

1940

*Present : Howard C.J. and Keuneman J.*FERNANDO *v.* THEMIS APPUHAMY.

55—6—D. C. Colombo, 876.

Power of attorney—Power to manage and transact business—Termination of business—Cancellation of power—Recitals control the operative part.

Where a power of attorney contained the following recitals:—
“Whereas I am carrying on business as a timber merchant; and whereas I am unable to carry on the said business personally; and whereas I am desirous of appointing some fit and proper person as my attorney to manage and transact all my business and affairs in respect of the said business”,—

And where the operative part of the power nominated a person his “true attorney to act for him and on his behalf and in his name or otherwise in respect of my said business”,—

Held, that the purpose for which the power was given was the management of the business as a timber merchant and that with the cessation of the business the power of attorney was automatically cancelled.

A PPEAL from a judgment of the District Judge of Colombo.

N. E. Weerasooria, K.C. (with him *E. B. Wikremanayake* and *H. A. Koattegoda*), for the first defendant, appellant.

C. V. Ranawake, for the second defendant, appellant.

H. V. Perera, K.C. (with him *Dodwell Gunawardena*), for the plaintiff, respondent.

Cur. adv. vult.

March 13, 1940. HOWARD C.J.—

This is an appeal by the defendants from a judgment of the Additional District Judge of Colombo dated December 9, 1938, who held that certain deeds of transfer numbered respectively 129 and 130 and dated December 1, 1936, were executed without any authority. The second defendant purported to execute the deeds transferring certain properties to the first

defendant by virtue of a registered power of attorney No. 1000, exhibit P 3 dated May 6, 1933, and executed by the plaintiff in favour of the second defendant. By P 3 the second defendant was appointed by the plaintiff to act for him and on his behalf and in his name or otherwise in respect of his business as a timber merchant. In paragraph 6 of his plaint the plaintiff pleaded that he ceased to carry out his said business in or about February, 1935. In paragraph 1 of his answer the first defendant admitted the averments contained in paragraphs 1 to 7 of the plaint. The second defendant who was added as a party on the application of the first defendant did not in his answer deny the averment contained in paragraph 6 of the plaint. The only question, therefore, for decision by the District Judge was whether, having regard to the fact that the business of the plaintiff had come to an end, the second defendant had authority to execute the two deeds in favour of the first defendant. It was argued by Counsel for the defendants that even if the business of the plaintiff had come to an end the second defendant was justified in executing the deeds of transfer in order to raise money to pay for debts transacted whilst the business was being carried on. The only witness called was the second defendant and his evidence with regard to such debts was of the vaguest character. The amount of such debts has not been established nor has it been proved that any debts were in fact owing by the second defendant's principal, the plaintiff. The question, therefore, as to whether the second defendant was justified in making the transfer by the existence of business debts owing by the plaintiff was in my opinion rightly resolved by the District Judge in favour of the plaintiff.

It was further contended by the defendants that the power of attorney being registered and not having been cancelled still supplied the authority for the second defendant to execute the two deeds of transfer. It has been held in a series of cases that the recitals in a power of attorney control the generality of the operative part of the instrument. Thus in *Danby v. Coutts & Co.*¹ the operative part of a power of attorney appointed X and Y to be the attorneys of the plaintiff without in terms limiting the duration of their power, but it was preceded by a recital that the plaintiff was going abroad and was desirous of appointing attorneys to act for him during his absence. X and Y both before and after the plaintiff's return to England purporting to act under the power of attorney borrowed moneys from a Bank on mortgage upon the security of charges on the plaintiff's property. It was held that the charge given after the plaintiff's return was invalid. In *Attwood v. Munnings*², it was held that general words in a power of attorney were not to be construed at large, but as giving general powers for the carrying into effect the special purposes for which they were given. In *Lewis v. Ramsdale*³, A gave a power of attorney to B to manage real estate, recover debts, settle actions, also to "sell and convert into money" personal property and to execute and perform any contract, agreement, deed, writing, or thing that might in B's opinion be necessary or proper for effectuating the purposes aforesaid or any of them. It was held that the general words were limited by the

¹ 29 Ch. D. 500.

³ 55 L. T. 179.

² 108 E. R. 727.

special purpose of the power of attorney, and did not authorise a mortgage of his personal property. In *Harper v. Gadsell*¹, P, a partner in the firm of B. W. & Co., gave A a power of attorney "for the purposes of exercising for me all or any of the powers and privileges conferred by an indenture of partnership constituting the firm of B. W. & Co.", and the power afterwards went on "and generally to do, execute, and perform any other act, deed, matter or thing whatsoever . . . in or about my concerns, engagements and business of every nature and kind whatsoever". It was held that the former words restrained the generality of the latter words and consequently that A could not under this power execute a deed in P's name dissolving the partnership of B. W. & Co., and assigning over P's share of the partnership property.

It is now necessary to apply the principles formulated in these cases to the power of attorney on which the defendants rely in this case. The powers given under the operative part of the power are full and general. The power contains, however, *inter alia*, the following recitals:—

"And whereas, *inter alia*, I am carrying on business as a timber merchant".

"And whereas I am unable to carry on the said business as a timber merchant personally".

"And whereas I am desirous of appointing some fit and proper person as my attorney to manage and transact all my business and affairs in the said Island of Ceylon in respect of my said business as a timber merchant".

The operative part of the power also states that the plaintiff nominates the second defendant his true attorney to act for him and on his behalf and in his name or otherwise "in respect of my said business". The phraseology of the recitals indicated, therefore, that the purpose for which the power was given was the management of the plaintiff's business as a timber merchant and restrained the generality of the operative part. With the closing down of that business the authority of the second defendant to act under the power of attorney was automatically cancelled. In these circumstances I am of opinion that the learned Additional District Judge was right in the conclusion at which he arrived.

The second defendant claims that as he had no interest in the action and was an added defendant no order for costs should have been made against him. It must, however, be borne in mind that the second defendant filed answer and participated in the action as a party. He took an active part in it and cannot be heard to complain if an order is made against him for costs. In these circumstances the order for costs against the second defendant was properly made.

For the reasons given both appeals are dismissed with costs against both defendants.

KEUNEMAN J.—I agree.

Appeal dismissed.

¹ L. R. 5 Q. B. 422.