

1956

Present: Basnayake, C.J., and Palle, J.

N. U. WIJEGOONETILLEKE and others, Appellants, and B.
WIJEGOONETILLEKE and another, Respondents

S. C. 640—D. C. Kalutara, 29,631

Deed—Proof of execution—Notary's position as "attesting witness"—Evidence Ordinance, ss. 68, 69.

A Notary who attests a deed is an attesting witness within the meaning of that expression in sections 68 and 69 of the Evidence Ordinance.

APPPEAL from a judgment of the District Court, Kalutara.

N. E. Weerasooria, Q.C., with *A. C. Gunaratne*, for the Plaintiff-Appellants.

No appearance for the Defendant-Respondents.

July 6, 1956. BASNAYAKE, C.J.—

The only question that arises for decision on this appeal is whether a Notary who attests a deed comes within the ambit of the expression "attesting witness" in section 68 of the Evidence Ordinance.

The document relied on by the defendants, D1, a certified copy of a deed executed by one Samarasundera Aratchige Henry Wijegoonetilleke, was produced by the attesting Notary who gave evidence without any objection being taken to its production. In his attestation the Notary says that he did not know the person who executed the deed, but in the course of his evidence he indicated that he knew that the person who executed the deed was a deaf and dumb person who knew English, about whom he had heard and whose family he knew. He had taken all the precautions necessary to make sure that the donor was no impostor and that he was quite aware of the fact that he was making a gift of a number of his lands.

At the conclusion of the case it was submitted by learned counsel for the plaintiffs that as the deed had not been proved in the manner required by section 68 of the Evidence Ordinance it was not in evidence and could not be acted on for the purpose of this case.

In the replication the plaintiffs had alleged that the deed was of no force or avail in law inasmuch as the executant to the said deed, Henry Wijegoonetilleke, had no capacity to understand the nature and contents of the deed and that he was prevailed upon by the exercise of undue influence by the defendants to sign the deed. There is no evidence to support these allegations, and the Notary's evidence shows beyond doubt that the donor knew what he was doing.

Learned counsel for the appellant contended that a Notary was not an attesting witness for the purpose of section 68 of the Evidence Ordinance. He cited the case of *Don Carolis v. Don Bastian*¹. In that case one of the defendants denied that he executed a deed on which the plaintiff relied. It was contended that as the defendant in question had signed the deed with a cross or mark it need not be proved in the manner required by sections 68 and 69. The Notary was not a witness at the trial.

Learned counsel also referred us to the case of *Seneviratne v. Mendis*². In that case Schneider A.J. dealing with a similar argument stated :

“ The language of section 2 of the Ordinance No. 7 of 1840 and in particular the words ‘ the execution of such writing, deed or instrument be duly attested by such notary and witnesses ’ to my mind leave no room for doubt or contention that the notary is an attesting witness in precisely the same sense as the other two witnesses mentioned in that section.”

In the case of *Kiri Banda v. Ukkuwa*³ Burnside, C.J. said :

“ It is quite true that the rule of evidence is that if you desire to prove a written instrument, to which the attestation of witnesses is necessary to give it validity, you must first call the witness or witnesses to it or account satisfactorily for not doing so; but the learned District Judge has erred in holding that a notary, who attests an instrument under our Ordinance against Frauds, is not an attesting witness so as to bring his evidence within the above rule of evidence. I do not doubt that he must be considered an attesting witness.”

It was held in the earlier case of *Somanader v. Sinnatamby et al.*⁴ that by proving the signature of the Notary the requirements of section 69 of the Evidence Ordinance were fulfilled.

In our opinion a Notary who attests a deed is an attesting witness within the meaning of that expression in sections 68 and 69 of the Evidence Ordinance. We are in respectful agreement with the decisions we have cited above. The appeal is dismissed without costs.

PULLE, J.—I agree.

Appeal dismissed.

¹ (1913) 2 *Matara Cases* 131.

² (1919) 6 *C. W. R.* 211.

³ (1892) 1 *S. C. R.* 216.

⁴ (1899) 1 *Thambyah's Reports* 38.