1956 *Present :* Sansoni, J., and Sinnetamby, J.

L. MARIAN, Appellant, *and* S. JESUTHASAN *et al.*, Respondents

S. C. 282—D. C. Jaffna, 11,447/L

Evidence Ordinance—Section 68—Deed—Proof of execution—Notary's position a "attesting witness"—Requirement of his personal knowledge of executant—Prevention of Frauds Ordinance, s. 2.

Where a deed executed before a notary is sought to be proved, the notary can be regarded as an attesting witness within the meaning of section 68 of the Evidence Ordinance provided only that he know the executant personally and can testify to the fact that the signature on the deed is the signature of the executant.

APPEAL from a judgment of the District Court, Jaffna

C. Ranganathan, with *V. K. Palasundaram*, for the defendant-appellant.

C. Chellappah, for the plantiffs-respondents.

Cur. adv. vult.

July 20, 1956. SINNETAMBY, J.—

This was an action *rei vindicatio* instituted by plaintiff in respect of a 2/3 share of the land described in the plaint. The defendant claimed to be the absolute owner of the entire land on deed bearing No. 311 dated 2/8/39 executed by his mother, marked D1. Plaintiff's claim was based on inheritance from the same source. The only issue therefore for adjudication was whether the deed D1 was duly executed and the case went to trial on this issue.

The defendant gave evidence to the effect that he went with his mother and the attesting witnesses to the notary to get D1 executed. He admitted that one attesting witness was alive and the other dead. He was questioned as to whether his mother placed her thumb impression in the deed D1 but on objection being taken this question was disallowed. One of the grounds urged at the argument was that this order was a wrong order though this point was not specifically raised in the petition of appeal. For the purpose of this decision I shall proceed on the assumption that the answer to this question is in the affirmative.

One ground of appeal was that the learned Judge refused a postponement to enable the plaintiff to call the attesting witness. There is nothing in the record to suggest that any such application was made and the judge himself has assured us that if such an application had been

made he would have recorded it. Both proctors in this case have filed conflicting affidavits on this question and in the circumstances we are of opinion that this appeal should proceed on the basis that no such application was in fact made. Learned Counsel appearing for the appellant at the trial presumably took the view that he had available sufficient proof of the due execution of the deed ; otherwise, it is difficult to understand why he chose to proceed with the trial without first making sure that the application for a postponement which it is alleged he made was duly recorded.

It was argued at the hearing of the appeal that there would be sufficient proof of execution if the notary before whom a deed is executed was called coupled with proof that the executant it was who signed it. In this case the executant placed her thumb impression. It was urged that in this case there was a sufficient compliance with the provisions of Sections 67 and 68 of the Evidence Ordinance as the notary was called and there was tendered proof *aliunde* of the executant's signature or thumb impression. It was contended that the notary was an attesting witness within the meaning of Section 68 irrespective of whether he knew the executant or not. Reliance was placed on the decision of this Court in *Seneviratne v. Mendis*[1]. *Ramen Chetty v. Assen Naina*[2] was differentiated on the ground that in that case there was no evidence that the executant set his signature to the impugned deed. It was contended that the effect of Section 67 read in conjunction with Section 68 rendered it sufficient for proof to be established by calling the notary irrespective of whether he knew the executant or not and proving the signature of the executant by other evidence. This in my view is a fallacy. The signature to a document can be attested without a notary. "To attest" means to "bear witness to a fact"—vide *Velupillai v. Sivakamipillai*[3]. The notary therefore to become an attesting witness within the meaning of Section 68 of the Evidence Ordinance must be able to bear witness to the fact that it was the executant who set his signature to the document. A document affecting land is executed before a notary to comply with the provisions of Ordinance 7 of 1840 and that fact alone does not make the notary an attesting witness. To become an attesting witness a notary must personally know the executant and be in a position to bear witness to the fact that the signature on the deed executed before him is the signature of the executant.

In the present case the notary says he did not know the executant. No attesting witness has been called and the defendant's evidence even if admitted to the effect that it was his mother who set her thumb impression to D1 would not establish proof of due execution. For these reasons I would dismiss the appeal with costs.

SANSONI, J.—I agree.

Appeal dismissed.

[1] *(1919) 1 C.L. Rec. 47.*
[2] *(1909) 1 Curr. L.R. 256.*
[3] *(1907) 1 A.C.R. 180.*