According to counsel's calculations, the loss suffered by the defendant was, as originally claimed $6,086.42, but after a slight adjustment, $6,047.54. Adopting the method suggested in the above-quoted passage for assessing damages in this case, I also arrived at the figure of $6,086.42, which subject to the adjustment, was $6,047.54. I therefore dismissed the plaintiff's claim with costs and allowed the defendant's alternative counter-claim for damages for the said sum of $6,047.54 together with half his taxed costs.

On the question of costs, I would again refer to the following paragraph in *Hudson's* Building and Engineering Contracts (10th Ed.) at page 584:—

"... the legal nature of the employer's right to damages against a building contractor where the latter sues for the price of the work was until recently somewhat obscure. It is now clear that it operates as a defence to the claim (technically, as an equitable set-off), which may have an important bearing on costs, since, if it exceeds the amount claimed, the claim will be treated as having failed."

The cost of completing the contract work and repairing work unsatisfactorily done in this case overtopped the balance claimed as due and payable for work performed by the plaintiff under the said agreement. There was perhaps no need for me to have made a specific order dismissing the plaintiff's claim with costs because the said claim would have been treated as having failed. In other words, the defendant had succeeded in defeating the claim of the plaintiff and in establishing its right to $6,047.54 on the counter claim. On that basis the fair order to make as to costs should probably have been somewhat similar to that made in the case of *Hanak* v. *Green*.[7] In that case, the plaintiff bought a house from the defendant, a builder, and contracted with him that he would do specified alterations to it by the date fixed for completion of the purchase. Subsequently she complained that the work had not been completed in time and that some of it was not satisfactory. In proceedings in the county court the plaintiff claimed £266 14s., whilst in his defence the defendant said he would "if necessary seek to set up (his counterclaim) by way of set-off in extinction or ... in diminution of the plaintiff's claim". The county court judge, revising the report of a referee to whom the respective claims had first been submitted, awarded the plaintiff £74 17s. 6d. and the defendant £84 19s. 3d. and ordered the plaintiff to pay the balance of £10 1s. 9d. to the defendant. He further gave the plaintiff the costs on her claim and the defendant his costs on the counterclaim.

The defendant appealed, contending that his counterclaim should be treated as being a set-off and, therefore, the plaintiff should recover nothing, and he (the defendant) should recover £10 1s. 9d. and be awarded the costs of the proceedings. The English Court of Appeal held *inter alia* that the defendant had an equitable set-off which defeated the plaintiff's claim; there would, therefore, be judgment for the defendant on the claim and judgment for him on the counterclaim for the balance. It also held that on that basis the fair order to make as to costs was that there should be judgment for the defendant on the claim with costs and that there should be judgment for the defendant for £10 1s. 9d. on the counterclaim with costs.

In this case, therefore, the judgment should have been specifically for the defendant on the plaintiff's claim with costs and judgment for the defendant for $6,042.54 on the counter-claim with half costs. In the result the plaintiff would still have to, as ordered, pay the defendant, the said sum of $6,047.54, costs of the claim and half the costs of the counter-claim.

Order accordingly.

Solicitors: *Thillaimuthu & Phock Kin; Maxwell, Kenion, Cowdy & Jones.*

KULUWANTE (AN INFANT) v. GOVERNMENT OF MALAYSIA & ANOR.

[O.C.J. (Yusoff J.) May 13, 1977]

[Kuching — Civil Suit No. K.242 of 1976]

Practice and Procedure — Declaratory suit — Alternative remedy — Locus standi — Ouster provision — R.S.C. 1967, O. 25, s. 16 — Federal Constitution, Article 15(2).

In this case the plaintiff had applied for declarations — (i) that the decision of the Registrar of Citizens Malaysia in rejecting the application of the plaintiff as a citizen is invalid; (ii) that the reasons given by the Registrar of Citizens for rejecting the plaintiff's application are bad in law and inconsistent with the provisions of Article 15(2) of the Constitution of Malaysia and (iii) that the plaintiff is eligible for registration as a citizen of Malaysia under Article 15(2) or Article 15A of the Constitution of Malaysia. The defendants made preliminary objections to the proceedings by the plaintiff on three grounds:

(1) that the decision of the government is final;

(2) that the applicant has not exhausted her statutory remedies; and

(3) that the form of application before the court is not proper.

Held: (1) the court in exercise of its inherent supervisory jurisdiction has the general power to award declaratory judgments in order to ensure that statutory tribunals whether judicial or administrative made their determination in accordance with the law. This remedy is available in any case where a statutory tribunal has acted without or in excess of jurisdiction or in breach of the rules of natural justice. The remedy is not excluded by the fact that any determination is by statute made final;

(2) the court has jurisdiction to entertain an action for declaration to correct an error of law in the proceedings before a tribunal and to declare such proceedings invalid or a nullity, and such jurisdiction cannot be excluded or taken away from the subjects except by clear words;

(3) in an action for a declaratory judgment, the plaintiff has to establish her title to sue. She has to establish that she has an immediate personal interest in the subject-matter of the proceedings and in claiming a declaration which relates to legal right, all that she has to establish is that she has some legitimate expectation of such right or interest;

(4) in a proper case the court is not precluded by reason of the 'ouster provision' only, to entertain a claim for a declaration that an individual is a citizen but whether the court would entertain a claim for a declaration that the plaintiff is eligible for registration as a citizen under a relevant provision of the Federal Constitution, as it was sought in this case, involves different consideration and the court should also construe other provisions of the law relating to citizenship to determine the effect of such declaration;

(5) as in this case the plaintiff had not exhausted the alternative remedy of an appeal to the Minister, the claim for the declarations should be dismissed.

Cases referred to:-

(1) *Soon Kok Leong* v. *Minister of Interior, Malaysia* [1968] 2 M.L.J. 88.

(2) *Mak Sik Kwong* v. *Minister of Home Affairs, Malaysia* [1975] 2 M.L.J. 168.

(3) *Taylor* v. *National Assistance Board* [1957] 1 All E.R. 183, 185.

(4) *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government & Ors.* [1959] 3 All E.R. 1.

(5) *Anisminic Ltd.* v. *The Foreign Compensation Commission & Anor.* [1969] 1 All E.R. 208.

(6) *Austen* v. *Collins*, (1886) 54 L.T. 903.

(7) *Russian Commercial & Industrial Bank* v. *British Bank for Foreign Trade Ltd.* [1921] A.C. 438, 445, 461.

(8) *Schmidt* v. *Secretary of State, Home Affairs* [1969] 2 Ch. 149, 170.

(9) *Bulmer* v. *Attorney-General* [1955] Ch. 588.

(10) *Attorney-General* v. *Prince Ernest Augustus of Hanover* [1957] A.C. 436.

(11) *Gray* v. *Spyer* [1922] 2 Ch. 22, 27, C.A.

(12) *Barraclough* v. *Brown* [1897] A.C. 615.

(13) *Manggai* v. *Government of Sarawak & Anor.* [1970] 2 M.L.J. 41.

(14) *Metal Industry Employees Union* v. *Registrar of Trade Unions & Ors.* [1976] 1 M.L.J. 80.

CIVIL SUIT.

T.O. Thomas for the applicant.

Mokhtar Sidin (Senior Federal Counsel) for the respondents.

Yusoff J.: This is a ruling on preliminary objections raised by the Senior Federal Counsel on behalf of the respondents, the Government of Malaysia and the Director of Immigration Sarawak, in an action for declaratory judgments against the decision of the Registrar of Citizens and also to determine the plaintiff's eligibility to citizenship. The declarations sought by the plaintiff, Kuluwante (*f*), an infant, suing through her father Karam Singh, are in the main:

(i) that the decision of the Registrar of Citizens Malaysia in rejecting the application of the plaintiff as a citizen is invalid;

(ii) that the reason given by the Registrar of Citizens for rejecting the plaintiff's application is bad in law and inconsistent with the provision of Article 15(2) of the Constitution of Malaysia; and

(iii) that the plaintiff is eligible for registration as a citizen of Malaysia under Article 15(2) or Article 15A of the Constitution of Malaysia.

The brief facts as appeared from the statement of claim are as follows:

The plaintiff was born in Brunei in December 1959, whose parents were at the time, residents in Lawas, Sarawak. Both her father and mother are now Malaysian citizens and so also are her 3 younger brothers and 2 younger sisters, all of whom are still living in Lawas. Soon after her birth, the plaintiff was brought back to Lawas where she was brought up and sent to school. In 1970 she was taken to India by her mother. They were both travelling with one Indian Passport. The plaintiff was left in India to attend school.

On her mother's return to Sarawak she, the mother, became a Malaysian citizen and in 1972 she surrendered the Indian passport to the Government of India.

In 1973 the plaintiff's father applied to the Registrar of Citizens Malaysia, to register plaintiff as a citizen under Article 15(2) of the Federal Constitution. The application was rejected. Being stranded in India and deprived of her travel document, the plaintiff obtained an Indian passport in October 1975. With that passport, she travelled to Sarawak.

In 1976 the plaintiff and her father made representations to the Registrar of Citizens Sarawak for reconsideration of her application which was again rejected on the ground that the plaintiff was not a permanent resident of Sarawak when the application was made.

The Senior Federal Counsel based his objections on the following three grounds, viz.:

1. that the decision of the government is final;
2. that the applicant has not exhausted her statutory remedies; and
3. that the form of application before the court is not proper.

On the first ground of objection, the Senior Federal Counsel submitted that the decision of the Government should not be reviewed by the court, having regard to section 2 of Part III of the Second Schedule to the Federal Constitution. This section provides that:

"2. A decision of the Federal Government under Part III of the Constitution shall not be subject to appeal or review in any court."

It is relevant to mention here that the Registrar of Citizens Sarawak, exercised the function of the Federal Government delegated to him, by virtue of sections 1 and 4(2) of Part III of the same Schedule and that the second respondent is not a proper party to this action.

The effect of section 2 of Part III of the Second Schedule of the Federal Constitution (ouster provision) which purports to preclude the jurisdiction of the court has been decided in a series of cases in our courts beginning with *Soon Kok Leong* v. *Minister of Interior, Malaysia*[1] and recently in the decision of the court in *Mak Sik Kwong* v. *Minister of Home Affairs, Malaysia*[2] and in the latter case, relevant authorities have been quite exhaustively dealt with. In those cases the courts have held that this ouster provision does not preclude the courts from entertaining an application for an order of *certiorari* to quash the decision of a statutory tribunal where there was an error of law apparent on the face of the record.

Contrary to those cases, the present claim is for declaratory judgment and in this respect, it was contended by the Senior Federal Counsel that since this is a statutory remedy obtainable under Order 25 rule 5 of the Rules of Supreme Court, 1957, it cannot override the ouster provision in the Second Schedule of the Constitution. He further submitted that following those cases, the remedy obtainable in this case is only limited to an action by way of prerogative writ of *certiorari*. With respect, I do not agree with this contention.

In my opinion, the court, in exercise of its inherent supervisory jurisdiction, has the general power to award declaratory judgments in order to ensure that statutory tribunals whether judicial or administrative made their determinations in accordance with the law. This remedy is available in any case where a statutory tribunal has acted without or in excess of jurisdiction or in breach of the rules of natural justice. The "remedy is not excluded by the fact that any determination is by statute made final" (per Lord Denning in *Taylor* v. *National Assistance Board*[3]).

In an appeal before the House of Lords in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government & Ors.*,[4] an action for declaration in which case it was contended that there was a statutory exclusion of the court's jurisdiction by section 17 of the Town and Country Planning Act, 1947, ex-final Viscount Simonds at page 6 held that "the right pressing that the Minister's determination was to be of the subject to have recourse to the courts of law cannot altogether be excluded and that the inalienable remedy of Her Majesty's subjects to seek redress cannot be taken away".

In *Anisminic Ltd.* v. *The Foreign Compensation Commission & Anor.*[5] also before the House in which case, one of the issues raised was whether the commission's determination under the Foreign Compensation Act, 1950, was a nullity and it was contended that such a declaration could not competently be made by the court by reason of the ouster provision in section 4(4) of the Act; the House rejected the argument and Lord Reid at pages 213 and 214 said:

"...although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice....

If it is entitled to enter on the enquiry and does not do any of those things..., then its decision is equally valid *whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law.*" (The italics are mine).

From these cases, there appears to be no doubt that the court has jurisdiction to entertain an action for declaration to correct an error of law in the proceedings before a tribunal and to declare such proceedings invalid or a nullity; and that such jurisdiction cannot be excluded or taken away from the subjects except by clear words. It follows that the Senior Federal Counsel's objection in respect of the first two declarations sought by the plaintiff cannot sustain.

On the contention that declaratory judgment is a statutory remedy and has no equal effect as the prerogative writ of *certiorari*, I find that this argument has no merit. In exercising the supervisory jurisdiction, the court relates on its inherent powers and as such, it is not correct to say that it relies on statutory remedy founded under Order 25 rule 5 of the Rules of Supreme Court. In my opinion, both declaratory judgments and *certiorari* are concurrent remedies and not mutually exclusive. As *certiorari* will lie to quash a decision for want or in excess of jurisdiction, breach of the rules of natural justice or error of law on the face of the record; a declaration is *prima facie* available as an alternative remedy for defects in jurisdiction and breaches of natural justice. In the words of Lord Goddard in *Pyx Granite* case (ibid) at page 8:

"It was also argued that, if there was a remedy obtainable in the High Court, it must be by way of *certiorari*. I know of no authority for saying that, if an order or decision can be attacked by *certiorari*, the court is debarred from granting a declaration in an appropriate case. The remedies are not mutually exclusive though, no doubt, there are some orders, notably convictions before justices, where the only appropriate remedy is *certiorari*."

This also answers the Senior Federal Counsel's third objection that the declaration sought by the plaintiff in this case is not an appropriate form of relief. In view of his concession on this point at the later part of the proceeding, I need not elaborate on the third ground of his objection.

The third declaration sought by the plaintiff poses a different issue. The award of this declaratory judgment involves the exercise by the court of its original jurisdiction. It has been held that this jurisdiction of the court should be exercised sparingly and with utmost caution. (See *Austen* v. *Collins*[6] and *Russian Commercial & Industrial Bank* v. *British Bank for Foreign Trade Ltd.*[7]).

But the ground of objection raised by the Senior Federal Counsel is that the plaintiff has not the requisite *locus standi*. He said that the plaintiff has no right to citizenship under Article 15 of the Federal Constitution and that only a citizen can have access to court for declaration of right.

With respect, I do not agree with this contention. In an action for a declaratory judgment, the plaintiff has of course, to establish her title to sue. She has to establish that she has an immediate personal interest in the subject-matter of the proceedings and in claiming a declaration which relates to legal right, in my opinion, all that she has to establish is that she has some legitimate expectation of such right or interest. In *Schmidt* v. *Secretary of State, Home Affairs*[8] Lord Denning, in relation to the right of hearing in a declaratory action by an alien, said:

"It all depends on whether he has some right or interest, or I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say."

The circumstances of the present case show that both the plaintiff's parents, brothers and sisters are federal citizens and for that reason she has a legitimate expectation to citizenship and in my view, she cannot be debarred to have access to this court by reason only that she is not a citizen. For the purpose of this claim for declaration, I hold that the plaintiff has the requisite *locus standi*.

The next point to be considered is whether the court is precluded from exercising its original jurisdiction in granting this declaration, by reason of the 'ouster provision' in the Second Schedule of the Federal Constitution. As intimated by the Senior Federal Counsel there is no precedent in our courts on this issue. In his submission he cited a passage

from the "Constitution of Malaysia" by Prof. H.E. Groves dealing with the provision at page 159 which says:

"... such pronouncement has limited meaning in connection with deprivation of citizenship (see below) and could also not apply to those whose claim of citizenship is by operation of law, ... *the provision must be directed towards the decision of the Government on application for citizenship* ...." (my italics).

Relying on this passage he urged that the court has no jurisdiction to entertain this claim.

It is to be noted that while Prof. Groves is quite emphatic on the exclusion of the court's jurisdiction by the 'ouster provision', Tun Mohamed Suffian in his book, "An Introduction to The Constitution of Malaysia", 2nd Edition, does not lay such emphasis and leaves the subject upon for later decision by the court on the issue. In dealing with the subject of citizen at page 259, he says:

"Will the court on the application of an aggrieved applicant compel the Federal Government to register him as a citizen? This question has never reached the court yet, and *it is thought that* as *the court is reluctant* to interfere with an executive discretion *it is unlikely that it will compel the Federal Government to register a citizen* about whose qualification it is not satisfied." (Again, the italics are mine).

In considering the effect of this 'ouster provision', it is to be noted that the British Nationality Act, 1948, contains similar formulae purporting to exclude judicial review. Section 26 of the Act provides that the exercise by the Secretary of State of his discretion in relation to application for registration, naturalisation, renunciation of citizenship in cases of doubt is *not* to be "subject to appeal to or review in any court". There seems to be no reported decision in the English Court concerning this exclusionary provision but it seems from decided cases, that the courts have jurisdiction to make a declaration that a person is of a British Nationality, without regard to section 26 of the Nationality Act (see *Bulmer* v. *Attorney-General*[9] and *Attorney-General* v. *Prince Ernest Augustus of Hanaver*[10]).

For these reasons, I am of the view that in a proper case, the court is not precluded by reason of the 'ouster provision' only, to entertain a claim for declaration that an individual is a citizen. But whether the court would entertain a claim for declaration that the plaintiff '*is eligible for registration* as a citizen' under a relevant provision of the Federal Constitution, as it is sought in this case, involves different considerations and the court should also construe other provisions of the law relating to citizenship to determine the effect of such declaration. This will be considered in the following objection.

The remaining and last ground of objection by the Senior Federal Counsel is that the plaintiff has not exhausted the statutory remedy available to her and that she seeks to by-pass that remedy by suing for this declaration. He urged that the normal channel would be for the plaintiff to appeal to the Minister under section 4 of Part III of the Second Schedule of the Federal Constitution. The relevant part of section 4 provides that the Minister, exercising the function of the Federal Government, may delegate to any officer of the government, any of his functions under the Constitution relating to citizenship by registration *but any person aggrieved by the decision of a person to whom the functions of the Minister are so delegated may appeal to the Minister.* (My emphasis).

It was contended that the Registrar of Citizens Sarawak exercised his powers derived under section 4 of the Second Schedule when he rejected the plaintiff's application for citizenship. The facts endorsed on the statement of claim show that consequent to the rejection of the plaintiff's application by the Registrar, a new application on behalf of the plaintiff was sent to him, and the Registrar refused to consider this new application. In view of the provision of section 4, it was argued that the plaintiff is open to appeal against the decision of the Registrar to the Minister and that in these circumstances the court should not entertain this claim.

I think, there is substance in this objection. The effect of section 4 of Part III of the Second Schedule, in my opinion, excludes the jurisdiction of the court to entertain a claim for declaration of an individual's eligibility for registration as citizen under the Federal Constitution before recourse is had to the Minister who exercises the function of the Federal Government. Such a declaration is, in my view, hypothetical in nature and cannot be entertained by the court. Similarly, the court will not entertain a claim for declaration questioning the validity of proceedings conducted by an officer delegated to exercise the powers of the Minister under the section, prior to an appeal to the Minister concerned. It would be premature for the court to intervene before the Minister has made his final decision.

Counsel for the plaintiff suggested that though the declarations sought would not bind the government, he urged that the Registrar of Citizens would be enlightened by the decision of the court. I do not agree with this suggestion and in my opinion, apart from the above, the court will not make a declaration for a mere legal right (see *Gray* v. *Spyer*[11]), in consequence of which embarrassment would be caused to the court.

For some authorities that the court would not make declaratory judgments where there are other suitable remedies available to the plaintiff, I refer to the following cases: —

In *Barraclough* v. *Brown*,[12] the statute provides for a court of summary jurisdiction to determine claims for expenses incurred in the removal of sunken vessels but the plaintiff sued the defendants in the High Court and argued that they were entitled to a declaration that they had a right to recover from the defendants; the House of Lords rejected the argument and Lord Herschell said at page 619:

"I think it would be very mischievous to hold that when a party is compelled by statute to resort to an inferior court he can come first to the High Court to have his right to recovery — the very matter relegated to the inferior court — determined. Such a proposition was not supported by authority, and is, I think unsound in principle."

A local case which is very much within the knowledge of the plaintiff's counsel, is *Manggai* v. *Government of Sarawak & Anor.*[13] In a dispute over some native lands decided by the Resident's

native court, the appellant in by-passing his right of appeal to the Native Court of Appeal, claimed for declaration that the native court was *functus officio* and without jurisdiction. It was argued that the plaintiff was not obliged to go to the Native Court of Appeal. The Federal Court, following the principle in *Barraclough's* case, rejected the argument and held that the court (High Court) would not make a declaratory judgment when an adequate alternative remedy is available.

In *Metal Industry Employees Union* v. *Registrar of Trade Unions & Ors.*,[14] the principle in *Manggai's* case was applied by the court. In that case the plaintiff applied for declaratory orders against the decision of the Registrar of Trade Unions where section 17(1) of the Trade Unions Ordinance, 1959 provides that an appeal against any opinion of the Registrar lies to the Minister. The court held that it should not be invited to make the declaration sought since an alternative remedy was clearly prescribed by law.

For these reasons, in my opinion, the plaintiff's claims at prayers (i) and (ii) are premature and the claim at prayer (iii) is hypothetical in nature since the law clearly provides an alternative remedy for an appeal to the Minister. The same considerations apply to the remaining declarations at prayers (iv), (v) and (vi) though not specifically dealt with in my ruling but they were kept in my view. I would, therefore, allow this objection and the claim is dismissed and struck out. Costs to the defendants.

Order accordingly.

TAN AH LEK v. GURCHARAN MUNTARA SINGH

[A.C.J. (Chang Min Tat J.) April 16, 1977]
[Kuala Lumpur — Civil Appeal No. 6 of 1977]

Practice and Procedure — Default judgment — Setting aside — Service by registered letter — Letter returned unclaimed — Merits in defence — Defence should be allowed without conditions — Subordinate Court Rules, 1950, O. VIII, r. 5.

In this case judgment had been entered against the appellant in default of appearance and defence. His application to set aside the judgment was allowed but conditional on his payment into court of a sum of $5,000, the amount estimated of the claim. Since he did not comply with this condition, judgment was entered against him. The appellant appealed to the High Court. It appeared that service of the summons had been effected by registered letter. That letter was not delivered or received and it was returned unclaimed.

Held: (1) in the circumstances of the case it was not possible to contend that service had been properly effected or at all or that there was evidence to show that the defendant had refused service;

(2) it is never the practice of the courts, where there are merits in a defence, that the defence would be allowed conditional upon the payment into court of the subject-matter of the claim.

CIVIL APPEAL.

Mrs. Jegathesan for the appellant.

Tee Keng Hoon for the respondent.

Chang Min Tat J.: The appellant had a judgment given against him in default of appearance and defence. His application to set aside this judgment was allowed but conditional on his payment into court a sum of $5,000, the amount estimated of the claim. Since he did not comply with this condition, judgment was entered against him. He now appeals to this court.

Service of the summons on him was effected by registered letter. That letter was not delivered or received and it was returned unclaimed. The learned President upheld the contention of the plaintiff that that constituted good service. Order VIII rule 5 of the Subordinate Court Rules provides that service should be effected by prepaid registered post. Service by ordinary registered post is therefore not in compliance with the order. There is good reason for the rule since by a prepaid registered letter there would be returned to the sender a card indicating either that the letter had been delivered or that the addressee had refused service, if in fact he had refused service. It is not correct to say that "unclaimed" can be equated with "refused delivery." It is elementary that the defendant should be served with the summons so that he should know what the claim against him is and decide for himself whether to defend or not. Where service has not been effected or where it cannot reasonably be presumed, from the circumstances of the case, that service was or would have been effected, but for the wilful refusal on the part of the defendant to accept service, the defendant is entitled *ex debito justitiae* to have the judgment set aside. In the circumstances of this case, I do not think it is possible to contend that service had been properly effected or at all or that there is evidence to show that the defendant has refused service. The judgment must be set aside.

It is not strictly necessary that I should deal with the second ground of appeal, which is that he should be given leave to defend without conditions. But perhaps it is salutary that I do so. The learned President found merits in the defence, but nevertheless imposed the condition. Why, I am not able to discern from the grounds of decision, but it apparently sprang from the finding that the defendant was at fault in refusing service. But it is never the practice of the courts, and I do not think it ever will be the practice that, where there are merits in a defence, the defence would be allowed conditional upon the payment into court of the subject-matter of the claim. Where the failure to effect service is caused by reason of some wilful default on the part of the defendant or where the defendant now seeks to defend, the plaintiff can always be compensated by an order for costs but no condition should be imposed where the defendant can raise a defence on merits.

The appeal was allowed with costs. The default judgment was set aside, and the case remitted to the learned President to hear it on the merits.

Appeal allowed.

Solicitors: *Jegathesan & Co.; Allen & Gledhill.*