THE NEW

LAW REPORTS OF CEYLON

VOLUME LVI

1954 *Present :* **Rose C.J. and Sansoni J.**

K. T. EDWIN DE SILVA, Appellant, *and* D. K. KARUNADASA DE SILVA, Respondent

S. C. 254—D. C. Galle, 4,358 L

Land Development Ordinance (Cap. 320)—Sections 162 and 163—Disposition of protected holding—Reference in deed to Government Agent's consent—Imperative and not merely directory—Meaning of term "attestation"—Notaries Ordinance (Cap. 91), s. 30 (20) and (21).

Under section 162 of the Land Development Ordinance the disposition of a protected holding is vitiated by the failure of the notary to refer specifically, in the attestation clause of the deed, to the written consent of the Government Agent to the disposition.

The term "attestation" in section 162 (1) includes both the subscription of the signature and the attestation clause.

APPEAL from a judgment of the District Court, Galle.

N. E. Weerasooria, Q.C., with *T. P. P. Goonetilleke*, for the defendant appellant.

E. G. Wikramanayake, Q.C., with *Sir Edwin Wijeratne, K. Herat* and *H. L. de Silva*, for the plaintiff respondent.

Cur. adv. vult.

August 4, 1954. ROSE C.J.—

In this matter the plaintiff-respondent sought to eject the defendant-appellant from a land described in the schedule attached to the plaint and to recover from him certain sums as arrears of rent and damages on the footing that the appellant, who was an allottee from the Crown under the Land Development Ordinance, Chapter 320, of the premises referred to, had by Deed P1 of the 9th August, 1947, transferred the land in question to the plaintiff-respondent with the consent and approval of

2—J. N. B 38165-1,592 (9/54)

the Government Agent, as required by the Ordinance, duly obtained. By Deed P2 of the same date the plaintiff-respondent purported to lease the said land to the defendant-appellant on certain terms and conditions which by a subsequent agreement P3 of the 27th of January, 1948, was varied to allow the defendant-appellant to possess and enjoy the land for a period of three years at a monthly rental of Rs. 300 subject to the conditions that if the respondent was in default in the payment of rent for a period exceeding six months the agreement P3 was to become null and void.

Counsel for the appellant confined himself before us to two points which arise under Section 162 of the Land Development Ordinance. In the first place he contends that the Deed P1 is of no effect for the reason that the written consent of the Government Agent had not been previously obtained.

Section 162 of the Ordinance reads as follows :

(1) " A notary shall not attest any deed operating as a disposition of a protected holding unless the written consent of the Government Agent to such disposition shall have been previously obtained nor unless such deed shall have attached thereto the document by which the Government Agent granted his consent to the disposition sought to be effected by such deed. Such document of consent shall be specifically referred to by the notary in the attestation of such deed."

(2) " A deed executed or attested in contravention of the provisions of this section shall be null and void for all purposes."

It is to be noted that the learned District Judge took the view that as the written consent of the Government Agent was referred to in the body of the lease P2, which was executed on the same day as P1, the omission to refer to it in P1 was not fatal as in the circumstances of the particular case P1 and P2 could properly be regarded as forming a single document. Moreover, the consent of the Government Agent was attached to P1, although no reference to it is made in the body of the document.

I find it difficult to accept this view as it seems to me that the document P1 is undoubtedly a transfer contemplated by the Ordinance and as such should in itself satisfy the requirements of Section 162. While it is true that P2 was executed on the same day and probably very shortly after P1, it seems to me that it should properly be regarded as a separate document and indeed such a lease could well have been entered into at any date subsequent to P1. Moreover, I am inclined to agree with the appellant's contention that the mere attaching of the consent to the document P1 does not necessarily demonstrate that the consent was obtained prior to the execution of the deed, as it may well, of course, have been attached upon its receipt subsequent to the execution ; and this, in fact, was the appellant's suggestion of what occurred in the present matter.

Apart from this, I am of opinion that the appellant's second point is entitled to succeed. He relies on the second sentence of Section 162 (1):

> "Such document of consent shall be specifically referred to by the notary in the attestation of such deed."

and Sub-Section (2) which provides that a deed executed or attested in contravention of the provisions of sub-section (1) shall be null and void for all purposes.

The learned District Judge, perhaps not unnaturally anxious to obviate the rigours of the section, held that the provision contained in the second sentence of Section 162 (1) was directory only and was therefore not governed by sub-section (2).

Learned counsel for the respondent endeavoured to draw a distinction between the word "Attestation" and the act of attesting. He submitted that the Deed was "attested" as soon as the signatures of the Notary and the witnesses were subscribed and that, provided the consent of the Government Agent had been previously given and had been attached to the Deed, sub-section (2) would have no operation in the event of the Notary failing specifically to refer to such document of consent in the "Attestation", which he submits, means the Attestation Clause.

It would seem to be straining the language of the Section so to limit the meaning of the word "Attestation". The more natural interpretation seems to me to be that the Legislature intended to use the word "Attestation" as the noun describing the act of attesting which latter term, it would appear, should include both the subscription of the signature and the attestation clause. Moreover, support for this view is supplied by Section 30, sub-section (20) of the Notaries Ordinance, Chapter 91, where the side note "Attestation" appears opposite the sub-section which begins :—

> "He shall without delay duly attest every deed or instrument . . . . and shall sign and seal such attestation."

Sub-section (21) reads :—

> "Every such attestation shall be substantially in the form E in the Second Schedule . . . . .."

Form E sets out a specimen attestation clause.

No Ceylon authority was cited to us by counsel for either party at the hearing of the appeal but after the close of the argument learned counsel for the respondent drew our attention to an English case—*Ex Parte Bolland ; in re Roper*, Law Journal 1883 New Series Volume 52, Equity, at page 113—in which in the course of the judgment a discussion took place as to the proper interpretation of Section 10 (1) of the Bills of Sale Act, 1878.

The sub-section reads :

> " The execution of every Bill of Sale shall be attested by a Solicitor of the Supreme Court, and the attestation shall state that before the execution of the Bill of Sale the effect thereof has been explained to the Grantor by the Attesting Solicitor . . . . "

Lord Justice Cotton, in one of three judgments which were delivered by the Court of Appeal, says :

> " As to the other point, the whole argument arises from an inaccurate use of language in section 10. The word ' Attestation ' is used in sub-section (1) as meaning the ' Attestation Clause ', and sub-section (2) as meaning the fact of attestation, that the deed has been attested by the attesting witness. The only thing required by the Act as to the mode in which the execution of the deed has to be attested, is that it is to be attested by a Solicitor of the Supreme Court. The explanation is something collateral, which must be done before the deed is executed."

Terms such as " attest " and " attestation", when they are not defined in the Ordinance in which they appear, should, it seems to me, be given the meaning which is in accord with the context. In the interpretation of that particular sub-section of the Bills of Sale Act, the learned Lords Justices of the Court of Appeal no doubt had good reason for drawing the distinction that they did. Having regard, however, to the position in the section which the second sentence of Section 162 (1) of the Land Development Ordinance occupies, it would seem that to draw such a distinction as the learned Lords Justices drew in the above case would make nonsense both of Section 162 itself (as well as the penalty clause, Section 163, which immediately follows it) and the section of the Notaries Ordinance to which I have already referred. It is for these reasons that I am of opinion, as I have already stated earlier, that the term " attestation " in Section 162 (1) must reasonably be taken to include both the subscription of the signature and the attestation clause.

No doubt the provisions of Section 162 are drastic and may operate harshly in certain cases. Presumably, however, the Legislature intended strictly to limit and protect dispositions of land which have been allotted by the Crown under the Land Development Ordinance. In any event, it is not for the Courts to endeavour to mitigate the severities of a piece of legislation in cases where the language used would seem to admit of no ambiguity.

These matters are sufficient to determine the present appeal. The appeal is therefore allowed and the plaintiff-respondent's action dismissed. The appellant will receive the costs of this appeal and of the proceedings in the court below.

Sansoni J.—I agree.

Appeal allowed.