MEERA SAIBO *et al. v.* PAULU SILVA.

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August 31.

D. C., Kandy, 11,868.

Sale of land—Deed of sale—Principal and attorney—Sale by power of attorney not notarially executed — Validity of sale — Ordinance No. 7 of 1840, s. 2—"Person lawfully authorized."

A notarial conveyance of land is not void because the person who purported to sign it for his principal was not authorized thereto by a notarial power of attorney.

WITHERS, J.—As an exponent of theRoman-Dutch Law, Mr. Berwick D.J., has had no superior in this Island.

PAKIR MOHIDEEN, being owner of the land in suit, gifted it to three persons, by deed dated 25th January, 1870, one of whom died leaving the other two, Rahamat Umma and Abdul

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Cader, as his heirs. Rahamat Umma, who was a Mohammedan lady residing in India, granted a power of attorney, dated 27th November, 1895, to her husband, who, acting as her attorney, transferred a moiety of the land to the plaintiffs by deed dated 27th November, 1897. The power of attorney appeared to have been made in Satankulam, in the District of Tinnevelly in South India, before five witnesses, and three days afterwards its execution appeared to have been admitted by Rahamat Umma before the Sub-Registrar of Satankulam and two witnesses, whose signatures it bore, together with the seal of the Sub-Registrar. The document bore an Indian stamp of five rupees, and appeared to have been duly registered on 30th November, 1895. The plaintiffs complained that defendant was in the forcible possession of the same. The defendant, claiming to be the lessee of a moiety under Abdul Cader, denied that Rahamat Umma executed the deed pleaded by the plaintiffs, and as regards the other moiety defendant pleaded prescriptive possession.

The District Judge held that Rahamat Umma's deed in favour of the plaintiff was bad, because the person who signed it for her was not authorized to do so notarially. Following a judgment of the Supreme Court in *Dias v. Fernando*, reported in *8 S. C. C. 182*, he dismissed plaintiffs' case.

Plaintiffs appealed.

Wendt, for appellant.

No appearance for respondent.

Cur. adv. vult.

31st August, 1899.—The Supreme Court set aside the judgment of the Court below and gave judgment for plaintiff.

WITHERS, J.—

The only question argued before us was whether the District Judge was right in holding that a certain notarial conveyance was void and of no effect because the person who purported to sign it for his principal was not authorized thereto by a notarial power of attorney.

The District Judge relied on the case of *Dias v. Fernando*, D. C., Colombo, 9,793, reported in *8 S. C. C. 182*.

The important question of law, observed Chief Justice Burnside, which arises in this appeal, is whether the plaintiff's agent, not having been duly appointed agent by a notarial document, was a person " lawfully authorized by him " to sign a lease required to be notarial by the 2nd section of the Ordinance No. 7 of 1840 against Frauds and Perjuries. The Chief Justice came to the conclusion

that, as our Ordinance requires a notarial document to authenticate a lease, the authority to sign such a lease should be notarial. His reasons for arriving at this decision I prefer to give in his own words: " Now it is manifest that the object of the Ordinance was " to secure the most solemn proof of the contract, and not to let it " depend upon the very fallible proof which parol evidence would, " more especially in this country, afford. It would be, in the langu- " age of Lord Eldon, the most mischievous evasion of the Ordinance, " if, whilst the instrument of lease itself must be of the solemn " character prescribed, yet the authority to execute it and thus bind " a party to it might depend upon the weakest and most unsatis- " factory of all proof. The English statute requires a mere writing: " our Ordinance requires a most solemn writing, which has all of, " and more than, the solemnity of the execution of a deed by " English Law, and in this material particular the two enactments " differ, and open the way to a decision based on the well-recog- " nized principle of English Law, that the authority to execute " a deed must be by deed." The Chief Justice expressed himself as being glad to be able to arrive at this conclusion, because any other would seem to permit the very evils which it was the admitted intention of the Legislature to defeat.

Mr. Justice Clarence, who sat with the Chief Justice on that appeal, expressed no opinion on the point. He was content to affirm the judgment of the Court below, on the ground that there was no evidence of any kind of an authority given by the plaintiff to the defendant to make the lease.

The action, it appears, was for rent secured on a lease, and the District Judge had dismissed the action because in his opinion the plaintiff had no right to sue on the lease.

With all deference to the learned Chief Justice his reasoning seems to me to be based on the fallacy that the intention of the Legislature as to powers of attorney to convey interests in land must be taken to be the same as to the intention respecting the forms of actual conveyance or agreements to convey such interests. The intention of the Legislature must be found in the language which it uses to express its intention. The Ordinance No. 7 of 1840 clearly ordained that conveyances of interest in immovable property must be attested in the solemn forms presented by its provisions. But, what does it say with regard to the mandates to those who execute such conveyances under the authority of their mandates? " No sale, contract, &c., shall be of force or avail in law unless the " same shall be in writing and signed by the party making the same, " or *by some person lawfully authorized by him or her* in the pre- " sence of a notary," &c. The underlined words were introduced

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for the first time into a local Ordinance having for its object the prevention of frauds or perjuries. They are not to be found in the previous Ordinance, No. 7 of 1834. It is a pity that more intelligible language was not used, for who is meant " by him or her? " But the words " lawfully authorized " are not ambiguous. They mean authorized in a manner recognized by the law. What was the law? The law " according to the laws and institutions " which subsisted under the ancient Government of the United " Provinces," to use the words of the Proclamation of the 23rd September, 1799. I say that must be the law, because I can find no previous Ordinance, Regulation, or Proclamation specially dealing with the subject of mandates or power of attorney.

What that law is cannot be better explained than it was by Mr. Berwick in a considered judgment on the very point before us, of which I append extract* (D. C., Colombo, No. 61,545, 21st January,