1951 *Present :* **Gratiaen J. and Pulle J.**

ABDUL CADER, Appellant, *and* SITTINISA *et al.*,
Respondents

S. C. 77—D. C. Galle, 818

Appeal—Abatement—Application for typewritten copies—Failure to tender full fees prescribed by Schedule—Revision—Civil Appellate Rules, 1938—Need for amendment—Rules 2 and 4 (a)—Interpretation Ordinance (Cap. 2), s. 14 (1) (e)—Civil Procedure Code, s. 756 (3).

Proctor and client—Client's deed of gift in favour of Proctor or Proctor's close relative—Validity thereof—Confidential relationship—Conflict between interest and duty—Presumption of undue influence—Burden of proof—Requirement of independent adviser.

(i) The appellant, when he made his application for typewritten copies under Rule 2 of the Civil Appellate Rules, 1938, tendered by mistake Rs. 20 instead of Rs. 25 which was the appropriate sum according to the Schedule. As no objection was taken either by the Court Secretary or by the respondents, the sum tendered was accepted and the record was duly forwarded to the Supreme Court.

On objection taken in appeal, under Rule 4 (*a*) of the Civil Appellate Rules, that the appeal had abated in consequence of the failure to tender the proper sum of Rs. 25—

Held, that as the respondents had not been in any manner prejudiced the appellant should, as a matter of indulgence, be heard by way of revision.

Observations regarding the urgent need for the amendment of the Civil Appellate Rules so as to enable the Court to grant relief to the appellant in a case where a technical breach of the rules has caused no prejudice to the other side.

(ii) The Courts are under a duty to scrutinize with "close and vigilant suspicion" any transaction in which a Proctor is professionally concerned and from which he or a relative in whom he has a special interest obtains from the lay client a benefit by way of gift. The transaction, when it is impugned, belongs to a class of case where the special relationship between the Proctor and his client at the time of execution of the gift raises a presumption that the former had influence over the latter. In such cases, unless the legal presumption of undue influence can be rebutted, "the Court interferes, not on the ground that any wrongful act has in fact been committed, but on the ground of public policy".

In such cases, the donee must rebut the presumption of undue influence by proof of circumstances which satisfy the Court that the gift was the result of the free exercise of the donor's independent will. Often, the only way to prove this is by establishing that the gift was made after the mature and effect of the transaction had been fully explained by some independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing.

APPEAL from a judgment of the District Court, Galle.

Plaintiff had fallen ill and, as he took a pessimistic view of his chances of recovery, decided to distribute a considerable part of his assets among the members of his family. He entrusted to his nephew the 2nd defendant, who was a Proctor and Notary, the professional duty of drafting and attesting a number of notarial conveyances. One of the conveyances executed was P1, which was an irrevocable gift of a valuable residential house, in favour of the 1st defendant who was the wife of the 2nd defendant and niece of the plaintiff. When the plaintiff expressed to the 2nd defendant his desire to make the gift to the 1st defendant, the 2nd defendant did not insist that the plaintiff should obtain independent legal advice in regard to the transaction; the 2nd defendant merely procured the services of another Proctor to draft and attest the deed upon instructions communicated by himself.

Shortly after the plaintiff recovered from his illness he brought the present action to have the deed of gift P1 set aside on the main ground that it had been obtained by undue influence on the part of the 2nd defendant.

H. W. Jayewardene, for the 1st to 3rd defendants respondents, raised a preliminary objection.—Under rule 2 of the Civil Appellate Rules, 1938, an appellant is required to tender the fees prescribed in the schedule to the Rules together with his application for typewritten copies of the record. The Proctor for the appellant in the present case deposited Rs. 20 when the prescribed amount was Rs. 25. In consequence of the failure to comply with rule 2 this appeal abated under the provisions of rule 4 (*a*) and cannot now be entertained.

H. V. Perera, K.C., with *J. A. L. Cooray*, for plaintiff appellant.—There is a distinction between a complete failure to make an application and failure to comply with an incidental requirement. The application in this case was accepted by the officer concerned, viz., the Secretary of the Court. The failure was not fundamental because the application did not fail to achieve its purpose. See *Palaniappa Chettiar v. Mercantile Bank* [1].

It is further submitted that rule 4 (*a*) which declares the appeal to have abated is *ultra vires*. Section 756 of the Civil Procedure Code states what should be done on presenting a petition of appeal. This has been done by the appellant. If under the general law appellant has a right of coming before the Supreme Court the rules of a rule-making body cannot deprive him of that right. The rules of a rule-making body must be looked at from a practical point of view—*Maxwell: Interpretation of Statutes*, 6th ed., p. 520. Such rules must be construed with reference to the object sought to be achieved. The power to make a rule declaring an appeal to have abated is not included in the power to make incidental provisions regarding the prosecution of appeals. Rule 4 (*a*) must not be inconsistent with the Civil Procedure Code. The expression " appeal shall be deemed to have abated " in rule 4 (*a*) is an unfortunate expression. If the "abatement" is only with regard to the rules, then rule 4 (*a*) is *intra vires*. If the " abatement " is with regard to the appeal, then the rule is *ultra vires*.

H. W. Jayewardene in reply.—Section 49 of the Courts Ordinance gives power to the Judges of the Supreme Court to frame rules to give effect to the Ordinance. All these rules must go before the Legislature under section 49. The Civil Appellate Rules are not inconsistent with the Civil Procedure Code. See *Maxwell; Interpretation of Statutes*, 9th ed., pp. 301, 303, 377. Rule 2 is imperative and no distinction as laid down by Howard C.J. in *Palaniappa Chettiar v. Mercantile Bank* (*supra*) can be drawn in the present case. If the appeal has abated this Court should not interfere in revision as such interference would be tantamount to circumventing the Civil Appellate Rules—*Chitaley: Indian Civil Procedure Code*, Vol. 1, p. 1017. Further, the power of revision should not be exercised where the remedy of appeal is open to a party—*Goonewardene v. Orr* [2]. On the question *of ultra vires* see section 14 (1) (*e*) of the Interpretation Ordinance (Chap. 2); *Institute of Patent Agents v. Lockwood* [3]; *Minister of Health v. The King* [4]; *R. v. Comptroller-General of Patents* [5].

[1] *(1942) 43 N. L. R. 121.*
[2] *2 A. C. R. 172.*
[3] *(1894) A. C. 347.*
[4] *(1931) A. C. 494.*
[5] *(1941) 2 A. E. R. 677.*

[Counsel for the appellant was then called upon to address on the merits of the appeal.]

H. V. Perera, K.C., with J. A. L. Cooray, for the plaintiff appellant.—The plaintiff brought this action to have a deed in favour of the wife of Mr. Wadood set aside. At the time the deed was executed the relationship of proctor and client existed between Mr. Wadood and the plaintiff. There is in such a case a legal presumption of undue influence by the proctor which cannot be met or rebutted by any evidence—*Liles v. Terry*[1]. As to the necessity of showing independent advice see *Spencer Bower: Actionable Non-disclosure*, p. 377; *Huguenin v. Basely*[2]. Further the subject-matter of the gift was not delivered to the donee. In Muslim Law the subject-matter must be delivered. Delivery of deed is not delivery of subject-matter—*Sultan v. Peiris*[3].

H. W. Jayewardene, for the 1st to 3rd defendants respondents.—Wadood was in the position of an adopted son of the plaintiff. He was employed as such and not merely as his proctor. The onus is on plaintiff to show that the relationship of proctor and client existed and that he executed the deed without independent legal advice. In the present case plaintiff had competent legal advice as Hamid was a proctor. Further, section 90 of the Trusts Ordinance is applicable to the facts of this case, not English rules of Equity. Section 3 of the Muslim Intestate Succession Ordinance brought the earlier Muslim Law of donations into line with the Roman-Dutch Law. Delivery of deed is sufficient.

M. H. A. Azeez, for the 4th to 9th defendants, respondents.

H. V. Perera, K.C., in reply, cited *Inche Noriah v. Shaik Alli Bin Omar* [4].

Cur. adv. vult.

July 18, 1951. GRATIAEN J.—

The principal parties to the transaction to which these proceedings relate are the plaintiff, who was over 70 years of age at the relevant date, and his nephew Mr. Wadood Abdul Wadood who was a proctor and notary. Mr. Wadood was the 2nd defendant in the action, but he died during the pendency of these proceedings, and his heirs were substituted as parties in his place. The 1st defendant is the widow of Mr. Wadood and is the daughter of the plaintiff's cousin.

The plaintiff had fallen ill during the month of May, 1943, and was suffering from a painful affliction in his scrotum. I shall assume, as the learned District Judge has done, that the evidence as to the state of the patient's condition at the time has to some extent been exaggerated. His mental faculties were certainly unimpaired. On the other hand, there is no reason to doubt that his affliction induced in him a state of acute mental depression. There are clear indications that in June he had taken a pessimistic view of his chances of recovery, and that he decided in consequence to distribute a considerable part of his worldly possessions among the members of his family. He instructed Mr. Wadood

[1] *(1895) L. R. 2 Q. B. D. 679.*
[2] *14 Ves 273.*
[3] *(1933) 35 N. L. R. 57 at p 81.*
[4] *(1929) A. C. 127.*

to prepare for his signature a number of deeds of gifts whereby certain properties were to be transferred to his present wife and to his other relatives. One of these transactions took place on June 4, 1943. Two other deeds of gift were executed on June 13, another on June 14, and yet another on June 16. On each occasion, except for a comparatively small gift under the deed 1D6 in favour of Wadood's daughter Suriya, the attesting notary was Mr. Wadood who had also been responsible for drafting the respective conveyances. On June 21 two further deeds were executed, but to these I shall refer later. On June 23, Mr. Wadood attested another transfer from the plaintiff to a relative.

Shortly afterwards the plaintiff was restored to better health, and it is a point in favour of Mr. Wadood that the plaintiff has since confirmed the earlier donations in respect of which Mr. Wadood was the attesting notary, and also the gift in favour of Suriya. With regard to the transactions of June 21, however, the plaintiff adopted a very different attitude, and it is necessary that I should now refer to these in some detail.

The notary who had attested the earlier deed of gift 1D6 in favour of Wadood's daughter was the witness Mr. M. S. A. Hamid. He states that he drafted the deed on instructions which he had previously received "through Mr. Wadood". The document was attested by him in the plaintiff's house on the evening of June 14, and on that occasion the plaintiff told him "that there will be another deed to be attested, and that Mr. Wadood could not possibly attest it, and the plaintiff said that he would send the title deeds through Mr. Wadood in about 3 or 4 days' time. Mr. Hamid relates that shortly afterwards "Mr. Wadood brought a plan with certain papers relating to a partition about which I had to refer in Court, and he wanted a deed drafted in favour of the 1st defendant (i.e., Mrs. Wadood). I drafted that deed. Mr. Wadood gave me further instructions about the assignment of a mortgage which I drafted in favour of Mr. Wadood. I asked Mr. Wadood why this mortgage bond was to be assigned and he told me that the plaintiff wanted him to recover certain monies from one Deesan Silva (i.e., the mortgagor) and return them to the plaintiff. Two days later after preparing the deeds I went to the plaintiff's house with Mr. Wadood".

On the evening of June 21, Mr. Hamid attested the deed of gift P1 whereby the plaintiff purported to transfer the house in which he resided to his "niece" Mrs. Wadood. The house was valued when the action commenced at Rs. 20,000 and its value has since appreciated. The gift is declared in the conveyance to be *irrevocable* and it purported to come into immediate operation. The donation was accepted by the 1st defendant on the same evening.

The other document attested by Mr. Hamid on June 21 was the deed of assignment 1D10 whereby the plaintiff, in consideration of a sum of Rs. 1,287.50 (the receipt of which the plaintiff purported to acknowledge) assigned to Mr. Wadood the existing mortgage executed in the plaintiff's favour by his debtor Deesan Silva. Admittedly this recital bears no relation to the actual facts. Mr. Wadood did not pay any consideration for this assignment until February 12, 1944, by which

time serious disputes had arisen between the parties. Moreover, the language of the assignment, taken by itself, is inconsistent with the terms of the arrangement that Wadood should be appointed only as an agent for the collection of the mortgage debt. Looked at in another way, the occasion for the later payment of the consideration on the basis of an outright assignment, and before Deesan Silva had liquidated his debt, is not quite clear.

The present action was instituted by the plaintiff on September 2, 1943—i.e., very shortly after his recovery—to have the deed No. 1149 of June 21, 1943, in favour of Mrs. Wadood set aside. The substantial grounds upon which the action was based are *inter alia*—

(*a*) that the gift in favour of Mrs. Wadood had been obtained by undue influence and duress on the part of Mr. Wadood;

(*b*) that the transaction was vitiated because Mr. Wadood, being the plaintiff's legal adviser at the time, stood in a position of active confidence towards the plaintiff ;

(*c*) that, the parties to the transaction being Muslims, the gift was in any event bad because no delivery of the property had taken place.

A further issue was also raised at the trial in which the plaintiff suggested that he was not of sound disposing mind at the time of the transaction and he gave evidence to the effect that he was unconscious when his signature was obtained to the deed. This evidence was rejected by the learned Judge who also held against the plaintiff on all the other issues. I am satisfied that if, in the circumstances of the case, the burden was on the plaintiff positively to establish undue influence and duress, the action was properly dismissed. It was on this assumption that the plaintiff's action was disposed of in the Court below.

I have given my anxious consideration to this case, and have borne in mind the circumstance that Mr. Wadood, who was a professional gentleman of good repute, died before he could give his own version of the transaction which is now impugned.

The conclusion at which I have arrived is that the learned Judge has misdirected himself as to the burden of proof in this case. Had he not fallen into error on this fundamental point, it seems to me that upon the evidence the plaintiff's claim was entitled to succeed. I am happy to state that my judgment does not in any sense involve a finding that Mr. Wadood had acted *dishonestly* in the transaction which is under investigation. He was found wanting only in a proper appreciation of the obligations which the law imposes upon persons who are placed in a position where *interest* and *duty* are brought into conflict with each other.

That Mr. Wadood and the plaintiff stood in the relationship of proctor and client during the month of June, 1943, has been very clearly established. The plaintiff was ill at the time, and, as I have already said, one cannot resist the conclusion that, influenced by his apprehensions as to his chances of recovery, he decided that the time had arrived for him to dispose of a considerable part of his possessions. In that

state of mind he entrusted to Mr. Wadood, who was not only his close relative but also a lawyer in whom he resposed special confidence, the professional duty of drafting and attesting a number of notarial conveyances which, as Mr. Jayawardene himself suggests, were in effect of a quasi-testamentary character. The objects of the benevolence were certainly not unnatural. I also assume, because I accept the learned Judge's express findings which are not vitiated by misdirection, that the plaintiff, in spite of his physical condition at the time, was possessed of his normal faculties and was not incapable of making dispositions of his own free will. Indeed, it is not denied that the terms of those conveyances which Mr. Wadood had attested and which the plaintiff has subsequently confirmed were in complete accord with the plaintiff's wishes.

I do not reject the submission that it was probably the plaintiff himself who expressed to Mr. Wadood a desire to include Mrs. Wadood, whom he regarded as his niece, in the group of persons whom he proposed to benefit. Nor do I deny that among persons in the class of society to which the plaintiff belongs, it was perfectly natural that a sick man, over 70 years old, in apparent anticipation of death, should be disposed to distribute his properties, by a series of gifts *inter vivos*, among his kith and kin. But the questions which confront themselves in regard to such a situation are (1) what obligations the law imposes upon a proctor when his client desires to make over a gift of valuable property to the proctor's wife, and (2) how Mr. Wadood in fact reacted to that situation.

The answer to the first question which I have posed is clear enough. " The law with a wise providence, not only watches over all the transactions of parties in this predicament, but it often interposes to declare transactions void which, between other persons, *would be held unobjectionable*. It does not so much consider the bearing or hardship of its doctrine upon particular cases, as it does the importance of preventing a general public mischief, which may be brought about by means, secret and inaccessible to judicial scrutiny, from the dangerous influence arising from the confidential relationship of the soliciter and client ". *Story on Equity (3rd Edition) page 129.*

The Courts are under a duty to scrutinize with " close and vigilant suspicion " any transaction in which a proctor is professionally concerned and from which he or his close relative obtains from the lay client a benefit by way of gift. If, of course, the client can affirmatively prove that the gift was procured by fraud, duress or undue influence, the transaction must obviously be set aside. But failure to achieve this positive result, as the plaintiff has failed in these proceedings, does not conclude the matter. The impugned transaction belongs to a class of case where the special relationship between the proctor and his client at the time of execution of the gift raises a *presumption* that the former had influence over the latter. In such cases, unless the presumption can be rebutted, " the Court interferes, *not on the ground that any wrongful act has in fact been committed, but on the ground of public policy*". *Allcard v. Skinner*[1].

[1] *36 Ch. D. 145.*

The relationship of proctor and client was still subsisting between Mr. Wadood and the plaintiff, and it was therefore the plain duty of Mr. Wadood, when the plaintiff expressed to him a desire to donate valuable property to Mrs. Wadood, to insist that the plaintiff should obtain independent legal advice in regard to the implications of such a transaction. The ties of kinship and the bonds of natural affection which connected the plaintiff and Mr. and Mrs. Wadood did not exclude the operation of this necessary precaution. It was not sufficient for Mr. Wadood merely to procure the services of Mr. Hamid to draft and attest the necessary deeds of conveyance upon instructions which were communicated by Mr. Wadood himself. Had Mr. Hamid been expressly employed to give the plaintiff the benefit of his independent advice on this occasion, he should (and I do not doubt that he would) have discussed many relevant matters with the plaintiff such as *inter alia* (1) the disadvantages arising from making an irrevocable gift of his private residence, (2) the desirability of making a testamentary disposition or a *donatio mortis causa* in favour of Mr. Wadood instead of a gift *inter vivos* taking immediate effect, (3) the reservation of at least a life interest in the property, (4) the arrangements which the plaintiff would have to make for an alternative residence in the event of his surviving his present illness. What actually occurred was that the plaintiff's instructions, and any discussions which may have arisen thereon, took place between the plaintiff and Mr. Wadood direct, and that those instructions were merely communicated by the latter to Mr. Hamid. In the result, Mr. Hamid's *potential influence*—I need not place it higher than that—was never removed from the atmosphere in which the transaction was eventually carried out.

In *Liles v. Terry*[1], the client of a solicitor, without independent advice, made a voluntary conveyance to him of certain premises in trust for herself for life, and after her death in trust for the solicitor's wife, who was her niece. The Court of Appeal set aside the deed although "the plaintiff intended to make the gift . . . . . and knew that she could not afterwards alter it and intended to bind herself irrevocably". Lord Esher was satisfied that the position "was fully explained by the solicitor to the plaintiff before she executed the deed, so that she did precisely what she intended to do and that no undue influence whatever was exercised on her." Nevertheless, he applied "the positive rule of equity to the effect that, because the solicitor who acted in relation to the execution of the deed was the husband of the plaintiff's niece, *and the plaintiff had not the advice of an independent solicitor*, therefore the gift which the plaintiff intended to make for the benefit of the niece was invalid. In other words, *there is in such a case a legal presumption of undue influence by the solicitor which cannot be met or rebutted by any evidence.*" The House of Lords took a similar view in *Willis v. Barron* [2] where the gift had been obtained from a client in favour of his solicitor's son.

The proper functions of an independent legal adviser whose services are called in aid in transactions of this nature are clearly indicated by Fletcher Moulton L.J. in *Coomber v. Coomber* [3]. "It is necessary", he

[1] *(1895) 2 Q. B. 679.*

[2] *(1902) A. C. 271.*

[3] *(1911) 1 Ch. 723.*

said, "that some independent person, free from the taint of interest which would affect his advice, *should put clearly before the person what the nature and consequences of the act are* . . . . The donor should be for the time being removed entirely from the suspected atmosphere, and from the clear language of an independent mind he should know precisely what they are doing". In *Inche Noriah v. Shaik Ali* [1] the Privy Council dealt with a case where the donor had in fact consulted an independent lawyer who, however, did not possess "a knowledge of all the relevant circumstances" which was essential to the best independent advice which "a competent and honest adviser would give if acting solely in the interests of the donor." The gift was set aside. In the present case, it cannot be pretended that Mr. Hamid stood in the position of an independent adviser when his services were procured merely to draft and attest the deed of gift. He was not retained to give any advice to the plaintiff and, in the words of Lord Hailsham in the case to which I have referred, there was really no occasion for him to "bring home to the plaintiff the consequences to himself of what he was doing or the fact that he could more prudently, and equally effectively, have benefited the donee without undue risk to himself by retaining the property in his own possession during his life and bestowing it upon the donee by his will".

It would seem that the decision of the Privy Council in *Inche Noriah's* case has to some extent modified the rigours of the equitable doctrine laid down earlier in *Liles v. Terry* (*supra*). The present rule, in its modified form, is that the donee must rebut the presumption of undue influence by proof of circumstances which satisfy the Court that the gift was the result of the free exercise of the donor's independent will. "The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained by some independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the donee (i.e., the solicitor or the relative in whom the solicitor has a special interest) and with a full appreciation of what he was doing". Lord Hailsham has taken the view that such proof *may often be "the only means by which the donee can rebut the presumption"*, and any proctor placed in Mr. Wadood's position would be well advised to assume that no other method of removing the suspicion created by the situation is likely to satisfy a Court of law.

The principles which are enunciated in the authorities emphasise the importance, from the point of view of public policy, of "insisting that a gift made under circumstances which give rise to the presumption of undue influence must be set aside unless the donee is able to satisfy the Court of facts sufficient to rebut the presumption". In the present case I am content to say, without casting any aspersions on the *bona fides* of Mr. Wadood, that the presumption of undue influence, which was created by the existing professional relationship in which he stood towards the plaintiff, has not been rebutted. The plaintiff was entitled, before making over his valuable residential house to his proctor's wife, to receive independent advice which in this case was not made available to him.

[1] (*1929*) *A. C. 127.*

I would therefore set aside the judgment of the learned District Judge and enter a decree setting aside the deed of gift No. 1149 dated June 21, 1943. The plaintiff is entitled to the costs of the argument in this Court, but in all the circumstances of the case I would make no order as to the costs of the trial as between the plaintiff and the 1st defendant. He has unnecessarily, and with little regard for the truth, exaggerated the grounds on which his cause of action was based. With regard to the costs of the defendants who were substituted as parties in the place of Mr. Wadood on his death, it seems to me that there was no need to join them in the proceedings. I would therefore order the plaintiff to pay to these defendants their costs both here and in the Court below.

In the view which I have taken, I do not propose to discuss the difficult question whether, and to what extent, the proviso to section 3 of the Muslim Intestate Succession and Wafks Ordinance (Cap. 50) has altered the earlier law affecting donations under the Muslim Law. With regard to the preliminary objection raised by Mr. Jayawardene to the constitution of this appeal, I agree so entirely with the observations made by my brother Pulle in his separate judgment that it is unnecessary to add to anything which he has said. It is very much to be hoped that the Civil Appellate Rules will be amended at any early date so as to authorise Judges to grant relief to appellants where, as in this case, a technical breach of the rules has caused no prejudice to the other side. To my mind, it would be a travesty of justice if some mere technicality were to deprive a party of his right of appeal to the Supreme Court from a judgment which seriously affects his interests. Until the present rule is relaxed, I see no reason why the revisionary powers of this Court should not be exercised in appropriate cases.

PULLE J.—

I agree that the deed of gift No. 1149 dated June 21, 1943, should be set aside for the reason given in the judgment of my brother Gratiaen. I cannot help feeling that Mr. Abdul Wadood was erroneously, though in good faith, under the impression that if the deed in question was drafted and attested by a notary other than himself, its validity could not be challenged on the ground that the donee was his own wife. The relationship in which Mr. Wadood stood to the plaintiff rendered it imperative that before he executed the deed the plaintiff should have received independent advice as to the full implications of the step he intended to take. The burden was on the 1st defendant to rebut the presumption of undue influence arising from the fact that Mr. Wadood was the plaintiff's legal adviser. This burden has not been discharged.

There remains the submission, raised as a preliminary objection, that in view of the provisions contained in rule 4 (*a*) of the Civil Appellate Rules, 1938, it was not competent for this Court to entertain an appeal which had abated before the record and brief were sent up. The facts which give rise to the preliminary objection are as follows: The petition of appeal was tendered on April 27, 1949, with stamps to the value of Rs. 30 for the Supreme Court judgment and Rs. 15 for the certificate in appeal. Rule 2 requires the appellant to apply in writing for type-written copies of the record, tendering along with the application the

fees prescribed in the Schedule to the Rules. The Proctor for the appellant made an application in writing dated April 26, 1949, addressed to the Secretary of the District Court for a typewritten copy of the case. He stated that the value of the land which was the subject matter of the action was Rs. 20,000. It is clear from the schedule to the Rules that the fee payable for a typewritten copy in a case falling under the class Rs. 20,000 and above is Rs. 25. The mistake made by the appellant's Proctor was that instead of tendering Rs. 25 he tendered Rs. 20. Without objection on the part of the Court Secretary or of the respondents the sum tendered was accepted and the application for a typewritten copy was registered presumably on the basis that it was entirely in order. On the same day the Court ordered that the record be forwarded to the Supreme Court in due course. There were no further steps to be taken by the appellant because the respondents waived in writing security, notice of security and notice of appeal. In the then known state that the appellant had tendered only Rs. 20 and not Rs. 25 the respondents, nevertheless, consented expressly to the case being forwarded to the Supreme Court. Having regard to the trifling difference involved, there is no room to doubt that both the Proctor for the appellant and the Court inadvertently overlooked that the sum tendered was less by Rs. 5.

Mr. Jayawardene takes up the position that the failure to comply with the rules is manifest and that the appeal had abated in consequence of this failure. The reply is twofold. It is urged that the rule declaring the appeal to have abated is *ultra vires* and that if it is not *ultra vires* the failure to tender the proper sum of Rs. 25 was not fundamental and did not therefore amount to a substantial default. The argument of *ultra vires* was put forward in the case of *Palaniappa Chettiar et al. v. Mercantile Bank* [1] but was not considered by the learned Judges who heard that appeal. It seems to me that the provision in section 14 (1) (*e*) of the Interpretation Ordinance (Cap. 2) that all rules which have been submitted to the Legislature and have not been annulled have upon publication in the *Gazette* " the force of law as fully as if they had been enacted in the Ordinance " under which they are made is a sufficient answer to the argument of *ultra vires*. Even otherwise, it is difficult to maintain that a body empowered to enact rules of practice to supplement the Civil Procedure Code is barred from laying down what the consequences would be if a step in the procedure is not complied with.

In regard to the second argument I entertain considerable doubt as to whether the requirements of rule 2 (1) can be divided into those which are fundamental and those which are not. One cannot help feeling that in *Palaniappa Chetty's case* the distinction was drawn in order to mitigate the harsh results of holding that an appellant who did not conform to the letter of the rule was beyond relief. That part of the rule which states that the application " shall be accompanied by the fees prescribed " in the schedule is clearly fundamental. It strikes one as unfortunate that whereas the Legislature has made express provision in section 756 (3) of the Code to relieve an appellant from mistakes, omissions or defects in complying with section 756 (1) there is no corresponding rule to enable the Court to grant relief in respect of mistakes or omissions in applying

[1] *(1942) 43 N. L. R. 121.*

for typewritten copies. The frequency with which objections based on non-compliance with the rules are taken and the extremely harsh manner in which they operate in certain cases are grounds which call for an urgent amendment of the rules.

The respondents have not been in any manner prejudiced by the fact that the appellant in applying for the typewritten copy paid only Rs. 20 instead of Rs. 25. None the less we have kept in mind that the hearing was, as a matter of indulgence, by way of revision. In the ultimate result we have the satisfaction of knowing that we have interfered with the judgment of the learned District Judge substantially on a point of law only.

I agree to the proposed order as to costs.

Judgment set aside.