1957 *Present :* **Basnayake, C.J., Pulle, J., K. D. de Silva, J., Sansoni, J., and L. W. de Silva, A.J.**

THE UNIVERSITY OF CEYLON, Petitioner, *and* E. F. W. FERNANDO, Respondent

S. C. 568—In the matter of an Application for Conditional Leave to Appeal to the Privy Council in S. C. 559 D. C. Colombo 28,909

Privy Council—Application for conditional leave to appeal —Notice thereof to opposite party—Personal service not necessary—Appeals (Privy Council) Ordinance (Cap. 85), Schedule, Rule 2—Appellate Procedure (Privy Council) Order, 1921, Rules 5, 5A, 6.

Rule 2 of the Schedule to the Appeals (Privy Council) Ordinance reads as follows :—

" Application to the court for leave to appeal shall be made by petition within thirty days from the date of the judgment to be appealed from, and the applicant shall, within fourteen days from the date of such judgment, give the opposite party notice of such intended application. "

Held, that the Rule does not require personal service of the notice required to be given thereunder and that Rules 5 and 5A of the Appellate Procedure (Privy Council) Order, 1921, have no application to it. Accordingly, where the post is used as a medium of transmitting the prescribed notice, the applicant is required to do nothing more than send, in due time, a properly addressed prepaid letter containing the name and address of the opposite party.

Fradd v. Fernando (1934) 36 N. L. R. 132, overruled.

APPLICATION for conditional leave to appeal to the Privy Council. The hearing of this application was referred to a Bench of five Judges under Section 51 (1) of the Courts Ordinance.

H. W. Jayewardene, Q.C., with *John de Saram*, for Applicant-Appellant.

Colvin R. de Silva, with *Walter Jayawardena, K. Shinya* and *M. Hussein*, for Respondent-Respondent.

Cur. adv. vult.

July 31, 1957. BASNAYAKE, C.J.—

This is an application by the University of Ceylon (hereinafter referred to as the University) for leave to appeal to the Privy Council from the Judgment of this Court delivered on 28th November 1956.

Rule 2 of the Rules in the Schedule (hereinafter referred to as Scheduled Rule 2) to the Appeals (Privy Council) Ordinance requires an applicant for leave to appeal to the Privy Council—

(*a*) to give, within fourteen days from the date of the judgment to be appealed from, the opposite party notice of his intention to apply for leave, and

(*b*) make an application to this Court by petition within thirty days from the date of such judgment.

The present application has been made within the prescribed time; but the opposite party (hereinafter referred to as the respondent) opposes it on the ground that the University has not given the prescribed notice. It is not disputed that failure to give the prescribed notice is fatal to this application. This Court has all along taken the view that the provision of Scheduled Rule 2 as to notice is imperative and that compliance therewith is a condition precedent to the reception of an application for leave to appeal.

Learned counsel on behalf of the University claims that it has in the instant case complied with the requirements of Scheduled Rule 2 by doing the following acts :—

(*a*) By sending by registered post on 6th December 1956 two notices directed to the respondent, one signed by the Vice-Chancellor and Registrar of the University and sealed with its Seal, and the other signed by the Proctor for the University, to each of the following places :—

(i) No. 82 Barnes Place, Colombo, the admitted residence of the respondent, and

(ii) St. Peter's College, where at the material date the respondent was a teacher.

(*b*) By sending by registered post on 6th December 1956 to the address for service given in the Proxy of the Proctor who represented the respondent both at the trial and in the appeal to this Court, two notices in the same terms and signed by the same persons who signed the notices sent to the respondent.

(*c*) By handing to the same Proctor personally two similar notices on 11th December 1956, before the expiry of the period of fourteen days.

All the notices sent on 6th December 1956 were delivered on 7th December 1956 at the respective addresses. Learned counsel for the University submits that all the notices satisfy the requirements of Scheduled Rule 2.

The respondent has filed an affidavit in which he says that on 7th December, the day on which the notices were delivered both at 82 Barnes Place and at St. Peter's College, he left his residence at 8 a.m. before the letters were delivered there, for the purpose of invigilating at a term test at St. Peter's College, where he worked from 8.45 a.m. to 10.30 a.m. From St. Peter's College he went to the National Museum and worked there till 4.30 p.m., and came back to the College where he helped at its Christmas Fete till 7.30 p.m. and later left for Peradeniya by the 8.15 p.m. train without going back to his house. He returned to Colombo on the night of 16th December 1956 and was handed the letters containing the notices by his mother the next morning. The respondent also states that on being informed on 21st December by his Proctor, Lucian Jansz, that notices addressed to him had been sent by post to the care of the Rector, St. Peter's College, he went to the College and found them lying on a table in the Masters' Room.

On these facts learned counsel for the respondent submitted

(a) that notice as required by Scheduled Rule 2 has not been given,

(b) that a notice under that Rule to be effective must reach the respondent, in the sense of his becoming aware of it, or of the notice coming to his knowledge, within the prescribed period of fourteen days,

(c) that the delivery of a notice at the respondent's residence without proof that he read the notice or otherwise became aware of it within the fourteen days, is not notice as contemplated in Scheduled Rule 2,

(d) that the delivery of a notice at the place where the respondent is employed, without proof that he read the notice or otherwise became aware of it within the fourteen days, is not notice as contemplated in Scheduled Rule 2,

(e) that the notice given to and served on the Proctor who represented the respondent at the trial of the action and in the appeal to this Court does not amount to giving notice to the respondent as the Proctor had no authority to act for him beyond the terms of his Proxy which did not expressly authorise him to receive a notice given under Scheduled Rule 2,

(f) that even if the Proctor who represented him at the trial can be regarded as his agent the delivery of a notice to him in the absence of a special authority under Procedural Rule 6 of the Appellate Procedure (Privy Council) Order, 1921, does not satisfy the requirement of Scheduled Rule 2 in view of the decision of this Court in *Fradd v. Fernando* [1].

We have had the advantage of a full argument by learned counsel on both sides and we have been referred to a number of decisions both of this Court and of the Courts in England. It is not necessary for the purpose of this judgment to refer to most of the cases cited and only those which have a direct bearing on the questions arising for decision will be mentioned herein.

It is an established principle that where personal service is required it must be so stated in express words in the enactment and in the absence of such words a notice required to be given by a statute may be given in any other way. (*Reg. v. Deputies of the Freemen of Leicester* [2], *Ex parte Portingell* [3]). Our Civil Procedure and Criminal Procedure Codes and the Insolvency Ordinance contain examples of such express provisions prescribing personal service. The words "give", "send", "deliver", and "serve" by themselves are not to be regarded as connoting personal service. In certain contexts they have been held to mean merely send or despatch or transmit (*vide Retail Dairy Company Ltd. v. Clarke* [4] and the Judgment of Buckley L.J. in *Browne v. Black* [5]). In other contexts they have been held to mean not only sent, despatched or transmitted but also sent, despatched or transmitted and received at the other end. (*vide*

[1] *(1934) 36 N. L. R. 132.*
[2] *117 E. R. 613 at 615.*
[3] *(1892) L. R. 1 Q. B. 15 at 17.*
[4] *(1912) 2 K. B. 388.*
[5] *(1912) 1 K. B. 316 at 322.*

Judgments of Vaughan Williams and Kennedy, L.JJ. in *Browne v. Black*[1].) The decisions of this Court have recognised the use of the post as a means of giving the notice required by Scheduled Rule 2 and learned counsel for the respondent does not seek to question the right of an applicant for leave to send the prescribed notice by post. Where the post is used as a medium of transmitting the prescribed notice, is an applicant for leave required to do more than send, in due time, a properly addressed prepaid letter containing the name and address of the opposite party ? We think not, for it is not in his power to do more. Besides, it is well established that " where a letter, fully and particularly directed to a person at his usual place of residence, is proved to have been put into the post-office, this is equivalent to proof of a delivery into the hands of that person ; because it is a safe and reasonable presumption that it reaches its destination "—per Abbott, Ld. C.J. in *Walter v. Haynes*[2]. Although the law does not require that the registered post should be used it is the practice of cautious persons (as in the instant case) to adopt the safeguard of registering the letter so that proof of its delivery at its destination could be adduced should it become necessary to do so.

Now when we turn to Scheduled Rule 2 we find no express words requiring personal service. The requirement of " giving notice " is therefore satisfied by sending a notice by post. In our opinion the requirements of the statute are satisfied once the letter is despatched and reaches its destination within the prescribed period. The addressee may not be at his house, he may not choose to open the letter, he may destroy it, his servant or other person to whom the letter is handed by the postman may forget to give it to him ; but all these are not considerations which affect the act of the applicant once he has performed it in due time. To expect the applicant not only to send the notice in due time, but also to ensure that the respondent reads it or becomes aware of it within the prescribed period, is to ask the applicant to do the impossible. *Lex non cogit ad impossibilia* is a well-known maxim applicable to the interpretation of statutes. A statute should be construed so as not to place upon it an interpretation which requires the performance of the impossible. Without express words in that behalf we are not disposed to place on Scheduled Rule 2 the construction that learned counsel for the respondent seeks to place on it. We are unable to uphold his submission that not only must a notice sent by post be delivered to the address to which it is despatched but it must also " reach " the addressee in the sense that he must become aware of it by opening and reading the letter within the prescribed period.

We are of opinion that in the instant case notice was given the moment the letters reached No. 82 Barnes Place and St. Peter's College and that it is immaterial that the respondent was not at his residence at the time the letter was delivered and for nine days thereafter or did not read the notices till after the fourteen days. The duty cast on an applicant for leave to appeal being to give notice, once a notice in writing has been delivered at the usual place of residence of the opposite party in due time, the terms of the statute are satisfied and it is immaterial whether he reads the notice within the prescribed period or after it or never.

[1] *(1912) 1 K. B. 316 at 319 and 326.* [2] *(1824) 171 E. R. 975.*

In support of his contention that the delivery of the letter at the house of the respondent was sufficient, learned counsel for the University referred us to the following remarks of Lord Kenyon in *Jones v. Marsh* [1] :—

> " But in every case of the service of a notice, leaving it at the dwelling-house of the party has always been deemed sufficient. So wherever the Legislature has enacted, that before a party shall be affected by any act, notice shall be given to him, and leaving that notice at his house is sufficient. "

The view we have formed is in accord with the observations quoted above, and in our opinion they apply with equal force to a letter delivered by post.

The soundness of this principle has been reaffirmed by Lord Chief Justice Abbott in *Doe dem. Neville v. Dunbar* [2] and in the later case of *Tanham v. Nicholson* [3], by Lord Westbury where he pointed out that owing to the looseness of the language in some of the later judgments the erroneous notion grew that it was competent to meet the evidence of delivery by counter testimony and to prove that the notice never reached the person for whom it was intended.

The argument of this case proceeded on the assumption that Scheduled Rule 2 is not satisfied unless the notice is in fact delivered at the address of the respondent within the period of fourteen days. The question whether a notice posted within the prescribed period and in fact delivered after it, owing either to delay or mishap in the post or on account of the letter having been posted without allowance being made for its delivery in the ordinary course of post at the address of the opposite party within the period, is a valid notice, does not arise for decision here, and we do not therefore propose to refer to it in this judgment although it was discussed at length in the course of the hearing and the decision of this Court in *Balasubramaniam Pillai v. Valliapa Chettiar* [4] was cited in support of the argument that it is sufficient if the notice is sent within the fourteen days even though it is delivered to the opposite party after that period.

Counsel for the University contended that a mere sending or despatching of the notice within the fourteen days was sufficient while counsel for the respondent maintained that not only must the notice be delivered at the address of the respondent within the fourteen days but it must also reach him in the sense of his being made aware of it within that period.

Our opinion that the University has complied with Scheduled Rule 2 disposes of this application. But as this application was referred to a Bench of five Judges for the purpose of deciding the further question whether Rules 5 and 5A of the Rules made under section 4 of the Ordinance (hereinafter referred to as the Procedural Rules) were applicable to the giving of notice under Scheduled Rule 2, it is necessary to deal with it as the conclusion we have come to is in conflict with the previous decisions of this Court.

[1] *(1791) 100 E. R. 1121.*
[2] *(1826) 173 E. R. 1062.*
[3] *(1871-2) 5 L. R. H. L. English and Irish Appeals 561 at 573 and 574.*
[4] *(1938) 40 N. L. R. 89.*

It appears to have been assumed in all the previous cases that Procedural Rule 5 prescribed a mode of serving the notice required to be given under Scheduled Rule 2. The principle which we have stated above, that where personal service is not expressly required by a statute it should not be construed as requiring personal service does not seem to have been given due consideration in the previous decisions. We have no reason to doubt the soundness of that principle and we do not see how, without doing violence to it, Procedural Rule 5 can be said to prescribe the mode of giving notice under Scheduled Rule 2. Procedural Rule 5, which prescribes that " a party who is required to serve any notice may himself serve it or cause it to be served, or may apply by motion in Court before a single Judge for an order that it may be issued by and served through the Court ", can therefore have no application to a rule which does not require personal service. The Schedule is a part of the enactment, and to hold that Procedural Rule 5 controls the Schedule would amount to saying that a subsidiary rule can over-ride the enabling enactment. It is well settled that a rule made under an enactment cannot derogate from the enactment itself and where a subsidiary rule is inconsistent with the enabling enactment it must yield to the enactment. If Procedural Rule 5 was designed to apply to Scheduled Rule 2 it would clearly be *ultra vires*. There is no ground for assuming that the rule-making authority intended to make a rule which is clearly *ultra vires*. Procedural Rule 5 must be regarded as being *intra vires* of the enabling power, but as having no application to Scheduled Rule 2.

As stated above our opinion that Procedural Rule 5 does not prescribe the mode of giving the notice required by Scheduled Rule 2 is in conflict with the previous decisions of this Court, chiefly *Fradd v. Fernando* [1]. In that case it was held that Procedural Rules 5 and 5A should be read in conjunction with Scheduled Rule 2 and that as Procedural Rule 5 prescribes personal service the notice required by Scheduled Rule 2 should be served on the opposite party personally. We are unable to agree with that decision. Our reasons are—

(*a*) As stated in the earlier part of this judgment, Scheduled Rule 2 does not require personal service of the notice required to be given by it. A rule prescribing the mode of personal service cannot therefore apply to it.

(*b*) Procedural Rule 5 is made under section 4 of the Appeals (Privy Council) Ordinance which provides for the making of rules to be observed in any proceedings before the Supreme Court. The notice given under Scheduled Rule 2 not being a proceeding before the Supreme Court, Procedural Rule 5 can have no application to it. (*vide Hayley and Kenny v. Zainudeen* [2]; *Municipal Council, Colombo v. Letchiman Chettiar* [3].)

(*c*) Procedural Rule 5 is designed to apply to notices given after proceedings have commenced in Court while the notice prescribed in Scheduled Rule 2 is a step to be taken before the application for leave to appeal is made.

[1] *(1934) 36 N. L. R. 132.* [2] *(1923) 25 N. L. R. 312.* [3] *(1943) 44 N. L. R. 217 at 219.*

(*d*) A statute cannot be modified by rules made under it in the absence of express power in that behalf. To read Procedural Rule 5 as applying to Scheduled Rule 2 would amount to holding that the Schedule (which is part and parcel of the enactment) can be modified by rules made under it. Section 4 does not confer any power to make rules inconsistent or in conflict with the Ordinance. It would therefore be wrong to read Procedural Rule 5 as controlling Scheduled Rule 2.

(*e*) Procedural Rule 5 when read as applying to notices required to be given after proceedings have commenced is *intra vires* of the enabling enactment and should be read in that sense so as to give it validity.

In our opinion therefore *Fradd v. Fernando* (*supra*) has been wrongly decided and we accordingly over-rule it.

We wish to repeat that Scheduled Rule 2 does not require personal service of the notice required to be given thereunder and Rules 5 and 5A of the Procedural Rules have no application to it.

The application for leave is granted upon the condition that the appellant shall within a period of one month from the date of this judgment enter into good and sufficient security by depositing with the Registrar a sum of Rs. 3,000 and by hypothecating that sum by bond for the due prosecution of this appeal and the payment of all such costs as may become payable to the respondent.

We declare the University entitled to costs of the hearing into the respondent's objection.

PULLE, J.—I agree.

K. D. DE SILVA, J.—I agree.

SANSONI, J.—I agree.

L. W. DE SILVA, A.J.—I agree.

Application granted.