1959 *Present:* **Weerasooriya, J., and H. N. G. Fernando, J.**

THE ATTORNEY-GENERAL, Appellant, *and* M. W. SILVA, Respondent

S. C. 366—Application for an extension of time to print the record for transmission to the Privy Council in S. C. 785 D. C. Colombo 34746/M

Proctor—Requirement of proxy—Replacement of Proctor on record by a Proctor without a proxy—Permissibility—Appellate Procedure (Privy Council) Order, 1921, Paragraphs 6, 11, 18—Civil Procedure Code, ss. 25, 27.

Even assuming that an unsigned proxy in favour of a Proctor may be subsequently rectified, a complete omission to file the act of appointment of a Proctor within the prescribed time cannot be subsequently supplied.

In terms of Paragraph 6 of the Appellate Procedure (Privy Council) Order, 1921, a party appealing to the Privy Council had, on 5th December 1958, appointed Proctor S to act for him in connection with the proceedings in the Supreme Court. On 28th April 1959 the Supreme Court had granted an extension of time until 28th July 1959 for the purpose of printing the record of the case. The present application for further extension of time was filed on 18th July 1959. It was filed and signed, not by Proctor S, but by Proctor L, and was heard by Court on December 21, 1959. Objection was taken on behalf of the respondent that at the time of the filing of the present application no document had been filed appointing Proctor L to act for the appellant.

Held, that the failure to file the appointment of the new Proctor precluded the Supreme Court from entertaining the application filed by him and that the defect could not be cured by the appointment being filed *after* the application was made.

APPLICATION for an extension of time to print the record of a case for transmission to the Privy Council.

J. W. Subasinghe, Crown Counsel, for the defendant-petitioner.

E. R. S. R. Coomaraswamy, with *Neville Wijeratne* and *M. Amerasingham*, for the plaintiff-respondent.

Cur. adv. vult.

December 21, 1959. H. N. G. FERNANDO, J.—

This is an application under Paragraph 18 of the Appellate Procedure (Privy Council) Order, 1921, for an extension of the time allowed by Paragraph 11 of the same Order for the printing of the record of the case for the purposes of transmission to the Privy Council. On 28th April 1959, this Court had granted an extension of time for printing until 28th July 1959, and, in anticipation of further time being required, the present application for further extension was filed in this Court on 18th July 1959.

The party making the present application, who is also the appellant in the proposed appeal to the Privy Council, is the Attorney-General. In terms of Paragraph 6 of the Order mentioned above, there had been filed in the Registry of this Court an instrument dated 5th December 1958 by which the appellant appointed Proctor A. H. M. Sulaiman to, act for the appellant in connection with the appeal.

The present application has been filed and signed, not by Mr. Sulaiman but by Proctor S. C. O. de Livera, and the objection has been taken that at the time of the filing of the application no document had been filed in terms of Paragraph 6 appointing Mr. de Livera to act for the Attorney-General in connection with the appeal. Counsel has argued in addition, that, in conformity with section 27 of the Civil Procedure Code, leave of Court should first have been obtained for the revocation of the proxy previously held by Mr. Sulaiman and that a proxy in favour of Mr. de Livera should have been filed under Paragraph 6 either before, or contemporaneously with, the present application.

It seems clear that, if an appellant desires to be represented by a Proctor, other than the one whose act of appointment has previously been filed in terms of Paragraph 6 or the one who by implication is recognized by that Paragraph as the party's Proctor for the purposes of the appeal, a document appointing the new Proctor must be filed under that Paragraph. In the absence of such a " new " appointment, neither the Registrar nor the Court, nor the opposing party, can be expected to regard any act or application of a " new " Proctor as being verily done or made on behalf of the appellant. Indeed a proxy in his favour is a *sine qua non* to enable any Proctor to take any step on behalf of a litigant in a civil action. The only question for our decision is whether the failure to file the appointment of the new Proctor absolutely precludes this Court from entertaining an application filed by him, or whether

on the other hand the defect can be cured by the appointment being filed *after* the application is made. In the present instance, the revocation of the proxy of Mr. Sulaiman, and an appointment in favour of Mr. de Livera, were filed with the Registrar on 14th August 1959.

Crown Counsel has sought to rely on the decision in *Aitken, Spence & Co. v. Fernando*[1]. In that case, there had been a reference to arbitration under section 676 of the Code signed by the Proctors for the plaintiffs on record; the Proctors purported to act by virtue of a special authority referred to in that section. But the special authority had, in relation to some of the plaintiffs, been signed not by themselves but by the holders of their powers of attorney. In an appeal against the award, the objection was taken that these powers of attorney or copies thereof had not been filed in Court as required by section 25 (*b*) of the Code, and that the reference to arbitration was bad for that reason. During the course of the argument in appeal, the Court (Bonser, C.J. and Moncrieff, J.) intervened to express the opinion that the powers of attorney may be filed at any stage of the case. The Court's reasons for this opinion were not stated in the judgment, and I am therefore not in a position to consider whether their reasons would be applicable in a case where there has been a failure to file, not a power of attorney to a recognized agent, but the appointment of a Proctor for a party.

A decision more directly in point is that of *Tillekeratne v. Wijesinghe*[2]. In that case, the plaintiff's action had been dismissed in the lower Court on default of his appearance, and on appeal to this Court it was discovered that the proxy in favour of the plaintiff's Proctor, though duly filed in the lower Court, had not been signed by him. The Court in rejecting the contention that an unsigned proxy was void made the following observations :—

> " Section 27 enacts that 'the appointment of a proctor to make any appearance or application or do any act as aforesaid shall be in writing signed by the client and shall be filed in Court.' In my opinion that is only directory. If a plaintiff appearing throughout the action by a proctor, whom he has instructed to act for him, but whose proxy he had forgotten to sign, were to recover judgment, and if the omission to sign were then discovered and the proxy signed, the Court could not, in my opinion, hold that the whole of the proceedings on the part of the plaintiff up to and including the judgment were void because of the non-signature of the proxy; or, if the plaintiff failed in the action and it was dismissed with costs, the Court could not hold that the decree under such circumstances was of no effect against the plaintiff. No doubt the enactment means, though it does not in terms say so, that the appointment is to be signed and filed before the proctor does anything in the action. But if the omission to sign is not because the proctor has not in fact any authority, and if the client afterwards ratifies what has been done in his name by signing the authority, in my opinion that satisfies the requirements of the enactment ".

[1] (*1900*) *4 N. L. R. 35.*

[2] (*1908*) *11 N. L. R. 270.*

It has to be noted that the construction placed on sections 25 and 27 of the Code in these two decisions were in the nature of *obiter dicta*, for in each instance the party taking the objection was in any event successful on other grounds. Moreover, in each of them, the default was not noticed or relied on in the lower Court, but only at the hearing of the appeal. The decisions are therefore not clear authority for the proposition that a defendant on being served with summons cannot successfully object to the exercise of the Court's jurisdiction on the ground that a proxy or power of attorney has not been duly signed or filed.

In *Kadirgamadas et al. v. Suppiah et al.*[1] there had been an action by the plaintiff against two defendants. The original plaintiff and the original first defendant both died after the institution of the action. An order had been made on 4th June 1951 substituting five persons in place of the deceased plaintiff, but this order was subsequently set aside on 4th April 1952 by another Judge who instead substituted one Suppiah. In place of the deceased first defendant, certain other defendants including the former second defendant had been substituted. It would appear however that although the original second defendant had signed a proxy in favour of Proctor Nalliah, the other defendants who were substituted in place of the deceased first defendant had not signed a proxy in favour of Mr. Nalliah or any other Proctor, at the proper time. On 25th April 1952 a petition of appeal was filed, on behalf of all the defendants, against the order for substitution made on 4th April 1952. At the hearing of the appeal a preliminary objection was taken on the ground that Mr. Nalliah had no authority to sign the petition of appeal on behalf of those defendants who had not by that time executed a proxy in his favour. In fact such a proxy had been filed only on 8th May 1952, i.e. after the appealable time had expired.

Nevertheless Gunasekara, J., held that the irregularity in the appointment of Mr. Nalliah had been cured by the subsequent filing of the proxy in his favour. This opinion was to a great extent based on the view taken in *Tillekeratne v. Wijesinghe*[2] that the requirements of section 27 of the Code are merely directory. But the learned Judge was careful to point out that from 16th November 1951 until 21st March 1952 Mr. Nalliah had acted on behalf of all the defendants in connection with the application for substitution ultimately decided on 4th April 1952, the order upon which was the subject of the appeal. He also referred to the case of *Silva v. Cumaratunga*[3] where it had been held that if there is a Proctor on record, the petition of appeal must be signed by him because " this Court cannot recognize two proctors appearing for the same party in the same cause". It seems to me that the decision in *Kadirgamadas et al. v. Suppiah et al.*[1] does not assist the appellant in the present application for two reasons :—firstly the proxy filed in that case after the date of the petition of appeal was entertained partly at least because the Proctor had previously functioned without objection taken that he lacked a proxy, and secondly that decision recognized the principle that a Proctor on record cannot be replaced by a Proctor without a proxy. To entertain the present application which was made

[1] *(1953) 56 N. L. R. 172.* [2] *(1908) 11 N. L. R. 270.*

[3] *(1938) 40 N. L. R. 139.*

by Mr. de Livera at a time when the "current" appointment under Paragraph 6 of the Appellate Procedure (Privy Council) Order, 1921, was in favour of Mr. Sulaiman, would be to act contrary to that principle.

If a plaintiff in default can be permitted to rectify his omission even when the default is pointed out at the earliest possible time, and does not in such an event have to file a fresh plaint, decisive consequences may follow. For example, although rectification may take place at a time when the cause of action sued upon has become prescribed, the fact that the plaint was filed within time will render the action nevertheless maintainable. Similarly, if one were to consider the case of an appeal to the Privy Council, which must be filed within 30 days of the date of the judgment of the Supreme Court: suppose the application for leave to appeal is filed within time by a Proctor, but no instrument of his appointment is filed within the 30 days under Paragraph 6 of the Order, can it be held that the application for leave has been duly made if, after objection taken by the respondent, the omission to file the appointment is rectified at some subsequent date? It seems to me that in such an event the respondent can properly maintain that there has been no due application for leave to appeal. Even if the decision in *Tillekeratne v. Wijesinghe*[1] has to be followed, that would mean only that an unsigned act of appointment can be subsequently rectified, but not that a complete omission to file the act of appointment can be subsequently supplied.

If we were now to decide that applications of the present kind can be entertained although made by Proctors in respect of whom the requisite acts of appointment have not been filed previously or contemporaneously, we would be providing a dangerous precedent for the excuse of lapses on the part of Proctors and parties in complying with the procedure set out in the various enactments concerning appeals to the Privy Council and applications connected therewith.

I would refuse the application with costs fixed at Rs. 157/50.

WEERASOORIYA, J.—I agree.

Application refused.

[1] *(1908) 11 N. L. R. 270.*