Present: Bertram C.J. and De Sampayo J.

1918.

KULANTAIVELPILLAI *v.* MARIKAR

90—D. C. (Inty.) Puttalam, 3,023.

Dies non—*Sunday—Judge accepting plaint on a Sunday in his house—"Court"—Ordinance No. 4 of 1886.*

The question whether a Judge is acting judicially is not to be determined by the building or place where he sits, but by the capacity in which he purports to act.

A Judge may accept a plaint in a civil case in chambers at his residence. This act is not rendered invalid by being performed on a Sunday.

BERTRAM C.J.—"The effect of the declaration of a day as a public holiday and *dies non* by Ordinance No. 4 of 1886 is two-fold. In the first place, it excuses judicial officers and their subordinate ministerial officers from the necessity of attending Court, or of performing any judicial or ministerial acts, on that day; in the second place, it protects any member of the public from being forced to attend Court, or to attend any judicial proceeding held elsewhere than in Court, on that day. It does not affect any judicial act or proceeding which may be validly done or taken in the absence of a party, and which, consequently, does not involve his personal attendance. Further, it does not preclude a judicial officer, or any of his ministerial subordinates, from waiving his privileges if he so decides, and from doing any act or taking part in any judicial proceeding on a day declared to be a holiday. There is nothing either in the Ordinance or in the principles laid down by Voet which declares null and void any judicial act which a judicial officer voluntarily elects to do, and which does not involve the compulsory attendance before him of any party affected."

THE facts appear from the judgment.

A. St. V. Jayawardene (with him *Bawa, K.C.*), for appellant.

Drieberg, for the respondent.

Cur. adv. vult.

October 31, 1918. BERTRAM C.J.—

In this case two objections are raised to the validity of the proceedings which are said to invalidate all orders made in the case subsequent to the matters complained of. The first objection is that the District Judge accepted the plaint and issued summons in the action upon a Sunday. The second objection is that he took these proceedings, not in Court, but in his own residence.

The facts are that the District Judge being in Puttalam on a certain Sunday, the plaint was tendered to him for acceptance in chambers at his own residence. Application was also made to him, firstly, to issue summons; and secondly, to grant an interim injunction. We need not consider the question of the granting of the interim injunction, because we are not now dealing with any

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proceedings based upon that injunction. Nor do I think it is necessary to say very much about the question of the issue of summons. It is not clear that the District Judge did order the issue of summons on this Sunday, but even if he did, it is purely a ministerial act. But it is hardly contested that ministerial acts might be performed in connection with judicial proceedings upon a Sunday.

The important question to be considered is, whether it was competent for the District Judge to accept a plaint on a Sunday. The acceptance of a plaint may for this purpose be considered a judicial act, inasmuch as it involves the consideration of various provisions of the Civil Procedure Code by the District Judge, and the giving of a decision may be the subject of subsequent judicial review.

It is urged by the appellant that under no circumstances can a District Judge accept a plaint on a Sunday, or at least that he can only do so if strong actual necessity is affirmatively proved. The question is purely a question of interpretation of statutes, and there are only two statutory provisions which may be considered to affect the matter. The first is section 365 of the Civil Procedure Code, and the second is section 4 of the Holidays Ordinance of 1886.

It is quite clear that the present proceeding is not within section 365 of the Civil Procedure Code. That relates—as I understand the Code—purely to the services of processes in civil cases which are to be carried out by the Fiscal. The acceptance of a plaint is not one of such processes. The second provision, which is the one which it is really important to interpret, is section 4 of the Holidays Ordinance of 1886. That Ordinance was passed with a view to declaring a number of days to be public and bank holidays respectively. A number of days are scheduled for this purpose. Those days are partly of a purely secular character. No distinction for the purpose of the Ordinance is made between the various religious of the various communities inhabiting the Island. Section 4 declares that the several days mentioned in Schedule A, and therein described as public holidays, shall, in addition to Sundays, be *dies non*, and shall be kept as holidays in the Colony. The question is, What is the effect of the enactment that these days shall be *dies non* ?

The expression *dies non* may be interpreted in two ways. It may be considered simply as having reference to the scope of the Ordinance. The object of the Ordinance is to bring about an observance of certain holidays in public offices and in banks. The Ordinance should be interpreted with reference to the two objects, which are more fully developed aftewards in the Ordinance, namely, as regards public holidays, the closing of public offices, and as regards bank holidays, the closing of banks and the suspension of the presentation and payment of bills of exchange and promissory notes. By saying that a public holiday should be a *dies non*, it may simply be the intention of the Ordinance to declare that such

a day shall not count as a working day in public offices. It seems to me that that would be a perfectly legitimate way of interpreting the Ordinance.

An alternative interpretation is, however, suggested, namely, that the expression *dies non* is merely a concise way of saying *dies non juridicus*. That suggestion has the authority of a late eminent Judge of this Court, Wendt J., who expressed that view. What is the effect of declaring a day to be *dies non juridicus*? We must consider this question from the point of view of the common law of the Colony, namely, the Roman-Dutch law. That law is discussed and expounded in *Voet 2, 12, 2*. Voet there explains that from the point of view of the jurist, holidays are "*dies ab actibus judicialibus vacui.*" They are divided into two classes: divine and human, or, as we may perhaps more appropriately express it, holidays of divine institution and holidays of human institution. "*Divinæ dicuntur quæ ob cultum divinum sunt constitutæ, et altissimae Maiestate dicitæ*" . . . . . "*Humanæ feriæ discuntur, quæ propter hominum utilitatem constitutæ.*" The conditions governing these two classes of holidays would appear not to be identical. It is necessary, therefore, in the first place, to ask whether, in declaring Sundays to be public holidays and *dies non* under this Ordinance, the legislator intended them to be considered as *feriæ divinæ* or *feriæ humanæ*. I am clearly of opinion that, for the purpose of the Ordinance, Sundays must be considered as belonging to the latter category. Schedule A, as I say, consists of days partly of a religious and partly of a purely secular character. It seems to me that by grouping these two classes of days together, and by ranking Sunday with them on exactly the same footing, the Ordinance expressly disclaims any intention of attributing any special sanctity to Sunday as a religious day. That being the case, Sunday and the other days mentioned in Schedule A must be all alike considered as holidays of human institution, created by the act of the Legislature, *propter hominum utilitatem*. With regard to this class of holiday, the principle governing them, as expounded by Voet, is clear enough. It is that on *feriæ humanæ* no one shall be compelled to take part in litigation against his will. *Feriis autem humanis licet nemo invitus litigare cogatur* (*2, 12, 6*). Voet does not declare that any judicial act done upon a holiday of human institution is *ipso facto* void. What he says is that any judicial act by which it is sought to compel any one to take part in litigation on such a holiday against his will is void, and that, I think, is the significance which we ought to give to the expression *dies non* in Ordinance No. 4 of 1886, if it is to be interpreted on this basis.

If paragraph 6 of title 12 is carefully considered, it will be clear that this is the principle which Voet intends to enunciate. A little further down the paragraph these words appear: *Nulla vero sunt, quæ die feriato contra leges, invito adversario, gesta, decreta, iudicata*

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sunt, nisi ratihabitio postmodum fuisset subsecuta; that is to say, that these things are "void which on a holiday are done, decreed, or adjudged contrary to the intention of the law against the will of the opposing party in the absence of subsequent ratification." A little further down we have a further expression: *immo ipso iure nulla sint feriato die in absentem et ignarum decreta, i.e.*, "decree passed on a holiday against an absent party without notice *ipso jure* void." Both these expressions are, in my opinion, to be limited to cases in which it is sought to compel a person to take part in litigation on a holiday against his will.

The effect, therefore, in my opinion, of the declaration of a day as a public holiday and *dies non* by Ordinance No. 4 of 1886 is two-fold. In the first place, it excuses judicial officers and their subordinate ministerial officers from the necessity of attending Court, or of performing any judicial or ministerial acts, on that day; in the second place, it protects any member of the public from being forced to attend Court, or to attend any judicial proceeding held elsewhere than in Court, on that day. It does not, in my opinion, affect any judicial act or proceeding which may be validly done or taken in the absence of a party, and which, consequently, does not involve his personal attendance. Further, it does not preclude a judicial officer, or any of his ministerial subordinates from waiving his privileges if he so decides, and from doing any act or taking part in any judicial proceeding on a day declared to be a holiday. There is nothing either in the Ordinance or in the principles laid down by Voet which declares null and void any judicial act which a judicial officer voluntarily elects to do, and which does not involve the compulsory attendance before him of any party affected.

In this case, then, all that we have is the fact that the District Judge accepted a plaint, and possibly issued a summons, on a Sunday. This act on his part does not seem to me to be rendered void either by statute or by the common law.

There is a further point which has been taken in the case, though no issue was framed upon it. It was, however, pleaded, and the District Judge gave his view on the question. It is contended that it is not competent for a District Judge to accept a plaint at any other place than the Court premises, and certain authorities have been cited to us on that point. The principal case referred to is the case of *Mohidin v. Nalle Tamby*.[1] The actual point decided in that case was that a judgment-debtor, who had been arrested under a civil warrant, had not been validly discharged, and the real reason for the decision was that the order of the District Judge purporting to discharge him was not made when the debtor was before the Court, but was made in his absence. That, I think, is clear from the judgments of both Withers J. and Bonser C.J. Bonser C.J.

[1] *(1896) 1 N. L. R. 377.*

said that the District Judge not having the debtor before him had no jurisdiction to make either an order of committal or discharge. It is perfectly true that Withers J. and Bonser C.J. *obiter* gave expression to the opinion that under the section there under consideration, which required that the debtor should be brought before "the Court," the debtor should be brought before the Judge sitting actually in Court. Withers J. asks: "What is meant by the Court? It surely means the place where the Judge is acting judicially, and is empowered to act judicially." He referred to the definition of "Court" as given in the Courts Ordinance. "Court" is defined in the Courts Ordinance as being "a Judge empowered by law to act judicially alone, or a body of Judges empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially." That definition seemed to Withers J. and Bonser C.J. to imply that a Judge is only acting judicially when he is sitting in Court. Personally, I do not so read the words in that sense. The definition does not say "in any place in which such Judge or body of Judges is empowered to act judicially," but when, *i.e.*, on any occasion on which such Judge or body of Judges is acting judicially. The question whether a Judge is acting judicially—as I understand the matter—is not to be determined by the building or place in which he sits, but by the capacity in which he purports to act.

The *dicta* in that case were referred to in a subsequent case, namely, *Suppramaniam Chetty v. Curera.*[1] But they were referred to, not as being adopted, but simply that two cases might be distinguished. Lawrie J. in the previous case had expressed the opinion contrary to that of the other Judges. He did not now retract that opinion. All that he said was that in a previous case the opinion had been expressed that a judge could not discharge a debtor except in Court, but that in this case the Judge had not discharged the debtor at all.

There is not, therefore, any binding authority that a Court can only act judicially in a Court-house. I do not understand such a proposition to be in accordance with existing practice, and I am therefore of opinion that the plaint in this case was validly accepted by the Judge in chambers at his residence in the sense explained by Lawrie J. in his judgment in *Mohidin v. Nalle Tamby.*[2]

For the reasons I have explained, I am therefore of opinion that the appeal should be dismissed, with costs.

DE SAMPAYO J.—

I am of the same opinion, more especially with regard to the interpretation of section 4 of the Holidays Ordinance.

Appeal dismissed.

[1] *(1898) 3 N. L. R. 193.*

[2] *(1896) 1 N. L. R. 377.*