1935 *Present :* **Macdonell C.J. and Koch A.J.**

ANNAMALAY CHETTY *v.* THORNHILL.

215—D. C. Ratnapura, 4,687.

Privy Council—Application for conditional leave—Application made by attorney of applicant—Proxy granted to proctor by attorney—Irregularity—Ordinance No. 31 of 1909, Schedule I., rules 2 and 6.

Where an application for conditional leave to appeal to the Privy Council was made by a duly authorized attorney of the applicant through a proctor to whom the attorney had granted a proxy for the purpose.—

Held, that the application was not regularly made.

THIS was an application for conditional leave to appeal to the Privy Council.

H. E. Garvin, for defendant in support.

Gratiaen (with him *D. W. Fernando*), for plaintiff, respondent.

March 19, 1935. KOCH A.J.—

This is an application for conditional leave to appeal to the Privy Council from a judgment of this Court delivered on February 6, 1935. The applicant was the defendant against whom judgment was pronounced and the respondent the successful plaintiff. The application is opposed by the respondent on the grounds that in two respects the requirements of rule 2 of Schedule I. to Ordinance No. 31 of 1909 had not been complied with. The rule reads as follows :—

" Rule 2.—Application to the Court for leave to appeal shall be made by petition within thirty days from the date of judgment to be appealed from, and the applicant shall, within fourteen days from the date of such judgment, give the opposite party notice of such intended application."

Two things then are required of the applicant, to apply to this Court within thirty days from the date of the judgment, and to give notice of that application to the other party within fourteen days from that date.

The facts material to this application are briefly these. The applicant had executed a power of attorney on March 24, 1934, in favour of one W. B. Morison empowering that attorney to act for and on behalf of the applicant in various matters including proceedings in Court and in appeals not only to this Court but also to the Privy Council. There was a further provision giving the attorney power to grant proxies to proctors for these purposes.

Accordingly on October 3, 1934, the attorney granted on behalf of the applicant a proxy to Mr. J. A. Perera, proctor, in the following terms:—

"To appear for me in action No. 4,687 of the District Court of Ratnapura in which I am appellant, to support my appeal, to file all necessary papers and to make all necessary motions and applications and generally act for me in the said action". This proxy of October 3, 1934, was duly filed and is the one on which appeal to this Court was brought, resulting in the judgment of February 6, 1935. It was contended that this proxy sufficiently authorized the present application, but it seems clear that the terms of the proxy do not empower the proctor to act under this Ordinance, No. 31 of 1909, that is to apply to this Court for leave to appeal to the Privy Council.

The decree of this Court intended to be appealed from was delivered, as has been said, on February 6, 1935, and five days later, on February 11, 1935, Mr. J. A. Perera acting presumably on the proxy of October 3, 1934, filed an application in this Court for conditional leave to appeal to the Privy Council. Later on, he seems to have been afraid that this proxy of October 3, 1934, was insufficient and accordingly he, Mr. J. A. Perera, filed an additional proxy which had been granted to him on February 15, 1935, by the attorney of the appellant, which proxy empowers Mr. Perera "to appear for me in action 4,687 of the District Court of Colombo (this should be Ratnapura) S. C. Final No. 215 and to take the necessary steps to appeal from the judgment of the Supreme Court dated February 6, 1935, to the Privy Council, to file all necessary papers, &c.", and it also ratifies "all acts done, applications made, and appearances entered heretofore by my said proctor". Notice of the intended application to this Court for leave to appeal to the Privy Council was served personally on the respondent on February 20, 1935, that is, within the fourteen days allowed by rule 2, but the additional proxy of February 15, 1935, was not filed in the Registry until February 21, 1935, *i.e.*, fifteen days after the date of judgment.

The first objection raised by the respondent to this application for leave to appeal to the Privy Council is that timely notice had not been given to him, the opposite party, under rule 2. It was argued that the notice had not been in time inasmuch as the proxy of February 15, 1935, was only received in the Registry on February 21, *i.e.*, one day after the period within which notice had to be given. I do not think that there is any substance in this objection as the act of ratification, *i.e.*, the proxy of February 15, 1935, took place within time, namely, before February 20.

The unauthorized filing of the application for leave to appeal on February 11, 1935, has been cured by the act of ratification which took place on February 15. It seems immaterial that this document of February 15 ratifying what had previously been done reached the Registry after the specified time of fourteen days had expired. The ratification itself had been within time. I am therefore of opinion that the first objection fails.

The second objection raises a question of considerable difficulty. It is this: the respondent contends that the notice to him, the opposite party, of the intended application for conditional leave to appeal is not in order inasmuch as it was given by a proctor who was not lawfully authorized to give it, seeing that the proxy of February 15, 1935, in his favour for that purpose had not been executed by the defendant himself but only by his attorney, Mr. W. B. Morison. The respondent referred us to rule 6 of the Orders regulating the procedure under Ordinance No. 31 of 1909 (*Handbook of the Supreme Court, p. 105 et seq.*) and argued that under that rule an attorney has no power to authorize a proctor to take proceedings under that Ordinance No. 31 of 1909. If this objection succeeds it will invalidate not only the notice given but the application for leave to appeal itself. Rule 6 reads as follows:—

> "6. A party to an application under the Ordinance, whether applicant or respondent, shall, unless he appears in person, file in the Registry a document in writing appointing a proctor of the Supreme Court to act for him in connection therewith; provided nevertheless that, if he has already filed in the Registry a writing appointing a proctor to act for him for the purpose of the original appeal to the Court, and empowering him to act under the Ordinance, no further appointment shall be required."

The proviso to this rule does not apply in the present case since the proxy of October 3, 1934, only empowered the proctor to appeal to this Court but did not also empower him to act under this Ordinance No. 31 of 1909.

Now the decision regarding this objection turns entirely on the question as to whether the word "party" means the party only or include his lawfully authorized attorney. The argument that it does include his lawfully authorized attorney is difficult to accept in view of the wording of rule 5A and rule 6. Rule 5A requires the service of a notice to be effected "upon a party personally or upon his proctor empowered to accept service thereof", and rule 6 follows requiring the party "unless he appears in person" to file a proxy specifically for the application for leave to appeal. If these words "personally", "unless he appears in person", had been absent, it could well have been contended that the word "party" was wide enough to include an attorney, but the language of the two rules, as also their juxtaposition, emphasizing in the case of rule 5A the requirement of service on the respondent personally or upon his proctor empowered to accept service, and the wording of rule 6 "unless he appears in person", seem to enact that it must be the individual party himself who must do the acts required by these rules. This is strengthened by the fact that the words in rule 6 "unless he appears in person" were inserted as an amendment to the original rule 5.

The correct paraphrase of rule 6 seems to be that unless the party appears in person, he, *i.e.*, the party himself and not his attorney, must file or cause to be filed in the Registry the documents required. In *Fradd v. Fernando* [1], the Chief Justice observed that some meaning must be given to the word "personally" in rule 5A, and held that the notice contemplated in that rule had to be served on the respondent personally or on the proctor empowered to accept service of the notice and that service of such notice on an attorney was bad. The present case is the converse of that decision. Giving, as we must, due weight to the words in rule 6 "unless he appears in person", I think we will be justified in inferring that the document which is the basis of the present application, namely, the proxy of February 15, 1935, cannot validly be executed by the attorney of the party but must be executed by the party himself if it is to be valid. It may be that this construction of rule 6 occasions hardship, but we have to interpret the law as we find it.

I therefore hold that the present application is not in order and that it must be refused with costs.

MACDONELL C.J.—I agree.

Application refused.