

Present : Hutchinson C.J. and Wood Renton J.

Oct. 3, 1910

MOLDRICH v. CORNELIS et al.

178—D. C. Galle, 9,941.

Bond by administrator and sureties for duly administering estate—Bond not strictly in Form 90, Schedule II.—Civil Procedure Code, ss. 538 and 751.

The administrator of the estate of an intestate and his sureties bound themselves to "D. M. Jansz, Secretary of the District Court of Galle, or to the Secretary of the District Court of Galle for the time being," in a penal sum.

Held, that the Secretary for the time being could sue on the bond, though it was not strictly in the form prescribed by section 538, Civil Procedure Code (Form 90, Schedule II.).

The Secretary may bring a separate action for enforcing the bond.

THE facts are fully set out in the judgments.

Elliott, for the defendants, appellants.—Section 538 of the Civil Procedure Code directs that the bond by an administrator and his sureties should be according to Form 90 of Schedule II. The bond sued upon is not in the form prescribed. Even if the bond were in the form specified, it is open to doubt whether the Secretary for the time being could sue upon a bond given under section 538, as the provisions of section 751 do not apply to section 538.

The Secretary of the District Court is not a corporation sole. The plaintiff in this case, who is the present Secretary, cannot sue upon the bond. The then Secretary (Jansz), who is still alive, must sue upon the bond; if Jansz be dead, his legal representative may sue upon it. See *Misso v. Kandappa*; ¹ *Lewis v. Ukkuwa Dureya*.²

De Jong, for the plaintiff, respondent.—The bond sued upon is substantially in Form 90. The form is so worded as to enable a Secretary for the time being to sue upon it. It is not necessary that section 538 should have expressly enacted that a successor could also sue on the bond.

Elliott, in reply.

Cur. adv. vult.

October 3, 1910. HUTCHINSON C.J.—

This is an action against the sureties on a bond. The bond was given under section 538 of Civil Procedure Code by the administrator of the estate of the late Samitchy Fernando, and is in the form

¹ (1899) 3 A. C. R. 48.

² (1908) 3 A. C. R. 46.

Oct. 3, 1910

HUTCHINSON
C.J.

Moldrich v.
Cornelis

prescribed by that section, viz., Form 90, but, perhaps, in the particulars, which I will presently mention, it does not precisely follow the form. By it the administrator and the defendants bound themselves to " D. M. Jansz, Secretary of the District Court of Galle, or to the Secretary of the District Court of Galle for the time being," in a penal sum, and the condition was that the administrator should duly administer the estate. The administrator admittedly made default, and was ordered to pay into Court a certain sum, which he failed to pay ; he was committed to prison for contempt of court for his default, and he has since died.

This action was brought, not by the original obligee of the bond, Jansz, but by the present Secretary of the District Court. The defendants objected that under section 538 this action cannot be maintained, but that the bond can only be enforced in a suit for the administration of the estate of S. Fernando, and also that the present Secretary of the Court cannot sue on it. And the issues were :—

- (1) Does a separate action lie ?
- (2) Can the present Secretary of the District Court sue ?

Section 538 enacts that the bond shall be in Form 90, and shall render the sureties responsible in any suit brought for the administration of the deceased person's property for all deficiencies, &c., attributable to the default of their principal. That section is part of chapter XXXVIII. Section 751 enacts that all bonds made under chapters XXXIX., XL., and XLI. shall (unless otherwise expressly or by indication directed) be expressed to be made with the Secretary of the Court for the time being, and that in the case of bonds so made, upon each occurrence of a change of Secretary, the new Secretary shall be deemed to take the place of the one whom he succeeds as obligee of the bond. This section, therefore, does not apply to the bond now in question, which was made under chapter XXXVIII. Form 90, " Form of security bond to be given by executor or administrator when required," refers to sections 521, 538, and 541 (all of which are part of chapter XXXVIII.), and by it the principal and sureties are bound " unto——, Secretary of the District Court of ——(or to the Secretary of the District Court of—— for the time being), in Rupees——, to be paid to the said Secretary, or Secretary for the time being." This form therefore gives a choice of two things : the bond may be either " to——, Secretary of the District Court of——," or it may be " to the Secretary of the District Court of—— for the time being " ; and the bond given in this case does not strictly conform to it. And, indeed, I find it difficult to understand a contract with " Mr. A. or Mr. B.," unless it means " Mr. A. and Mr. B." A bond to " the Secretary for the time being " is quite intelligible, and would be quite valid if the Legislature authorized

it. And in the case of a bond given under chapters XXXIX., XL., or XLI., the Legislature has expressly authorized it, or rather has directed (section 751) that it shall be so made. Why was section 751 not extended to bonds given under chapter XXXVIII.? Because, says the District Judge, that form of bond is already provided for in section 538 ; and I think that that is the true explanation, and that a bond under section 538 may either be made " to Mr. A. B., the Secretary of the District Court," or it may be made to " the Secretary of the District Court for the time being." I think that section 538 enacts that a bond given under it may be given to the Secretary of the District Court for the time being, and that, therefore, on a bond given in that form, the Secretary for the time being can sue, and that the Secretary for the time being can sue on this bond, although the bond is not strictly in the form prescribed.

As regards the first issue, I think that the latter part of section 538, which enacts that the bond can be enforced in a suit for the administration of the estate, does not mean that it can only be enforced in such an action. I would therefore dismiss the appeal with costs.

WOOD RENTON J.—

This case raises an interesting question of law as to the construction of section 538 of the Civil Procedure Code. The defendants-appellants were sued by the plaintiff-respondent, who is the Secretary of the District Court of Galle, on a security bond dated December 1, 1902, given by them for the due administration of the estate of one Samitchy Fernando by his administrator M. D. Christian, in Testamentary Case No. 3,418 of the District Court of Galle. The bond in question is substantially in Form No. 90 in Schedule II. of the Civil Procedure Code, and that form is referred to in the section as the one in which such a bond as we are here concerned with is to be given. The appellants in the bond of December 1 bind themselves to " David Mathew Jansz, Secretary of the District Court of Galle, or to the Secretary of the District Court of Galle for the time being." It was pointed out by the Chief Justice in the course of the argument that the terms of this bond do not strictly comply with Form No. 90, inasmuch as that form does not contemplate the granting of a bond in the alternative to an existing Secretary of the District Court, and at the same time to a Secretary for the time being. I should propose, however, to decide the present case on the footing that the appellants' bond does in effect comply with Form No. 90. At the date of this action, Mr. Jansz, the original first obligee, had ceased to be Secretary of the District Court of Galle. The respondent is Secretary of that Court for the time being ; and it is by him that the action has in fact been brought. The appellants contend, first, that the respondent is not a corporation sole, and has no title to sue ; and in the next place, that such an action as the present, in which

Oct. 3, 1910
 HUTCHINSON
 C.J.
 Moldrich v.
 Cornelis

Oct. 3, 1910

WOOD
RENTON J.*Moldrich v.
Cornelia*

the respondent claims judgment with interest for the sum stipulated for in the bond, is not maintainable, since the latter portion of section 538 of the Civil Procedure Code itself limits the liability of sureties in such a case as this to making good all deficiencies, depreciations, or loss of the property under administration which is attributable to the default of their principal. It is alleged by the respondent in the present case that Christian, the original administrator of the estate of Samitchy Fernando, was guilty, and, indeed, was convicted of and sentenced to imprisonment for, mal-administration, and that he has since died in jail, leaving no property whatsoever.

It is unnecessary to decide the second of these points, for, in my opinion, the appellants are entitled to succeed on the first. It has been held by this Court, and it is I think clearly good law, that a corporation sole must be a creation of the Legislature itself. The Secretary of the District Court is a corporation sole in those cases only where the law itself has invested him with that character. He possesses it, by virtue of section 751 of the Civil Procedure Code, as regards security bonds made under or in pursuance of Chapters XXXIX. (Lunacy), XL. (Appointment of Guardians), and XLI. (Appointment and Removal of Trustees). The present bond, however, was made under chapter XXXVIII., to which section 751 has no application. It has been held by the learned District Judge, in the order under appeal, that the reference in section 538 to Form 90 in Schedule II. and the alternative words used in that form—"Secretary of the District Court or the Secretary of the District Court for the time being"—amount to express legislation on the subject. I have had great difficulty in accepting that view. But I have come ultimately to the conclusion that it is right. The case for the appellants on this issue might be stated, I think, as follows. It has been held in England in *Dean v. Green*¹ and *R. v. Baines*² that it would be quite contrary to the recognised principles upon which Courts of Law construe Acts of Parliament to restrict the operation of an enactment by any reference to the words of a mere form given for convenience sake in a Schedule. It may fairly be argued, in my opinion, that it would be clearly unjustifiable to hold that the use of such words as we find in Form No. 90 can have the effect of investing the office of Secretary of the District Court with the qualities of a corporation sole in regard to security bonds under chapter XXXVIII.

On the other hand, it must be remembered that a schedule "is as much a part of the Statute, and is as much an enactment as any other part"—*Attorney-General v. Lamplough*³—and that, in the case with which we have here to deal, section 538 of the Civil Procedure Code directs that the bond shall be in the form which the schedule prescribed. That form makes provision for

¹ (1832) 8 P. D. 89.² (1840) 12 Ad. and E. 226.³ (1878) 3 Ex. Div. 229.

the granting of a bond to a Secretary of the District Court for the time being. I think that the Legislature must be taken to have intended to give effect to the language of the form itself. I cannot think of any reason why such provision should be created in the case of the security bonds dealt with in chapters XXXIX., XL., and XLI. of the Civil Procedure Code, and not as regards those required in chapter XXXVIII. On the whole, I am not prepared to say that the learned District Judge is wrong in the explanation which he offers of the omission in the text of section 538 of the Civil Procedure Code itself of any such provision as we find in section 751.

As regards the second issue, section 538 expressly enacts that the remedy created by the latter part of that section is subject "to the conditions of the bond". I do not think that the effect of section 538 is to release the obligor from liabilities created by the bond itself. I would dismiss the appeal with costs:

Appeal dismissed.

Oct. 3, 1910

WOOD
RENTON J.

*Moldrich v.
Cornelis*

