenant, was entitled. " At its best for him he was given a tacit permission as from 1948 to pay his rent in advance within the first seven days of each month, and no later. As he has failed to continue to perform his duty regarding rent payment within the permitted limits of variation, he is no longer protected by the Statute against the landlord's right to claim an order for ejectment. "

Applying that decision to this case, the most that can be said for the Defendant is that before he became a statutory tenant, on the evidence on record, he had been paying the rent once in two months. After he became a statutory tenant, he could have relied on the tacit permission given by the Plaintiff to continue to pay in that way. He did pay in that way until June 1954. But from July 1954 the delay in making payments became longer and longer until there was gross and inexcusable delay just before this action was filed. The equitable principle of promissory estoppel cannot in these circumstances provide him with a defence. That defence arises " where one party is under an existing legal obligation to another, who has so acted as to lead the former party to believe that the latter will not enforce that obligation, or not enforce it to its full extent or for the time being, intending the former party to act on that footing, and the former party has so acted. The latter party may be restrained in equity from enforcing the obligation on any footing inconsistent with the belief so induced " : see *Beesly v. Hallwood Estates Ltd.*[1] which refers to earlier cases dealing with this principle. I do not agree with Mr. de Silva's submission that the defendant was entitled to pay the rent as late as he pleased. He was 5 months and 12 days late in February 1958, and 6 months and 10 days late in July 1958—these degrees of lateness had no

[1] *(1960) 1 W. L. R. 549.*

parallel in earlier payments. And it should be noted that throughout the period of the statutory tenancy all payments of rent were accepted without prejudice, which meant that they were not to affect the notice to quit. The defendant has clearly failed to perform his obligation as a statutory tenant, and he has thereby lost his immunity from eviction.

For these reasons, the appeal must be dismissed with costs.

Appeal dismissed.