Present : Bertram C.J. and De Sampayo J. 1921.

FERNANDO *v.* FERNANDO.

37—D. C. Chilaw, 5,136.

Security for costs of appeal—May proctor execute bond ?—Bond executed by proctor in his office in favour of Secretary—Is bond valid ?

Where a deed is tendered as security for costs of appeal and that security has been approved, and the security bond is merely executed as an ancillary matter to give effect to the arrangement, the proctor has sufficient authority by virtue of his proxy to execute a hypothecary bond on behalf of his client.

A bond hypothecating immovable property as security for costs of appeal may be executed before the Judge or the Secretary of the Court, and when the bond was executed by the proctor in his office in favour of the Secretary without complying with the provisions of section 2 of Ordinance No. 7 of 1840, the bond was held to be invalid.

A bond given to the Secretary of the Court cannot be considered as a bond given to the Crown, and does not come within section 20 of Ordinance No. 7 of 1840.

THE facts appear from the judgment.

A. St. V. Jayawardene, K.C. (with him *H. W. Perera*), for appellants.

E. W. Jayawardene (with him *Croos-Dabrera*), for respondents.

October 19, 1921. BERTRAM C.J.—

Two preliminary objections have been taken in this case. The objections are to the security bond executed with regard to the costs of the appeal. The first objection is that the bond was not executed by the party, but only by his proctor. The second objection is that it was not executed either before the Judge or the Secretary in accordance with the established practice.

With regard to the first point, that has never been fully considered by this Court. There have been conflicting opinions expressed probably with regard to the special circumstances of the cases. But it has never come before this Court for formal decision. In the view we take of this case, it is not necessary to give a decision now. But it may be observed that where a deed is tendered as security and that security has been approved, and the security bond is merely executed as an ancillary matter to give effect to the arrangement, there seems very good ground for saying that the proctor has sufficient authority by virtue of his proxy to execute a hypothecary

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bond on behalf of his client. The more serious point, however, is as regards the manner in which the bond is executed. We have had occasion to consider this question before in the case of *Mohammaddo Thamby v. Pathumma*.[1] We there proceeded on the basis of an old decision (*Queen's Advocate v. Tamba Pulle*[2]). That case established an exception to the general statutory rule that every mortgage of immovable property must be executed in accordance with the requirements of Ordinance No. 7 of 1840. The Court in establishing that exception said that the provisions of section 2 of the Ordinance No. 7 of 1840 evidently referred to conventions between parties, and not to judicial hypothecs constituted as this is by the order of the Court. That exception has ever since been recognized. The question is what did the Court mean by establishing it. I think it meant to rule that the requirements of section 2 of Ordinance No. 7 of 1840 were not intended to apply to hypothecary bonds executed as an incident in judicial procedure before the Court. It is quite true that the requirements of the rules and orders of that day under which the security bond had to be executed in the presence of the Court have disappeared from our legislation. But the practice has still remained that bonds of this description should be executed either before the Judge or before the Secretary as representing him. In considering the extent to which the exception applies at the present day, I do not think that it is possible to leave that circumstance out of account. I do not think the Court would ever have said that the provisions in question did not apply to a bond given to the Secretary of a Court merely because he was the Secretary.

Mr. A. St. V. Jayawardene in this case asks us to extend the exception to cover a case in which a proctor acting on behalf of his client executes a bond in his own office and afterwards files it in Court. He suggests that the mere order of the Judge that documents should be filed brings it sufficiently to the cognizance of the Court to bring the exception into force. I think that it would be departing from the principle of the exception and establishing a dangerous practice, and it appears to me that the preliminary objection on this point is good.

There is a further point. We suggested in the case above referred to that possibly a bond given in favour of the Secretary of the Court, *virtute officii*, might be considered as a bond given to the Crown, and, therefore, an instrument to which the Crown was a party within the meaning of section 20 of Ordinance No. 7 of 1840. I regret that on consideration I cannot take this view. It has been held in the case of *Moldrich v. Cornelis*[3] that the Secretary of a Court, whether acting under section 751 of the Civil Procedure Code, or under the implied enactments containing references to the

[1] *1 C. L. Recorder 26.*

[2] *(1859) 3 Lor. 303.*

[3] *(1910) 14 N. L. R. 97.*

Secretary in the forms attached to the Code, is acting as a corporation sole or *quasi* corporation sole. If this is the capacity in which he acts, I do not think that he can be treated as though he were the representative of the Crown, and it appears to me, therefore, that the case cannot be brought within section 20 of Ordinance No. 7 of 1840. The preliminary objections will, therefore, be allowed.

There will be no order as to costs of appeal.

DE SAMPAYO J.—I agree.

Objection upheld.