1939 *Present :* **Soertsz and de Kretser JJ.**

PALANIAPPA CHETTIAR *v.* HASSEN LEBBE *et al.*

95—D. C. (Inty.) Colombo, 8,310.

(With application for *Restitutio in Integrum.*)

Warrant of attorney to confess judgment—Warrant in favour of a person, his heirs, executors, and assigns—Validity of warrant—Civil Procedure Code, ss. 31 and 32.

A warrant of attorney given to confess judgment in favour of a person, his heirs, executors, administrators, and assigns is invalid.

The warrant must be restricted to the form prescribed in section 31 of the Civil Procedure Code.

THIS was an action by the assignee of a mortgage bond against the mortgagor who had given a warrant of attorney to confess judgment to the mortgagee, his heirs, executors, administrators, and assigns.

The question argued in appeal was whether the warrant in favour of the creditor and his assigns was valid.

H. V. Perera, K.C. (with him *N. E. Weerasooria, K.C.*, and *U. A. Jayasundere*), for defendants, appellants and petitioners.—The warrant of attorney to confess judgment is in a form which is not authorized by the Civil Procedure Code. Warrants of attorney to confess judgment are extraordinary in their nature and owe their origin to English practice. They find no place in the Indian Code.

The warrant in question in the present case goes beyond the scope of the warrant provided for in section 31 of our Code. The sections dealing with power of attorney to confess judgment have to be strictly construed. Section 31, by expressly mentioning form 12, gives statutory force to it. It is not possible to extend the form to a case not covered by it, *e.g.*, to an assignee, as has been attempted in this case. Except for defeasance, the English form is similar. The English form appears in Vol. VIII of the *Encyclopedia of Forms and Precedents, p. 905 (1905 ed.)*. It may be possible to give a warrant restricting the form mentioned in section 31 of our Code, *e.g.*, omitting executors and administrators. (*Henshall v. Matthew* [1].)

N. Nadarajah (with him *E. B. Wikremanayake*), for plaintiff, respondent.—The parties have consented to the decree appealed from. A District Court has no jurisdiction to set aside its own decree entered of consent, in pursuance of a warrant of attorney to confess judgment. (*Van Twest v. Goonewardene* [2]; *Valiappa Chettiar v. Suppiah Pillai* [3].)

A warrant of attorney to confess judgment need not be confined to creditors and their executors and administrators only. A document similar to the one in question was discussed in *Vengadasalam Chetty v. Ana Fernando* [4].

[1] *(1831) 7 Bingham's Reports, 337.*
[2] *(1930) 32 N. L. R. 220.*
[3] *(1938) 10 C. L. W. 149.*
[4] *(1936) 38 N. L. R. 92.*

If a creditor acts unlawfully upon a warrant, it is open to the person damnified to proceed against him in an appropriate action. (*Subramaniam Chetty v. Naidu* [1].) So far as the present case is concerned, the consent of the parties is binding.

H. V. Perera, K.C., in reply.—In *Vengadasalam Chetty v. Ana Fernando* (*supra*) the question whether a warrant similar to the one under consideration now could be acted upon was not challenged. A warrant is void which does not conform to the provisions of sections 31 and 32 of the Code. (*Ramanathan v. Don Carolis* [2].)

Cur. adv. vult.

April 3, 1939. DE KRETSER J.—

These two matters were argued together as the appeal and the application were ancillary to each other and meant to prevent any possible technical objection to the hearing of the grievance which the appellant had.

The point of law involved is whether a warrant of attorney to confess judgment must be restricted to the form prescribed in section 31 of the Civil Procedure Code and cannot go beyond it though it may be less extensive.

Warrants of attorney to confess judgment have now become obsolete in England. In view of certain matters which gave rise to the feeling that they were being improperly used, provision was made by statute that the debtor should always have independent legal assistance before he signs such a warrant, and that it should be filed in a public office within 21 days of its execution, also that every defeasance or condition should be written on the same paper before the filing of the warrant in the public office.

Except for these matters warrants of attorney seem to have been evolved in the course of practice. They find no place in the Indian Civil Procedure Code from which we borrow our Code, but they were introduced into Ceylon in the course of adopting the English practice, and in 1880 the Full Court of this Island recognized such warrants. A reference to this fact will be found in *Venaithirthan Chetty v. Sondeperune Aratchige Don Migel Jayatilleke Appuhamy* [3], where it was pointed out that there should be limitation provided for in Ceylon similar to those provided in England and the provision in the Civil Procedure Code followed shortly afterwards.

It had been the practice in England to scrutinize the authority very closely and to limit the use of the warrant. It is unnecessary to quote the references and it is sufficient to say that a warrant of attorney handed to a creditor and empowering the attorney to confess judgment in a case brought by him was not extended to a case brought by his personal representatives. But when the warrant made provision for an action being brought by the creditor or his personal representatives, then it was held to be valid when used in such an action.

Curiously enough there is no instance of a warrant enabling its use in an action by the creditor's assigns.

[1] (1924) 26 *N. L. R.* 467. [2] (1917) 19 *N. L. R.* 378.

[3] 6 *S. C. C.* 105.

A warrant of attorney to confess judgment, as far as I can see, seems to have been regarded as a personal matter. It ended with the death of the debtor; when once used it ended with the death of the particular attorney or of one of them when it was in favour of two. (*Garvin v. Abeyawardene* [1].)

It could not be given by an agent on behalf of his principal even though specifically authorized to do so. (*National Bank of India, Ltd. v. George Gill* [2].)

Therefore, the absence of any instances where such warrant was used by assigns is not without significance, nor is the fact that in the form provided for in our Code there is no contemplation of such a situation.

It is useless to speculate as to the reason for such a restriction. It may be as Mr. Perera suggested that the debtor could trust the creditor and his personal representatives, but should not be called upon to put himself within the power of some absolute stranger.

A warrant of attorney to confess judgment is in the nature of a security. In this particular case, while the mortgage bond has been assigned to the plaintiffs, there has been no assignment of the warrant of attorney, and even assuming that a warrant of attorney may be used for the benefit of assigns, this can only be on the benefit being transferred to them. Here the assignment authorized the demand of the money and the grant of releases and discharges, but not the use of the warrant of attorney. On this ground too the use of it would be invalid.

But the main objection taken was that the only authority for the use of such warrants was to be found in section 31 and 32 of the Code, and section 31 having prescribed a form, nothing in excess of that form could be recognized. I think that this argument is sound.

The District Judge was of opinion that the use of the word "may" in section 31 enabled a creditor to obtain a warrant in a form other than the one given in the Code. If the position had been that the Code was merely recognizing the validity of warrants of attorney, which otherwise by implication might be held to have been repealed by the Code, then of course it may be argued that the form of the warrant was of no consequence, but if that were the position, the language used in section 31 is inapt.

I think that the section merely says that a warrant of attorney may or may not be given, but if given, it should be in the form 12 in the Schedule.

In drawing up the form, the legislators probably had in view the utmost limits to which the form had been extended in England, and they saw no reason to extend it any further in Ceylon. The combination of the words "executors, administrators and assigns" is so common that it is hardly likely they would have omitted the last word but for good reason.

It will be noted that the form is invoked in the section itself. Other forms are given in the Schedule, as for example forms 10 and 11 to be used in cases falling under sections 28 and 30, but these forms are not referred to in those sections. I think therefore that the form given in the section must be substantially adhered to.

[1] *24 N. L. R. 382.* [2] *32 N. L. R. 15.*

For the respondent it was contended that the judgment in *Vengadasalam Chetty v. Ana Fernando*[1] recognized the validity of a warrant of attorney such as the one we are now dealing with. I do not think that is sound nor did my brother Soertsz who was one of the Bench which decided the case. Dalton A.C.J. introduced his remarks with the words "it is sufficient to say" and he went on to hold that the particular warrant was bad. He did not apply his mind to the question whether the form given in the Code could be added to, nor does the reported argument of Counsel indicate that the arguments proceeded on such a footing.

In my opinion all proceedings subsequent to the filing of the plaint should be set aside and the case sent back to be proceeded with from that stage if the plaintiff be so inclined.

As the power *prima facie* justified the attorney in confessing judgment and the Court in acting on such confession, it seems to me that the remedy by way of *restitutio in integrum* is the proper one to adopt, but this question was scarcely alluded to as this Court has been approached by way of appeal also.

In the circumstances there should be no costs in this Court, but the defendant is entitled to costs in the District Court.

SOERTSZ J.—I agree.

Appeal allowed.