1960 *Present :* **Basnayake, C.J., K. D. de Silva, J. and Sansoni, J.**

AHAMADULEBBAI, Appellant, *and* JUBARIUMMAH, Respondent

S. C. 414—D. C. Batticaloa, 1243/L

Interpretation of statutes—Definition of an expression in one statute—Applicability of it to the same expression when used in another statute.

Appeal—Notice of tender of security for costs—Requirement of service on respondent in person—Distinction between "process" and "notice."—Deposit of money as security—Bond relating thereto—Requirement of execution before the Judge or the Secretary of Court—Fiscals Ordinance, s. 17—Civil Procedure Code, ss. 29, 756, 757—Supreme Court Appeals (Special Provisions) Act, No. 4 of 1960.

The definition of an expression in one enactment does not apply to the same expression when used in another enactment unless it is so expressly provided. Accordingly, the definition of the word "process" in section 17 of the Fiscals Ordinance is not applicable to the same word in section 29 of the Civil Procedure Code.

Prior to the date when the Supreme Court Appeals (Special Provisions) Act No. 4 of 1960 was enacted, an appeal from a judgment of a District Court was liable to be rejected in either of the following cases (unless there was waiver):—

(i) if the notice of tender of security for the costs of appeal given under section 756 of the Civil Procedure Code was not addressed to and served on the respondent himself in person. Service on the respondent's Proctor was not sufficient, for a notice of tender of security is not a "process" within the meaning of that expression in section 29 of the Civil Procedure Code.

(ii) if the bond hypothecating money deposited as security in terms of section 757 of the Civil Procedure Code was not executed before the District Judge or the Secretary of the Court.

[1] *(1934) 36 N. L. R. 400.*

APPEAL from a judgment of the District Court, Batticaloa.

C. Ranganathan, with *E. B. Vannitamby* and *A. R. Mansoor*, for Defendant-Appellant.

H. W. Jayewardene, Q.C., with *S. Sharvananda* and *L. C. Seneviratne*, for Plaintiff-Respondent.

Cur. adv. vult.

November 30, 1960. BASNAYAKE, C.J.—

When this appeal first came up for hearing learned counsel for the respondent raised a preliminary objection to its being heard on the ground that the requirements of section 756 of the Civil Procedure Code had not been complied with by the appellant. The grounds urged in support of the objection are—

(*a*) that the appellant has not given to the respondent notice of tender of security for costs of appeal as required by section 756.

(*b*) that the bond hypothecating the money deposited as security has not been executed before the District Judge or the Secretary of the Court.

As the decisions of this Court on the questions arising on the preliminary objection are all not easily reconcilable the matter of the objection has been set down for hearing before three Judges. The questions that arise for decision are—

(*a*) Is a notice of tender of security for the costs of appeal given under section 756 of the Civil Procedure Code addressed to the respondent's Proctor and served on him, a notice given to the respondent as required by that section ?

(*b*) Is an instrument hypothecating the money deposited by the party appellant as security for the costs of the respondent invalid for the reason that in the case of an appeal from a District Court it is not executed before the District Judge or the Secretary of the Court, and in the case of an appeal from a Court of Requests before the Commissioner of Requests or the Chief Clerk ?

The notice of tender of security given in the instant case reads as follows :—

" Notice of Security

No. 1243/L

In the District Court of Batticaloa

Mohamadu Saripu Ahamadulebbai of
Division No. 4, Sammanthurai.
Defendant-Appellant.

Ahamadu Meerasaibo Hadjiar
Jubariummah of Maruthamunai.
Plaintiff-Respondent.

To : N. Chinnaiyah, Esq.
Proctor for Plaintiff-Respondent
Batticaloa.

Take notice that the petition of appeal presented by me in the abovenamed action on the 19th day of September 1958, against the Order of the District Court of Batticaloa dated the 19th day of September 1958, in the said action having been received by the said Court, I on behalf of the Defendant-Appellant will on 7th day of October 1958, at 9 o'clock in the forenoon or so soon thereafter move to tender security by depositing the sum of Rs. 150 for any costs which may be incurred by you in appeal in the premises and will on the said day deposit in Court a sufficient sum of money to cover the expenses of serving notice of appeal on you.

Sgd. EDWARDS
Proctor for Defendant-Appellant.

Batticaloa,
September 22, 1958."

This notice was served on the plaintiff-respondent's Proctor and the Fiscal made return accordingly. The matter of security was considered by the Court on 21st October 1958. The minute in the Journal of that date reads—

" Notice of security served
Security
Parties absent
Plff's Proctor absent
Mr Advocate Mylvaganam for deft : ap.
Security accepted
Issue notice of appeal ret. 4.11.58."

In a recent case (S. C. Application 315 for Revision in D. C. Balapitiya Case No. 187/T—S. C. Civil Minutes of July 1, 1960)[1] it was decided by my brother de Silva and myself that a notice of tender of security

[1] *See (1960) 62 N.L.R. 97.—Ed.*

addressed to the respondent's Proctor and served on him is not a notice given to the respondent as required by section 756 of the Civil Procedure Code. Learned counsel's arguments on this point do not affect the decision in that case. He drew our attention to the definition of the expression " process " in the Fiscals Ordinance.

On the facts stated above it would appear that notice of tender of security for the costs of appeal has not been given to the respondent by the appellant in accordance with the statute. Where a statute requires that one party to a legal proceeding should be given notice of any step that the opposite party proposes to take, the notice must be given to the party personally unless the statute provides otherwise. Learned counsel for the appellant relied on section 29 of the Civil Procedure Code. That section reads—

> " Any process served on the proctor of any party or left at the office or ordinary residence of such proctor, relative to an action or appeal, except where the same is for the personal appearance of the party, shall be presumed to be duly communicated and made known to the party whom the proctor represents ; and, unless the court otherwise directs, shall be as effectual for all purposes in relation to the action or appeal as if the same had been given to, or served on, the party in person."

In the first place neither section 29 nor any other section of the Civil Procedure Code affords any authority for addressing to his Proctor a notice which the statute requires to be given to the respondent. What the section enacts is that service on the proctor of a party of " any process " meant for that party shall be as effectual as if it had been given to the party in person. Even in a case which falls within the ambit of section 29 the process must be addressed to the party for whom it is intended and not to the Proctor. The section does no more than permit the delivery to the Proctor of a party a process addressed to the party. Therefore a notice addressed to the respondent's proctor in terms of the section quoted above is not a notice to the respondent. In the second place it is only " process " served on the Proctor of any party that is presumed to be duly communicated and made known to the party whom the Proctor represents and is as effectual as if it had been given to or served on the party in person. As has been pointed out in S. C. Application 315/D. C. Balapitiya Case No. 187/T (*supra*) a notice of tender of security is not a " process " within the meaning of that expression in the Civil Procedure Code. As was submitted by learned counsel for the appellant the word " process " has been given by express definition a wider meaning in the Fiscals Ordinance. In that Ordinance a process is thus defined :" ' process ' shall include all citations, monitions, summonses, mandates, subpoenas, notices, rules, orders, writs, warrants, and commands issued by a court ; ". It is clear from the form of the definition that it was designed to include within its ambit all instruments whether they be process properly so called or not which the Fiscal may

be required to serve. The draftsman of the Ordinance appears to have defined the expression by giving it an artificial meaning as a device to facilitate drafting.

It is a well established rule of interpretation that the definition of an expression in one enactment does not apply to the same expression when used in another enactment (1921 A. C. 220) unless it is so expressly provided. As was stated by Lord Loreburn in *Macbeth v. Chislett*[1]—

> " It would be a new terror in the construction of Acts of Parliament if we were required to limit a word to an unnatural sense because in some Act which is not incorporated or referred to such an interpretation is given to it for the purposes of that Act alone."

This is not a case in which such provision is made. The Fiscals Ordinance makes it clear that the meaning given therein to the expression is for the purpose of that Ordinance alone, for section 17 states :

> " The following words and expressions in this Ordinance shall have the meaning hereby assigned to them, unless there be something in the subject or context repugnant to such construction : "

The rule of construction is different where words have been judicially interpreted. Expressions judicially interpreted are presumed to be used by Parliament in subsequent legislation in the sense which has been judicially declared to be the meaning of those expressions [(1933) A. C. 402 ; (1960) 2 W. L. R. 669—H. L.] the reason being that Parliament is presumed to know the law [(1933) A. C. 402 at 441 ; (1943) 2 All E. R. 289 at 298]. The context of the Civil Procedure Code clearly indicates that the expression " process " is used therein in a sense different from that in which it is defined in the Fiscals Ordinance. It draws a distinction throughout between " process " and " notices ". The word " process " when used in connexion with civil or criminal cases has a well understood meaning in its own right as would appear from the following quotation from Tomlin's Law Dictionary (Vol. II " Process ") :—

> " Blackstone considers process in civil cases as the means of compelling the defendant to appear in Court. This is sometimes called original process, being founded upon the original writ (now abolished in personal actions, see *post*) ; and also to distinguish it from mesne or intermediate process, which issues, pending the suit, upon some collateral interlocutory matter ; as to summon juries, witnesses, and the like. Mesne process is sometimes put in contradistinction to final process, or process of execution ; and then it signifies all such process as intervenes between the beginning and end of a suit."

It is dangerous as has been pointed out by the Privy Council [(1938) A. I. R. (P. C.) 152 at 158] to seek to construe one statute by reference to the words of another. As the word " process " in section 29 does not include a notice, in the instant case the notice has not only not been

[1] *(1910) A.C. 220, 223.*

properly addressed but has also not been served on the respondent in person as required by the Code. A procedural enactment is imperative and non-compliance with its requirements is fatal. The rule is well established and has been repeated in successive editions of Maxwell on Interpretation of Statutes. It is thus stated in the latest edition :

> " Enactments regulating the procedure in Courts seem usually to be imperative and not merely directory. If, for instance, an appeal from a decision be given with provision requiring the fulfilment of certain conditions, such as giving notice of appeal and entering into recognisances, or transmitting documents within a certain time, a strict compliance would be imperative and non-compliance would be fatal to the appeal." [(10th Edn p. 377) (112 J. P. 113)].

The case of *de Silva v. Seenathumma*, a decision of five Judges [1], gives effect to this rule of interpretation. It is a rule of construction that either party may waive provisions which are for his own benefit. Notice of appeal and security which are meant for the benefit of the respondent and are not matters with which the public are concerned may be waived by the respondent (*Graham v. Inglely* [2]). In the instant case there is nothing to show that the respondent waived his right to the prescribed notice ; both the respondent and his Proctor were not present when the Court made order accepting security. The rule is based on the maxim *quilibet juri pro se introducto renunciare potest.* This Court has so held in more than one reported decision. As all the previous decisions of this Court on this topic were reviewed by me in my judgment in S. C. Application 315/D. C. Balapitiya Case No. 187/T (*supra*) with which my brother de Silva concurred it is not necessary to burden this judgment with a review of those decisions.

I now pass to the next point. Section 757 provides :

> " The security to be required from a party appellant shall be by bond (form No. 129, First Schedule) with one or more good and sufficient surety or sureties, or shall be by way of mortgage of immovable property or deposit and hypothecation by bond of a sum of money sufficient to cover the cost of the appeal and to no greater amount."

The language of the section indicates that it is open to the respondent to " require " the appellant to give security in any one of the three modes prescribed therein. The security must be sufficient to cover the cost of the appeal. Now it is noteworthy that the section does not speak of the taxed costs of appeal but the cost of the appeal. It is well known that the actual cost of an appeal is much greater than the taxed costs. Section 756 contains a pointer to section 757 in the words " tender security as hereinafter directed ". The question for decision in the instant case is whether the bond hypothecating money deposited as security should be executed before the District Judge or the Secretary of the Court or whether it may be executed before a notary or whether it is sufficient if it is signed by the appellant without attestation by any

[1] *(1940) 41 N.L.R.241.* [2] *(1848) 1 Exch. 651, 657.*

public functionary such as the District Judge or the Secretary of the Court or a notary. Learned counsel for the respondent contended that a bond hypothecating money deposited as security created a judicial hypothec and should therefore be signed before the District Judge or the Secretary of the Court. He urged that the word " bond " presupposes a formal document and not an informal writing composed by the appellant and signed by him alone without any attestation. He relied on the meaning of the word " bond " and called in aid a long series of decisions of this Court in which it had been held that a bond given under section 757 should in the case of an appeal from the District Court be signed before the District Judge or the Secretary of the Court and no other.

The practice of requiring that bonds given under section 757 of the Civil Procedure Code should in the case of an appeal from a District Court be signed before the District Judge or the Secretary of the Court is one that has been long established. In *Menikhamy v. Pinhamy*[1] this Court approved the practice of executing security bonds before the Secretary of the District Court. Later in *Fernando v. Fernando*[2] Bertram C.J. gave his imprimatur to the established practice in these words :

> " It is quite true that the requirements of the rules and orders of that day under which the security bond had to be executed in the presence of the Court have disappeared from our legislation. But the practice has still remained that bonds of this description should be executed either before the Judge or before the Secretary as representing him."

These decisions were followed in the recent case of *Wijemanne v. Costa*[3] by my brethren Weerasooriya and K. D. de Silva who held that a bond hypothecating money as security for costs should be executed in the case of an appeal from a District Court before either the District Judge or the Secretary of the Court. I am in entire agreement with the opinion expressed by them. The rule is too long established to permit of any departure. Attempts to alter it have not been encouraged. In the instant case the bond, not having been executed either before the District Judge or before the Secretary of the Court, cannot be regarded as one that satisfies the requirements of the law.

Since we reserved judgment in this case the Supreme Court Appeals (Special Provisions) Act No. 4 of 1960 has become law and the only question that remains for decision is whether that Act applies to the instant case. As we have not had the advantage of hearing counsel on the point I direct that this appeal be listed before a bench of two Judges in the ordinary course for the decision of that question.

K. D. DE SILVA, J.—I agree.

SANSONI, J.—I agree.

Case to be re-listed.

[1] *(1921) 23 N.L.R. 189.* [2] *(1921) 23 N.L.R. 453.*
[3] *(1959) 61 N.L.R. 19.*