1947 *Present:* **Wijeyewardene and Dias JJ.**

SREENIVASARAGHAVA IYENGAR, Appellant, *and* JAINAMBEEBEE AMMAL, *et al.*, Respondents.

152 Inty.—D. C. Nuwara Eliya, 1,589

Evidence—powers of attorney executed in India—Proof of due execution—Power of attorney executed by pardanishin lady behind purdah while Notary stood outside the purdah—Validity of it—Admissibility of copy of power of attorney—Evidence Ordinance, ss. 70, 78 (6), 82, 85.

A power of attorney executed by a pardanishin lady behind the purdah while the Notary stood outside the purdah cannot be regarded as a power of attorney executed before the Notary for the purpose of attracting to itself the presumption under section 85 of the Evidence Ordinance.

Under section 70 of the Evidence Ordinance, the admission of a party to an attested document of its execution by himself is sufficient proof of its execution only *against that party.*

Where a power of attorney purported to have been executed in British India in the presence of two witnesses and a notary public—

Held, that, under section 85 of the Evidence Ordinance, the document could be admitted without evidence as to the signature of the notary or the identity of the executant.

A document purporting to be a "true copy" of a copy of the original power of attorney copied by a registering officer in a book kept under the Indian Registration Act, 1908, is not in itself sufficient to establish the fact of execution of the original power of attorney when it does not come under section 85 or section 78 (6) of the Evidence Ordinance and when it is inadmissible under section 82.

APPEAL from an order of the District Judge of Nuwara Eliya. The petitioner-appellant moved the District Court of Nuwara Eliya for an order substituting him in place of the plaintiffs. He pleaded that the plaintiffs had conveyed to him all their interests in the action by deeds S 1 and S 3. The deed S 1 purported to have been executed by the plaintiffs through their attorney who was alleged to have been appointed under the power of attorney S 2 executed in British India. The deed S 3 purported to have been executed by the plaintiffs through their attorney who claimed to have been appointed under a different power of attorney. A copy of the second power of attorney purporting to be a true copy issued under the hand of the Sub-Registrar of Paranavaisam was produced and marked S 4. The chief questions for consideration in appeal were (1) whether there was sufficient proof of the due execution of S 2, and (2) whether S 4 was admissible in evidence.

N. Nadarajah, K.C. (with him *L. A. Rajapakse, K.C.*, and *Cyril E. S. Perera*), for the petitioner-appellant.—The District Judge held that the powers of attorney S 2 and S 4 were not duly proved. S 2 and S 4 are admissible without proof of due execution and authentication. Sections 74, 78 (6) and 76 of the Evidence Ordinance support that view. Clearly under section 85 of the Evidence Ordinance S 2 is admissible without proof of due execution and authentication. S 4 also becomes admissible under section 85 because S 4 is a document executed and authenticated by an officer duly authorised under the Indian Registration Act of 1908

and acting under powers given by that Statute. The fact that these powers of attorney were not registered under Ceylon Powers of Attorney Ordinance (Chapter 104) makes no difference as that Ordinance is not exhaustive. Further, under section 82 of the Evidence Ordinance S 4 is admissible and must be presumed to be genuine. Under section 82, if the document is admissible without proof in England it is also admissible in Ceylon. See *Kowla Umma v. Modiheen*[1]. In England both under the common law and Statute law, public or semi-public registers are admissible without proof of execution. See Phipson on Evidence (8th edition) pages 332, 334 and 544; Vol. II. Taylor on Evidence (12th edition), sections 1591, 1592, 1593 and 1600; 8 and 9 Victoria, Chapter 183.

According to English authorities if the document is admissible in India it is also admissible in England. Foreign and Colonial Registers are also admissible if kept in accordance with the law of the country where they were kept. See *Evans v. Bull*[2]; *David Lyell v. John Lawson Kennedy*[3]; *Regan v. Regan*[4]; *Westmacott v. Westmacott*[5]; *Chottey Lal v. The Collector of Moradabad*[6]; *Kanhaya Lal v. National Bank of India, Ltd*[7]. Under Lord Brougham's Act 14 and 15 Victoria, Chapter 99, provision was made for admissibility of certified copies where the originals were admissible.

S 4, both as a certified and authenticated copy and as a document issued by virtue of a Statute, is admissible without proof of execution and authentication.

Further, the genuineness of S 2 and S 4 has not been challenged by the respondents in the District Court under section 154 of the Civil Procedure Code. The original plaintiffs have, by their counsel, consented to the substitution. The respondents, therefore, have no right to object to the substitution.

Dodwell Goonewardene, for the 1st, 2nd and 3rd respondents (original plaintiffs).

H. V. Perera, K.C., (with him *S. Nadesan*) for seventeenth to nineteenth, twenty-eighth to thirty-third and fortieth added parties and tenth to sixteenth and twenty-first substituted defendants.—It is not correct to say that the respondents did not challenge the genuineness of S 2 and S 4. Their counsel asked for strict proof of these documents since the presumption under Power of Attorney Ordinance was not available.

The appellant could not come in under section 339 of the Civil Procedure Code as there was no decree in favour of the plaintiffs. The plaintiffs' action was for partition and it was the defendants who asked for a deed in reconvention. The plaintiffs' action has been dismissed by the Privy Council and the Order in Council only imposes an obligation on the respondents subject to a condition. The respondents can waive their right to get a transfer deed. There is no executable decree in favour of the plaintiffs and consequently there was nothing to assign.

[1] *(1937) 39 N. L. R. 454 at 455.*
[2] *(1878) 38 L. T. 141.*
[3] *L. R. (1889) 14 A. C. 437.*
[4] *(1892) 67 L. T. 720.*
[5] *L. R. 1899 Probate 183.*
[6] *1922 A. I. R. (P.C.) 279.*
[7] *1923 A. I. R. (P.C.) 114.*

Section 404 of the Civil Procedure Code contemplates transfer of interest in an action. That section only empowers the original action to be continued. What the action is must be ascertained from the pleadings in the original action. Action is sometimes used in the Code to mean the proceedings, but the subject matter of an action can only be a thing as understood in our law, and not a proceeding which is only a chain of events. See *Wilson et. al. v. Velayuthan Chettiar et. al.*[1]

There was no decision by the Privy Council that the subject matter of this action was the money claim by plaintiffs. In fact there was no such claim. The order in Council cannot be construed in that way.

Under the Roman Dutch Law all assignments pending action are bad and neither section 339 nor section 404 under which the appellants seek to come in empowers them to do so.

There is a considerable amount due to the respondents as costs. The respondents apprehend, it may be wrongly, that these assignments are attempts to deprive them of the benefits of the Order in Council.

As regards S 2 and S 4, due proof of execution is necessary because these powers have not been registered in Ceylon. A power of attorney is not a public document under our law. Sections 74 (*b*), 78 (6) and 76 have no application. Section 85 cannot apply to S 4 as that section does not apply to a copy, and it cannot apply to S 2 because at least one of the executants was not before the notary as required by law.

Section 82 does not enact law in Ceylon analogous to the law in England. The section contemplates the documents themselves. That is to say, the appellants must prove that the particular document S 4 is admissible in England without proof of due execution to make it so admissible in Ceylon. See Ameer Ali's commentary on that section. The appellants have not shown that these documents are admissible in England without proof of due execution.

N. Nadarajah, K.C., in reply.—The subject matter of an action can vary from time to time on the orders of the Judge or for other reasons. In this case there is the Order in Council which must be enforced under rule 31 of the Privy Council Appeal Ordinance (Chapter 85). See *In re Barlow v. Orde*[2]; *Carnie and Gilman v. The Comptoir D'Escompte de Paris and Chartered Bank of India, Ltd.*[3]; *Joseph Pitts v. Edward La Fountaine, Trustee in Liquidation of Affairs of T. B. Morton and Co.*[4]

The Privy Council made an order for specific performance in this case and such an order ensures to the benefit of both the parties. There can be no waiver by one who is under an obligation to perform a duty. See *Halkett v. Earl of Dudley*[5]; *Maitra v. Sinha*[6]; *Akshyalingam Pillai v. Avayambala Ammal*[7]; *Bell v. Denver*[8].

In our Civil Procedure Code there are different kinds of decrees. See section 200 as regards decrees for pre-emption. See also *Pana Lana Saminathan Chetty v. Vander-Poorten*[9]; *Sinnathamby et. al. v. Anthony Pillai*[10]; *Holmes v. Alia Marikar*[11]; *Mathes Appuhamy v. Reymond*[12].

[1] *(1932) 1 C. L. W. 313.*
[2] *(1892) 18 Sutherland W. R. 175.*
[3] *(1871) L. R. 3 P.C. 465.*
[4] *(1881-2) L. R. 6 A.C. 482.*
[5] *(1907) 1 Ch. 590 at 601.*
[6] *(1932) A. I. R. Cal. 579 at 582.*
[7] *(1933) A. I. R. Mad. 386.*
[8] *(1886) 54 L. T. 729.*
[9] *(1932) 34 N. L. R. 287.*
[10] *(1924) 26 N. L. R. 69.*
[11] *(1896) 1 N. L. R. 232.*
[12] *(1897) 2 N. L. R. 270.*

The order in Council is either a decree or it is not. If it is a decree, section 339 applies. If it is not, section 404 applies.

Statements made by persons authorised to make and keep registers in the course of their duties become a part of the register and such statements are admissible without proof. It seems clear therefore that S 4 is admissible without proof of its due execution and authentication.

Cur. adv. vult.

January 6, 1947. WIJEYEWARDENE J.—

The plaintiffs instituted this action for the partition of a property in Nuwara Eliya. The seventh to sixteenth defendants filed answer stating that the beneficial interests in the land were vested in them and that the plaintiffs had only a share of the legal interest. They prayed for a dismissal of the plaintiff's action and for judgment in reconvention aganist the plaintiffs directing them "to execute such deeds in favour of the seventh to sixteenth defendants as may be necessary for the better manifestation of the title of the seventh to the sixteenth defendants".

The District Judge dismissed the plaintiffs' claim for partition and ordered them to execute deeds as pleaded for in the answer in favour of the seventh to the sixteenth defendants. This Court set aside that judgment and ordered a decree of partition to be entered (*vide 39 New Law Reports 105*). There was then an appeal to His Majesty in Council (*vide 41 New Law Reports 297*). The Order in Council restored the decree of the District Court and directed that "the plaintiffs-respondents on receiving the amount agreed to as being, or found on inquiry, in accordance with such directions as the said Supreme Court may give, to be, the share of the partnership assets due to on Pavana Ibrahim Saibo, ought to execute to the defendants a conveyance of the shares of the land claimed in this suit".

On an application made by the plaintiffs for the enforcement of the Order of the Privy Council this Court made order on April 1, 1942, giving the necessary directions to the District Court of Nuwara Eliya.

On December 12, 1942, the petitioner-appellant moved the District Court for an order subtituting him in place of the plaintiffs. He pleaded that the plaintiffs had conveyed to him all their interests in the action by deeds S 1 of December 19, 1940, and S 3 of November 17, 1942. The present appeal is from the order of the District Judge refusing that application.

The deed S 1 has been executed by the plaintiffs through their attorney A. S. A. Rahim alleged to have been appointed under the power of attorney S 2 of December 14, 1940. The deed S 3 has been executed by the plaintiffs through A. K. Mohamed Cassim who claims to have been appointed under a power of attorney of October 7, 1942. A copy of that power of attorney purporting to be a true copy issued under the hand of the Sub-Registrar of Paranavaisam has been produced and marked S 4.

The Council for the contesting defendants contended—

(*a*) that there was no proof of the due execution of the power of attorney S 2 by the plaintiffs;

(*b*) that the deed S 1 did not assign any interest in the action to the petitioner;

(*c*) that S 4 was not admissible in evidence;

(*d*) that there was no assignable interest in the action, as the contesting defendants' Counsel intimated at the inquiry before the District Judge that those defendants did not desire to have the deeds executed by the plaintiffs in their favour.

The power of attorney S 2 purports to have been executed by the three plaintiffs at Tanjore on December 14, 1940. It does not appear to have been registered under the Indian Registration Act, 1908.

I find on S 2 the alleged thumb impression of the first plaintiff and the alleged signature of the second and third plaintiffs. Then follow two declarations by a Notary Public of Tanjore. The first declaration is to the effect—

"I certify that I have satisfied myself on examining (at the residence of the plaintiffs) this 14th day of December, 1940, Jainambeebee Ammal (first plaintiff) who is a Gurtha lady with the aid of (a lady) that the power of attorney has been voluntarily executed by the said Jainambeebee Ammal who purports to be one of the principals and whose identity has been proved by inspection behind the purdah by (A) and (B)."

the second declaration of the Notary reads—

"Executed in my presence this 14th day of December, 1940, by P. E. Mohamed Cassim (third plaintiff) and P. E. Mohamed Sheriff (second plaintiff) whose identity is proved by (C) and (D)."

A comparison of the two declarations satisfies me that S 2 was not executed by Jainambeebee Ammal in the presence of the Notary. I do not think that a power of attorney executed by a pardanishin lady behind the purdah while the Notary stood outside the purdah could be regarded as a power of attorney executed before the Notary for the purpose of attracting to itself the presumption under section 85 of the Evidence Ordinance. In this connection I would refer to the following observations made by Lord Darling in *Hira Bibi et al v. Ram Hirè Lal et al.*[1] in considering a somewhat similar question:—

"Hira Bibi is a pardanishin lady The evidence shows, beyond contest, that, when Hira Bibi signed the mortgage bond, not one of the persons who signed as witnesses was present or saw her sign it. She was behind the parda. Anant Prasad, her son, took this deed and others inside the parda. He came and told those outside, and out of sight of Hira Bibi, that she had signed the deed. After this all those signed whose names appear as witnesses. The learned Judges from whose judgments this appeal is brought have themselves declared that this is wholly insufficient to comply with the statute relating to the due execution and attestation of such a document as this mortgage bond

[1] *(1925) 52 Indian Appeals 362.*

. . . . The mortgage deed here in question was not, in a legal sense, attested; for it was merely signed by persons who professed to be witnesses to its execution, although in truth and in fact they were not so."

It was argued by the appellants' Counsel that we should take into consideration the fact that the first plaintiff who was noticed to show cause against the substitution did not do so and that Mr. Advocate Goonewardene who appeared for her at the appeal agreed to the application being allowed. I presume that this argument is based on section 70 of the Evidence Ordinance. Assuming that the conduct of the first plaintiff may be taken as an "admission" it has to be noted that section 70 enacts only that "the admission of a party to an attested document of the execution by himself shall be sufficient proof of the execution *against him*". The "admission" therefore in this case may be sufficient proof against Jainambeebee Ammal of the execution by her of S 2 in the presence of the two witnesses but not aganist the petitioners (*vide Satish Chandra Mitra v. Jogendra Nath Mahalanobis et al*[1]). I may add that no oral evidence was led at the inquiry about the execution of S 2 by any of the plaintiffs. I would, therefore, hold that the petitioner has failed to prove the execution of S 2 by the first plaintiff.

S 2 purports to have been executed by the second and third plaintiffs in the presence of two witnesses and a Notary Public. There is a declaration to that effect by the Notary who signed it and affixed his seal. I do not think it necessary for the petitioner to tender an affidavit or lead any evidence verifying the signature of the Notary as this document has been executed in British India (*vide In re Goffs Estate, Siddal v. Nicholson*[2]); nor is an affidavit of the identity of the executant necessary (*vide In the Goods of Mylne*[3]). I would also refer to the unreported case of *Lanktree v. Molesworth*[4]. In that case a power of attorney executed before a Notary of the City of London and two witnesses and an authentication by the Notary were produced before the District Judge who refused to act on it in the absence of any evidence of the identity of the executant. In a short judgment this Court set aside the order of the District Judge "having regard to the fact that it has been the practice of this Court to accept documents witnessed and authenticated in that manner". I shall, therefore, presume under section 85 of the Evidence Ordinance that S 2 has been duly executed by the second and third plaintiffs.

I have read the deed S 1 carefully and I am unable to say that S 1 conveys the interest of the second and third plaintiffs under the Order in Council.

I shall now consider the position with regard to S 4. Not being a certified copy issued by the Registrar-General of Ceylon under the Powers of Attorney Ordinance, the petitioner cannot avail himself of the presumptions under section 8 of that Ordinance. It purports to be a "true

[1] (1917) *All India Reporter (Calcutta) 693.*
[2] (1866) *14 Law Times Reports 727.*
[3] (1905) *Indian Law Reports 33 Calcutta 625.*
[4] *S. C. No. 120; D. C. (Final) Trincomalee 13/2257; S. C. Minutes of February 16, 1940.*

copy " of a copy of the original power of attorney copied by a registering officer in a book kept under the Indian Registration Act, 1908. There is no evidence to show that S 4 has been compared with the original. I may also add that no oral evidence has been led before the District Judge regarding the execution of the power of attorney by the plaintiffs. The signatures which purport to be copies of the signatures of the second and third plaintiffs are in Tamil characters while the second and third plaintiffs have signed S 2 in English characters. In the absence of any explanation this fact involves in some doubt the genuineness of the original of S 4. The fact that the original of S 4 has been registered is not in itself sufficient proof of its execution (*vide Salimatul Fatima* alias *Bibi Horasaini v. Kaylaspoti Narian*[1]). S 4 shows that the power of attorney was not executed before any of the persons referred to in section 85 of the Evidence Ordinance. It appears to have been executed before two witnesses. S 4 does not come under section 78 (6) as the original has been executed in British India and not in a foreign country. It is therefore not necessary to discuss the question whether it complies with the other requirements of that section. Then remains the question whether it is admissible under section 82. To establish its admissibility under that section it has to be proved first that S 4 would have been admissible in England or Northern Ireland in proof of the due execution of the power of attorney without proof of the authentication. The question of the admissibility of a document in England must be determined by reference to any particular Statute governing the case (*e.g.*, Births and Deaths Registration Act, 1836 (6 and 7 William IV., Chapter 86), Indian Marriages Act, 1851 (14 and 15, Victoria, Chapter 40)) and, in the absence of such a Statute, by reference to the general provisions of section 14 of 14 and 15 Victoria, Chapter 99. No English Statute applicable to documents of the nature of S 4 executed in India has been cited to us. I do not think that S 4 comes under section 14 of 14 and 15 Victoria, Chapter 99 since that section does not refer to certified or examined copies issued in India.

The Evidence (Foreign, Dominion and Colonies) Act, 1933, 23 George V, Chapter 4, enables Orders in Council to be made applying the Act to India so as to enable official copies of a register in India to be admissible in evidence in England. No such Order in Council referring to the Indian Registration Act, 1908, has been brought to my notice.

For these reasons I hold that it has not been proved that S 3 has been executed under a power of attorney duly executed by the plaintiffs.

In view of my findings on the above points it is not necessary for me to express an opinion on the last point raised by the Counsel for the respondents.

I would dismiss the appeal with costs.

DIAS J.—I agree.

Appeal dismissed.

[1] *(1890) 17 Calcutta 903.*