* *Judgment of Berwick, D. J.*

NAMA SIVAYA *v.* COWASJIE EDULJIE.

D. C., Colombo, No. 61,545, 21st January, 1873.

Ordinance No. 7 of 1840, s. 2, " by some person lawfully authorized "— Authorization otherwise than by notarial instrument—Mortgage bond assigned by mortgagee's attorney under English power of attorney.

Mr. Grenier, subsequent to the last proceedings, cited *Story on Agency*, §§ *47, 48, 49*, and the cases there cited, to show that a power of attorney to execute a deed must be in as solemn a manner as the instrument to be executed under it; that the authority to execute an instrument under seal must itself be under seal; and therefore as Ordinance No. 7 of 1840 requires that the assignment in question should be solemnly made before a notary and two witnesses, so must be the power of attorney to execute it.

Mr. Grenier cited this with reference to the remark by the Court that the attesting witnesses or notary need not be called when an instrument could be validly executed without them.

The point, so far as it involves the necessity for such a power of attorney being attested by a notary or witnesses, is one of very grave importance, for I am aware that a very large number of Ceylon estates of great value have been transferred by notarial deeds in this country executed under English and Scotch powers of attorney which were not notarial. I have therefore given it great attention, and think it desirable to state formally my opinion on the subject.

And in the first place it must be observed that the " solemnities " (as the Civil Law calls them) prescribed by any system of laws for the execution of instruments, and made essential to their *validity*, whether it be in respect to the mode of signature, their execution before a Judge, Magistrate, or Police Officer, the public registration payment of stamp and other duties, or otherwise, though mostly enacted with a view to their greater authenticity, and, in a sense, to their mode of proof, are not strictly parts of the law of evidence in the sense in which the latter expression is commonly used, and in which the English Law of Evidence has been introduced into this dependency. For example, the English Law required that deeds in regard to the transfer of what is known to it as " real " estate, and those creating formal obligations and covenants, shall be under the *seals* of the parties executing them; but with a few exceptions

1873, *Namasivaya v. Cowasjie Eduljie*), and which I adopt. Mr. Berwick's judgment (1873) was affirmed in appeal without comment. He considered the question with his usual thoroughness, and as an exponent of the Roman-Dutch Law he has had no superior in this Island. I am indebted to my brother for this valuable judgment.

The only other reported case on the point I know is that of *Grey & Co. v. Captain Arabin*, to be found in *Austin's Reports, p. 164*. It was a Kandy District Court case, No. 24,146, decided apparently by the Collective Court in 1851. This is the material part of the judgment in appeal: " The first question presented " in this case is, Was such a person lawfully authorized by the de- " fendant to sign the agreements for him? The Court is of opinion " that he was. The Ordinance No. 7 of 1840 does not require the " agent to be authorized in writing, but uses the words ' lawfully

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in respect to certain public functionaries as notaries, and the proceedings of certain Courts of Justice, the solemnity of a seal is unknown to the law of this country otherwise than as a redundancy, and has no legal effect in our Courts. Mere formal solemnities, therefore, however essential they may be to give validity to an act, and to whatever extent they may have been devised with a view to better authentication and proof under the English Law, have not been introduced here in virtue of the introduction of the English Law of Evidence. It therefore does not follow that, because in the English Law a power of attorney to execute an instrument must be evidenced by an instrument of equal solemnity, the same is the Law of Ceylon: *e.g.*, that because our Ordinance No. 7 of 1840 requires that an instrument conveying an interest in land must be attested by a notary and witnesses, so a power of attorney to execute such an instrument must also be attested by a notary and witnesses. On the contrary, Story, in a footnote to the passage cited remarks that, although the Civil Law seems to have acted throughout upon that principle as to the *dissolution* of contracts, it has not as to the *creation of agencies*. Nowhere in his *Treatise on the Contract of Mandate* does Pothier advert to the necessity for notarial attestation, or even for a written authority for the valid constitution of an attorney. *Voet ad Pand.* has a considerable chapter, *lib, 17, tit. 1*, on the subject of mandate, but is silent as to the necessity for its being in writing or accompanied by any special solemnities. He says (§ 3): *suscipitur quoque vel expresse vel tacite.*

Van Leeuwen, in his *Censura Forensis* (*part 1, lib. 4, cap. 24*) divides powers of attorney into general and special, and also into express and tacit; and while he points out that there are many things which cannot be done under a general power of attorney (among others, sales and alienations), but which require a special power, he indicates no such difference under the further division into express (*quod expressum verbis sit* [*aut literis*]) and tacit mandates. He also classifies them as relating either to judicial or to extra judicial matters, and in a subsequent place, *part 2, lib 1, cap. 5*, where he is treating specially of the former, *i.e.*, of procurators or law agents, or as they are here called proctors, mentions (section 8) that the instructions of the Courts of Holland, Utrecht, and Friesland require that their proxies be either in the form of Acts of Court or in writing executed before a public officer. But this last forms an exception to the general rule of the Civil Law.

The conclusion is manifest that a power of attorney of the nature of that now tendered in evidence by the plaintiff, though giving power to execute an instrument affecting land which requires certain statutory solemnities, need not itself be

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" authorized ' alone, leaving it for parties to discover or Courts to " decide what shall be lawful authorization. The notarial agree- " ment in this case, as also the prior memorandum of agreement " therein referred to, were both made at Colombo, and must be " governed by the law in force between the contracting parties " there; and this law is the Roman-Dutch, which (so far as we can " discover) nowhere requires such an authority as the one under " consideration to be in writing."

My brother has kindly furnished me also with an unreported dictum of Mr. Justice Clarence (*S. C. Minutes, 1st February, 1887*), in an appeal from a judgment given in No. 91,022, District Court, Colombo (1886), to this effect: " I think, in general, the " authority to execute an agreement required to be notarial must " itself be notarial." The learned Judge gave no reasons for this opinion, curiously qualified by the words " in general." Did he

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executed with these solemnities, viz., attestation by a notary and subscribing witnesses; and at this point the English Law of Evidence comes into play, which dispenses with the necessity of calling an attesting witness to prove a document which is valid in law without an attesting witness.

Mr. Grenier further cited the Ordinance No. 7 of 1840, contending that the power of attorney itself established an interest affecting land, and was therefore within its provisions. But I think that the power of attorney does not establish or convey any interest in land; it only authorizes another person to establish or convey such an interest by all legal forms and solemnities which the law of the Island may require. The ministerial delegation is a personal act; the execution of the personal delegation is a " real " act. The latter must, in the present case, be done in conformity with the *lex loci citæ*; it may be that the former is to be governed by the law of the place where the ministerial delegation is made, viz., England, in respect to the form of making it and in respect to the interpretation to be put on the expression in the Ordinance " lawfully authorized;" but the Law of England does not require that the delegation to do a ministerial act of this nature as attorney for another (which is a different thing from an executory contract for the future transfer of land situated in England entered into directly by the intended vendor and the intended vendee or their agents) shall be attested either by a notary or by witnesses in order that the attorney may be " lawfully authorized;" while the law of this country does not require that the delegation shall be equally solemn with the transfer. See further *1 Burge, 23, 24; 2 Burge, 844, &c., Story on the Conflict of Laws, chaps. 8 and 10.*

For these reasons it is not necessary for the proof of the execution of the power of attorney to call the witnesses or the notary by whom it happens to have been attested; and it is therefore entirely a question for the Court as a jury to decide whether its conscience is satisfied by the proof of execution which has been given.

Now it was admitted by defendant's counsel in argument that this power of attorney was attested by a notary whose seal it bears, and though it is true that notarial instruments are not self-probative in all respects, even in those countries where they are so in some respects (*Erskine's Instit. 4, 2, section 5; 2 Burge 700*), it is the case that a notarial protest receives credit in all Courts and places without any auxiliary evidence (*3 Kent 93*): and that many other documents pass before notaries under their notarial seal which gives effect to them and renders them evidence in foreign Courts, though not in England (*King v. Scriveners Company, 10 B. and C. 519*). Although Burge says the contrary in his *Com. vol.*

mean, if a person who is resident, say, at Jaffna desires to lease some property at Colombo for a long term of years, he must authorize an agent at Colombo by a notarial act, but if he is resident out of the Island he may do otherwise? The proof of the mandate is one thing, the mode of the mandate is another. The words of the Ordinance " lawfully authorized " cannot be strained to mean that the law as to the conveyance of a land and the law as to a mandate to convey land shall be one and the same. If the Legislature intended to say so, what easier than to have said so in a few plain words? No prudent person would think of giving a mandate to another to sell his land, or mortgage or lease it, except in writing, though, as Mr. Berwick points out, this is not legally necessary. I am for pronouncing the judgment in appeal to be wrong and giving judgment for plaintiff.

BROWNE, A.J.—I quite agree.

2, p. 700, Van Leeuwen, in the *Censura Forensis* (*part 2, lib. 1, cap. 29, section 8*), says that notaries are public officers, and notarial instruments public instruments; and at section 12, that the Placaat of 1540 enacted that public faith is to be given to them as fully as if they had been executed before a Magistrate or Judge. Voet uses similar language *Ad Pand. lib.* 1. 14. 7. and 22. 4. 3, and *ibid 4*, where he says: *Ubi nullum in tabellione vitium, nullus defectus est, confecta ab eo instrumenta publica non tantum in loco, in quo creatus ac admissus est, sed et ubique alliis in locis fidem inveniunt; exceptis iis regionibus quaram lege reprobatus deprehenditur in universum usus tabellionum; utpote in quibus, &c.* The English Law also recognizes them as public officers. See *3 Burns' Ecclesiastical Law, pp. 10 and 12; Modern Rep. 345.*

By the English Law of Evidence the Courts are bound to take judicial notice of the seal of a notary public (*1 Taylor on Evidence, p. 8; Doe. v. Mason, 1 Esp. 53*), and also of the seal of the Corporation of London, under which and the hand of the Lord Mayor of London we have in this instance a certificate that Mr. Mercer, who has attested the document in question, is a notary public duly admitted, &c., and to all his notarial acts full faith and credit ought to be given in Court and without.

I am quite satisfied of the execution of the document by the grantor of the power of attorney, and I am satisfied of that by the proof of his handwriting given both by Mr. Buchanan orally, and also by the notary under his hand and seal of office, which last satisfies the case of *Banner v. Trompowski* (*7 Term Reports, 265*), cited by Mr. Grenier, the notary being equipollent to a witness. The power of attorney is therefore held duly proved and admitted in evidence. And there being no other point raised for the defence, judgment will be entered for the plaintiff in terms of the prayer of the libel.

Since drafting this judgment and after my decision on this case had been verbally communicated, my attention has been called to the report of the case, Kandy, D. C., 24,146, in *Austin's Reports, p. 165*, which it is satisfactory to find confirms the opinion I had formed.

IN APPEAL.

1st July, 1873.

Affirmed, the Supreme Court seeing no reason to the contrary.