1938

Present : **Moseley J.**

PERERA v. CASSIM.

1,007—P. C. Colombo, 13,406.

Notaries Ordinance, No. 1 of 1907—Deed of lease—Execution by lessor only—Meaning of "executed" in rule 24, s. 29—Failure to forward duplicate to Registrar—No breach of rule 24, s. 29.

The failure of the notary to forward to the Registrar of Lands a duplicate of a lease executed by the lessor only does not constitute a breach of rule 24 of section 29 of the Notaries Ordinance, 1907.

A DEED of lease was drawn by the accused, a notary, on December 14, 1936. It was signed and executed by the lessor whose signature was attested by the notary. A number was given to it, but he did not send a duplicate to the Registrar of Lands as required by rule 24 of section 29 of the Notaries Ordinance, 1907. He was charged with violating this rule. The learned Magistrate who tried the case held that, since the document, not having been signed by the necessary parties, was not a deed, the rule did not apply. He accordingly acquitted the accused. From this order the complainant appealed with the sanction of the Attorney-General.

E. A. L. Wijeyewardene, K.C., S.-G. (with him *E. H. T. Gunasekara, C.C.*), for complainant, appellant.—This is a test case. The deed was attested and executed, and a number was given to it. A "deed" in Ceylon is not the same as that in England. Properly speaking there is no "deed" in Ceylon. It is a notarially executed document. (*Ukku v. Rankiri* [1].)

[MOSELEY J.—Is deed defined in the Ordinance ?]

No. Under section 29, rule 3 the mere form giving the intention of the parties appears to be a deed. It is a deed even before it is executed.

[MOSELEY J.—Can you explain the use of the words "deed or instrument" in that section ?]

No. It is not material to decide in the present case whether a document is a "deed" or an "instrument" as rule 24 itself uses the words "deed or instrument".

The earlier part of rule 3 shows that the Legislature regarded a writing even before it was executed by the parties as a deed or instrument within the meaning of the rules. If the rule did not contain the words "or to sign his name or make his mark upon any paper or other material intended to be afterwards used for any such purpose", then in view of the above interpretation of the words "deed or instrument" it would have been in order for a notary to obtain the signature of a party to a blank piece of paper. Rule 16 (*a*) shows that a document drawn by a notary is a deed or instrument. Rules 7, 9, and 13 show that the document is a deed or instrument before it is signed by a party or witness. The notary attests the deed under rule 19 after it has been drawn and executed. Rule 22 deals with the numbering of deeds.

[MOSELEY J.—Suppose the lessor only signed but not the others, then what is the number ?]

[1] *(1908) 11 N. L. R. 212, at p. 213.*

The moment it is executed by the lessor a number must be given. When the lessee signs, there will be another attestation. Otherwise the words " without delay " in rule 19 would be superfluous.

Now deeds are executed in triplicate : one is sent to the Registrar, one is kept by the notary and the other is handed over to the party. The one sent to the Registrar contains the stamps required under the Stamp Ordinance, 1909. The Registrar has to see that the proper stamps had been affixed. They must be affixed immediately before the attestation. Hence the document must be sent to the Registrar to check the stamps.

[MOSELEY J.—If it is not executed by the lessee, is not the stamp fee recoverable ?]

Under section 51 (*d*) of Ordinance No. 22 of 1909, the Commissioner of Stamps could make an allowance for the stamps used on such an instrument. Section 10 of this Ordinance shows that the stamps should be affixed before the notary attests the deed.

[MOSELEY J.—Under the Notaries Ordinance, it must be done before the execution.]

That is for the protection of the notary. The stamps should be affixed before, but cancelled after the execution.

[MOSELEY J.—Should another duplicate be sent if there is another attestation ?]

As a matter of practice the duplicate is returned by the Registrar after he has satisfied himself as to the stamps, &c. The duplicate when completed by the signature of the other parties is then sent back to the Registrar by the notary.

[MOSELEY J.—The rule requires that it should be sent every time with fresh stamps ?]

It is anything but clear. The notary sent a list of deeds attested by him and this one was included. Unless the duplicate was sent to the Registrar, a breach of rule 6 cannot be detected. The Registrar must see that the revenue is paid.

Execution means the first signing.

L. A. Rajapakse, for the accused, respondent.—The notary is a proctor of twenty years' standing. He has attested the signature but not the deed. According to the evidence of the prosecution the practice has been not to send the duplicates till the deeds are fully executed. Execution and attestation of a deed refer to the embodiment of an agreement in a certain way. It is only such a transaction—not a portion of it—that should be followed up in that way. The elements necessary for a deed are given in *10 Hailsham 163, s. 199; Elphinstone p. 45.*

[MOSELEY J.—Those give the nature of the document. When does a deed come into being ?]

Parties manifest their intention which is written down by the notary. If they do not adopt them, then as their intention is not set, the document will not become a deed. If one party signs it, it is an instrument in the general sense of the term only. See *Stroud (2nd ed.), p. 986.* Stamps should be affixed before the parties execute the deed, but the deed is not complete till all parties sign it. If the duplicates are sent before some of

the parties execute it, it will cause hardship because they cannot complete the deed till the duplicates are returned. Hence this rule must be construed in favour of the public.

Cur. adv. vult.

February 18, 1938. MOSELEY J.—

This is an appeal with the sanction of the Attorney-General, against the acquittal of the accused (respondent) on a charge of a breach of rule 24 of section 29 of the Notaries Ordinance, 1907. The rule is as follows:—

"24. He shall deliver or transmit to the Registrar of Lands of the district in which he resides the following documents so that they shall reach the Registrar on or before the fifteenth day of every month, viz., the duplicate of every deed or instrument (except wills and codicils) executed or acknowledged before or attested by him during the preceding month, together with a list in duplicate, signed by him, of all such deeds or instruments which list shall be substantially in the form F. in Schedule II. hereto, and he shall at the same time forward a similar list so signed by him to the Registrar-General. Provided, however, that in the case of wills and codicils only the number and date of the document shall be inserted in such list."

It is common ground that the accused failed to send a duplicate of a document, numbered by him 486, as required by the said rule, if indeed the rule is applicable in the circumstances of the case. The document is a lease and appears to have been signed by the lessor, but not by the lessee. The accused contended that rule 24 does not apply to such document until it has been executed by all the parties necessary thereto. The learned Magistrate held that the document, not having been signed by both the necessary parties, had no validity in law, and held that the rule does not apply to incomplete deeds. He accordingly acquitted the accused.

It must be conceded on the authority of *Ukku v. Rankira et al.*[1], that the term "deed" as used in the Notaries Ordinance has no relation to a deed signed, sealed and delivered in accordance with English Law. The Ordinance deals with notarially attested instruments. It is convenient for the purpose of this case to refer to such a document as a deed.

Counsel for the appellant sought to interpret the rule as a requirement that a notary who has attested any execution of a deed shall transmit to the Land Registry a duplicate thereof, even if such document not having been executed by all the necessary parties, is of no legal effect. In support of his argument he brought to my notice a number of other rules under section 29, namely, rules 2, 3, 6, 7, 16 (*a*), 19, and 22 and contended that in each of those rules the document referred to might be, or in some cases must be of an inchoate character. I am not disposed to disagree with that view, but it seems to me that the Legislature in describing such documents as deeds or instruments did so in what Counsel for the respondent has put it as "an anticipatory manner", in order to avoid referring to such an inchoate document as a paper writing, which may ultimately become a deed or instrument.

[1] *11 N. L. R. 212.*

In my view, the case rests upon the proper interpretation to be placed upon the word "executed" in rule 24. The learned Solicitor-General expressed the view that one of the objects of the Legislature was to protect the revenue, that is to say, to give the Registrar-General the earliest opportunity of satisfying himself that the requirements as to stamping of the document had been observed. That argument loses a great deal of its cogency when it is realized that even if the appellant's view is correct, the Registrar-General is enabled to satisfy himself on this point. In the light of the first proviso to section 29 it seems to me more probable that the object of rule 24 is to ensure that the documents relating to land or property in Ceylon are brought to the notice of the Registrar of Lands. If that is so, or in any case, there does not appear to me to be any virtue in transmitting to the Registrar of Lands a duplicate of a document, which is only partially executed and which may never be completed.

In *Nicholson v. Fields*[1], Pollock C.B. observed as follows :—" We are, I think, bound undoubtedly to this sort of strict construction in a penal statute, that if there be a fair and reasonable doubt, we must do that which we always do in revenue cases—not to charge the subject with a tax unless the language by which the tax is imposed is perfectly clear and free from doubt; still more, perhaps, are we bound to do so in the case of a penalty. "

In view of my observations as to what I think to be the object of the rule, it will be realized that for myself I have very little doubt as to what is the meaning of the term " executed ". If I had any doubt the benefit should be given to the accused and against the Legislature which has failed to explain itself. In short, my opinion is that rule 24 does not apply to any deed or instrument which has not been executed by all the parties necessary thereto.

I may add that if the contention of the appellant is correct and the requirements of the rule as interpreted by him were strictly complied with an obvious inconvenience would result inasmuch as a document after execution by one party might have to be recovered from the Registry for subsequent execution.

The appeal is therefore dismissed.

Appeal dismissed.