

Present : Ennis J. and Schneider A.J.

1921.

**MENIKHAMY v. PINHAMY.**

322—D. C. Chilaw, 5,725.

*Appeal—Security—Mortgage of immovables—Bond signed before Secretary—Ordinance No. 7 of 1840—Civil Procedure Code, s. 4.*

The mortgage bond hypothecating immovable property as security for appeal was signed by the principal and surety in the presence of the Secretary of the Court and one witness.

*Held*, that the security bond was in order, as Ordinance No. 7 of 1840 did not apply to a judicial hypothec.

**T**HE facts appear from the judgment.

*Samarawickreme* (with him *Croos-Dabrera*), for ninth defendant, appellant.

*Zoysa* (with him *H. V. Perera* and *M. W. H. de Silva*), for respondent.

September 15, 1921. ENNIS J.—

A preliminary objection has been taken to this appeal on the ground that the security bond is not in order. The bond is a mortgage of immovable property in favour of the Secretary of the Court, and has been signed by the principal and one surety in the presence of the Secretary of the Court and one witness.

It was urged that this bond did not conform with the provisions of Ordinance No. 7 of 1840 or Ordinance No. 17 of 1852. It would seem that this question was raised in the case of *Mohamado Tamby v. Pathumma*,<sup>1</sup> and it was there held that the existing practice in Ceylon should not be departed from, and that practice was referred to in the case of *Q. A. v. Tambapulle*,<sup>2</sup> which held that Ordinance No. 7 of 1840 did not apply to a judicial hypothec, and that under the Rules and Orders then existing, which had received legislative sanction after the passing of Ordinance No. 7 of 1840, it was sufficient to execute a bond in Court.

The forms given in the Rules and Orders referred to in the case of *Q. A. v. Tambapulle*<sup>2</sup> seem to support the contention that there was a special practice in the case of judicial hypothec.

I would follow the case of *Mohamado Tamby v. Pathumma*<sup>1</sup> with some diffidence, as I am not sure that section 4 of the Civil Procedure Code is sufficient to carry forward the practice which is in direct conflict with the express terms of Ordinance No. 7 of 1840 and Ordinance No. 17 of 1852. However, following the cases I have referred to, I would over-rule the objection.

SCHNEIDER A.J.—I agree.

*Objection over-ruled.*

<sup>1</sup> 1 C. L. R. 26.

<sup>2</sup> 3 Lorenz, 303.