

1920.

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

*In re* THE ESTATE OF MALACHAIS

84—D. C. (*Inty.*) Colombo, 5,416.

*Proctor a party—Privilege to instruct counsel himself—Proxy to another proctor not necessary—Testamentary actions.*

A proctor who is a party to an action may himself instruct counsel to appear on his behalf, and it is not necessary for him to give a proxy to another proctor for the purpose of instructing counsel.

THE facts appear from the judgment.

*Hayley* (with him *Croos-Dabrera*), for appellant.—The District Judge was not dealing with Mr. A as an officer of the Court, but had called upon him to account for moneys received by him as proctor of the petitioner. As the inquiry was in open Court, Mr. A was entitled, as of right, to be represented by counsel. It was not necessary for Mr. A to grant a proxy in favour of another proctor, but he was entitled to instruct the counsel himself. Whenever a man is entitled to appear in person, he is entitled to be heard by an agent. The recognized agent to appear in Court is either a proctor or an advocate (section 24, Civil Procedure Code).

A solicitor who is a party to an action appearing for himself is entitled to tax professional costs and not merely out-of-pocket expenses. *The London Scottish Benefit Society v. Chorley et al.*,<sup>1</sup> affirmed in appeal in 13 Q. B. D. 872.

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"All proctors, attorneys, and solicitors are privileged to sue and be sued in their respective Courts in person . . . . A proctor of the District Court is not obliged to employ another proctor or advocate to conduct his suit therein, or to sign his petition of appeal his own signature, with the addition 'proctor of the District Court,' being a sufficient compliance with the rule." *Silva v. Coppe Tamby*.<sup>2</sup> The rule referred to is in the same terms as section 755, Civil Procedure Code.

It is only a matter of etiquette and not a rule of law that a counsel should be instructed by a solicitor. A proxy is required merely to denote that the proctor has authority to appear for his client.

*A St. V. Jayawardene*, for the Council of Advocates.—Where the appellant is an advocate or proctor, he may draw and sign the petition of appeal himself. *Perera v. Perera*.<sup>3</sup> Also cited (1911) 1 K. B. 87.

January 13, 1920. BERTRAM C.J.—

This is an appeal from an order of one of the learned District Judges of the District Court of Colombo giving certain directions to a proctor who was appearing in a testamentary action on behalf of the petitioner, and who in that capacity and as an officer of the Court had given a personal undertaking that all moneys collected by him on behalf of the petitioner should be paid into Court.

The learned Judge appears to have scrutinized the record and to have observed certain matters which he thought required comment. In so doing I think that the learned Judge was exercising a very commendable vigilance. It is much to be desired that District Court Judges of their own motion should exercise as close as possible a supervision over the proceedings in testamentary actions. It is very difficult for the Judge of a busy Court to do this. It is greatly to the advantage of the administration of justice when such a course proves possible.

The learned Judge, having noted these points, made a certain minute in the proceedings, and had an order served upon the proctor requiring him to furnish certain information to the Court. It would also appear that an order was made calling upon him to make payments into Court, but no formal notice was served upon him of this order. Nevertheless, it does appear that, when the matter came before the learned Judge in Court, it was understood

<sup>1</sup> (1884) 12 Q. B. D. 452.

<sup>2</sup> (1846) *Ram.* 1843-55, page 66.

<sup>3</sup> (1907) 2 A. C. R. 142.

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by everybody concerned that both the matters, namely, the furnishing of information and the payment of money into Court, were before the learned Judge.

In these circumstances, the proctor, whose conduct had been the subject of comment, and who was called upon to take certain action on the basis that he had been in a certain measure in default, desired to be heard by counsel. The learned Judge ruled that he could only be heard by counsel if he first of all gave a proxy to another proctor, and if then this proctor instructed counsel to be heard on behalf of his client.

The learned Judge appears to have considered that, by serving a notice upon the proctor, he had, in fact, made him an additional party to the case. I do not myself take this view of the proceedings. I do not think that the proctor was a party. It appears to me that this was an incidental proceeding arising in the course of a testamentary action, owing to the fact that the proctor, as an officer of the Court, had given a personal undertaking. In such circumstances occasions may arise when the Court may think the conduct of its officer requires criticism. In such a case it would always give an officer an opportunity of being heard before forming a decision on the subject, and it is obviously most reasonable and desirable that in all such cases the proctor should be entitled to be represented by counsel. I do not say that, in all cases in which a Judge requires an officer of the Court to furnish information, it would be reasonable for the proctor to ask to be heard by counsel. But in any case in which his conduct is impugned, it seems to me, on the face of it desirable that he should have this privilege.

The learned Judge, I am sure, fully appreciates this, but he formed an impression that it was necessary that a special proxy should be signed. Whatever be the nature of the proceedings, whether a proctor was an additional party, or whether as I think, he was simply acting as an officer of the Court in a matter which incidentally arose, I think the learned Judge has overlooked certain previous authorities which deal with the matter. They are the case of *Silva v. Coppe Tamby*,<sup>1</sup> and of a more recent case in which that case has been followed, *Perera v. Perera*.<sup>2</sup>

It is established by these cases that the proper practice or, at any rate, the legitimate practice is that if a proctor is himself a party to any matter, he may himself draw and sign a petition of appeal, and take any other formal step in the action without himself addressing a proxy to another proctor. If a proctor may so act, then it appears clear that he may also instruct counsel to appear on his behalf.

It is easy to see that in this case the proctor, who had very short notice of the inquiry which was held by the learned Judge, may have been embarrassed in being deprived of the assistance of counsel.

<sup>1</sup> (1846) *Ram. 1843-55*, page 66.<sup>2</sup> (1907) 2 *A. C. R.* 142.

I am by no means clear myself as to some of the items of the inquiry, and, I think, the right course is that the case should be sent back to the District Judge, who will, in light of the authorities pointed out to him, give an opportunity to the proctor to be represented by counsel, and will conduct the inquiry afresh with the assistance of counsel, who will then appear.

DE SAMPAYO J.— I agree.

*Sent back.*

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BERTRAM  
C.J.

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