1920.

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

COREA *v.* ASSISTANT GOVERNMENT AGENT, PUTTALAM.

56—D. C. Puttalam, 14.

Summons—Duty of proctors to prepare summons and tender same to Court—Civil Procedure Code, ss. 55 and 121 — Waste Lands Ordinance, No. 1 of 1897, s. 15.

Both under the Civil Procedure Code and in proceedings under the Waste Lands Ordinance summons to witnesses must be prepared by the proctors and submitted to Court for issue ; the Secretary is entitled to withhold any action for the purpose until forms have been submitted to him.

"The rule is not a rigid one. There obviously must be a certain elasticity, otherwise there must be some hardship to the poor litigants."

THE facts appear from the judgment.

H. J. C. Pereira (with him *Croos-Dabrera*), for the appellant.

Akbar, Acting S.-G. (with him *V. M. Fernando, C.C.*), for the respondent.

September 7, 1920. BERTRAM C.J.—

This case raises a question of procedure under section 15 of the Waste Lands Ordinance, No. 1 of 1897. The appellant in this case was a claimant under that Ordinance, and, after the case had been fixed for trial, he filed a motion in the District Court applying for the issue of summonses on certain witnesses. On a subsequent date —several days before the trial date—he inquired from the Secretary

whether the summonses had been issued. The Secretary intimated to him that the practice was, when summonses were applied for by a proctor, for the proctor so applying to furnish the forms of summonses for signature. This was in effect an intimation from the Secretary that before he could obtain an order for the issue of summonses he required the claimant, who in this case was represented by proctors, to furnish forms for the purpose. The claimant took no further steps on this intimation, but when the case came on for trial he applied for an adjournment, on the ground that the witnesses were not present, giving as a ground for their absence, that they were not duly summoned in accordance with the application. The District Judge refused an adjournment except on terms, these terms being that the claimant, whose action had led to the other side being in attendance, should pay the costs of the other side of the day. The claimant refused to accept these terms or to take part in the subsequent proceedings, and the District Judge, having heard the evidence of the Assistant Government Agent, dismissed the action, with costs.

It was contended before us on the appeal, that under section 15 the intention of the Legislature was, not only to provide a summary trial of the issues arising in cases under the Ordinance, but to relieve the parties of obligations they have under the ordinary civil procedure of taking steps to procure the attendance of their witnesses. The intention was, so it was argued, that when once the claimant or the Government Agent had intimated to the Court that he required the attendance of certain witnesses, the Court should take all necessary steps to procure their attendance, and itself issue the summonses without requiring any assistance for the purpose from the applicants. It was admitted that this was a departure from the existing practice under the Civil Procedure Code, but it was maintained that this was the specific intention of the section.

With regard to that particular contention, it appears that it has already been before this Court in a previous case—*Abeyeratne v. The Assistant Government Agent, Chilaw.*[1] In the argument before the District Court in that case this point was specifically raised, and raised by the same proctors who appear in this case, in the following words: "The Waste Lands Ordinance enacts a cheap and inexpensive method of coming to trial. From reference up to judgment of the District Court all the burden of regular procedure is taken away both from the claimant and from the Crown's representative. The Court itself has to see to all this. Parties have nothing to do with filing of lists of witnesses, summoning of witnesses, &c."

That contention was disallowed, and the costs allowed in that case included charges by the Crown Proctors for preparing summonses for their witnesses. The decision of the District Judge in that

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case was challenged before this Court, and in the judgment it was decided that under the Ordinance the parties "may have legal assistance from the beginning. The expenses are chargeable as costs in the ordinary way." These expenses so held to be chargeable, as I have said, include costs of the preparation of summonses, and it seems to me that this decision is in effect a decision that the ordinary provisions of the Civil Procedure Code, which allow all parties who have incurred expenses in the way of preparation of those documents to recover them from the other side, are applicable. It seems to me that the allowing of these expenses impliedly negative the contention that the intention of section 15 of the Waste Lands Ordinance was to bring into force a special procedure which was to be different from the practice hitherto observed. It is not clear, however, that the point was explicitly pressed upon the notice of the Court on appeal. In any case the distinction between the procedure under the Ordinance and the procedure under the Code is not made out. If in section 15 the words "the Judge shall issue a summons" imply that the Court must itself prepare the summons, the words "the Court shall order a summons to issue" in section 55 of the Code and "the parties may . . . . obtain on application to the Court . . . . summonses" in section 121 must have the same implication.

But Mr. H. J. C. Pereira did not rest his case upon this contention alone. He said that, both under section 15 of the Waste Lands Ordinance and under the Civil Procedure Code, the intention of the Legislature was that the Court, and not the parties, should prepare the documents which the Court was asked to issue. He argued this more particularly in regard to section 55 of the Civil Procedure Code. But he was prepared to admit that under section 121 that intention was, at any rate, less apparent. He maintained that, where in section 55 the Code says "the Court shall order a summons to issue," and where in section 15 of the Waste Lands Ordinance it is enacted "such Judge shall issue a summons for such purpose" it was the business of the Court itself to prepare the summons. Admittedly, this has not been the practice. Admittedly, when any party desires to obtain the issue of a summons from the Court, whether a summons against the original defendant under section 55, or a summons to procure the attendance of witnesses under section 21, he tenders a form for the purpose. It is, moreover, pointed out by the Solicitor-General that the Code expressly contemplates that these forms shall be prepared by the proctors for the parties who desire them. The schedule includes items in respect of making copies of documents for service on parties: drawing summons, subpœna, and making copy or translation of the documents above referred to.

The question which we really have to decide is this. Both under section 15 of the Waste Lands Ordinance and under sections

55 and 121 of the Civil Procedure Code is the Secretary of the Court entitled to withhold any action for the purpose of the issue of a summons until the party desiring the issue of that summons has furnished a form for the purpose? After very careful consideration, I have come to the conclusion that we must answer that question in the affirmative. The Code nowhere says, and the Ordinance nowhere says, that it is for the Court to procure the summons. It merely says that the Court "must issue" or "order its issue." It seems to me that the Code contemplates that these documents shall be prepared by the proctors for the parties. I do not say that the rule is a rigid one. There obviously must be a certain elasticity, otherwise there might be some hardship to poor litigants, both under the Code and under the Ordinance, if when they are not being represented by proctors they are required to prepare documents, the nature of which they may not understand, and in such a case I imagine a special order of the Court may be sought for. I hope that any Secretary in such case would bring the matter to the notice of the Judge. But we have to interpret those provisions partly in the light of the express provision of the Code—I refer to the items in the schedule—and partly in the light of practice. I do not think that we can lay down a rule that the practice is an erroneous one, and it appears to me, therefore, that the Secretary was right in acting in accordance with the practice in the present instance. This no doubt works out with a certain severity against the appellant. But, although Mr. Pereira said that the appellant is entitled, if he thinks fit, to insist on his legal rights and to take action accordingly, if he does take the responsibility of so acting he has to abide by the result. In this case, if the appellant wished to obtain a decision of the Court upon this specific point, and if his procedure was not merely in the nature of strategy, he would surely have requested the Secretary to bring the matter before the Court, so that an order of the Court might be made before those representing the Assistant Government Agent had come down prepared to argue the whole case. There was the Assistant Government Agent of Chilaw in attendance, and if the plaintiff disputed the correctness of the practice, he could have asked the Secretary to obtain a specific order of the District Judge. He did not take that course, but preferred to take his point when the trial date was reached and when both parties were in Court. In the circumstances, it seems to me that the order of the District Judge must be upheld, and the appeal must be dismissed, with costs.

DE SAMPAYO J.—I agree.

Appeal dismissed.