1930

Present : **Lyall Grant J.**

KING *v.* PERERA.

92—*D. C. (Crim.) Colombo, 9,435.*

Notaries Ordinance—Authority to practise—Live and hold office—Attestation of deeds outside office—Ordinance No. 1 of 1907, s. 29, sub-sec. (35) (a).

Where a notary public received instructions and executed some deeds in a place other than that at which he lived and held office, in the area within which he was authorized to practice,—

Held, that the notary did not commit a breach of sub-section (35) (*a*) of section 29 of the Notaries Ordinance, No. 1 of 1907.

APPEAL from an acquittal by the District Judge of Colombo.

Crossette Thambiah, C.C., for the Crown, appellant.

L. A. Rajapakse (with him *E. C. F. J. Senanayake*), for accused, respondent.

September 22, 1930. LYALL GRANT J.—

This is an appeal by the Attorney-General against an acquittal. The accused is a notary public and he is charged with an offence against the Notaries Ordinance, No. 1 of 1907.

The first charge is that he being a notary public, authorized by warrant of the Governor to practise throughout Meda pattu of Siyane korale, with residence and office at Wattadara, did on October 12, 1929, live and hold office at Weliweriya, in the division of Gampaha, of the District of Colombo, without the approval of the Governor being obtained, in violation of sub-section (35) (*a*) under section 29 of the Ordinance No. 1 of 1907.

The second is of the same offence on another date, and the third charge is that he committed the same offence during the months of January to October of the same year. That is to say, the first two charges refer to specific dates and the third charge to a general charge.

Most of the facts are admitted. The accused was a notary and not a proctor. He was authorized by the warrant of the

Governor " to be and act as notary public throughout Meda pattu of Siyane korale of Colombo District with residence and office at Wattadara ".

The accused took instructions and executed deeds in his house at Weliweriya. Weliweriya is within the Meda pattu. All protocols, registers, &c., were kept at the notary's office at Wattadara. The rule which the notary is said to have transgressed by attesting deeds at Weliweriya is sub-section (35) (*a*) of section 29 of the Ordinance. Sub-section (35) (*a*) reads as follows :—

> Every notary not being an advocate or proctor shall live and hold office at such places as he may elect subject to the approval of the Governor.

Crown Counsel's argument was that looking to the general tenor of the Ordinance " live and hold office " meant living and performing the functions of his office at any particular place, such as a village. He conceded, as I understood, that certain acts might be performed by a notary in a place other than that which was mentioned in his warrant, but he contended that the only place at which he could make a habit of performing the functions of a notary was the place mentioned in his warrant. In support of this contention he referred to various sections of the Ordinance. Section 10 provides that every notary shall be bound to have his office within the area specified in his warrant, and section 29 (35) (*d*) instructs him to keep his records at his office, or if he has more than one office, at such office as may be approved by the Registrar-General.

This is for purposes of inspection by proper authorities. Section 29 (35) (*e*) directs him to be present between certain hours on certain days at the office in which he keeps his records and that clause proceeds :—" The taking of instructions for or signature to a deed or instrument shall not be a good cause for absence from office, unless the person whose instructions or signature is to be taken is believed to be on the point of death. "

Section 29 (21) forbids any notary to authenticate or attest any deed or instrument in any area other than that in which he is authorized to practise.

Counsel for the respondent also referred to these and other sections of the Ordinance as sustaining his contention, which was that a notary is entitled to perform his functions throughout the area to which he is appointed although he is required to have an office in a particular place for the purpose of keeping his records. He referred to section 3 which provides that :—" Every appointment to the office of notary shall be by warrant under the hand and seal of the Governor, and shall specify the area within which, and the language or languages in which, the person appointed is authorized to practise, " and he says that the warrant in the present case is an authority to practise throughout the Meda pattu of Siyane korale.

The learned District Judge has come to the conclusion that the question for decision really is " What is meant by holding office ? " and in that I agree with him. He has come to the conclusion that the expression means putting up a notice board, keeping all books and documents, normally carrying on duties, and being present on days and hours as prescribed by the rules, and he points out that there is no evidence that the accused has not done so.

The contention of the Crown is that the execution of deeds and receiving instructions, at any rate in any degree of frequency, outside Wattadara, the place where he has his office, amounts to holding office in another place. Looking at the Ordinance as a whole, so far as I can piece together the different provisions, I think the learned Judge has come to the correct conclusion. Crown Counsel was unable to maintain that the occasional execution of a deed or the receiving of instructions by the notary within the pattu but outside his office amounted to holding office in the sense in which he wished me to construe it.

The Crown therefore is asking the Court to fix an undefined line of demarcation

between the case of the regular performance of duties and their irregular performance. If that is the contention, it is a sufficient answer to say that in this case I do not think that the Crown has proved the regular and consistent performance of duties at Weliweriya. It is true that 78 deeds have been produced by them covering a period of over nine months, but there is no evidence of the total number of deeds lawfully drawn or attested by the defendant in that time.

The position would have been otherwise if the accused had put up a notice board and held out his house at Weliweriya as his office. If facts such as those were proved, it would be necessary to consider whether they involved a breach of the law, but no such facts have been proved, and it is unnecessary to surmise what they would involve. All that has been proved is that on a fair number of occasions throughout the year the notary took instructions and executed deeds at Weliweriya. The Ordinance nowhere says that this is an offence. It is made a distinct offence by section 29 (21) to authenticate or attest a deed or instrument at any place not within the area at which he is authorized to practise. By implication I think it may be inferred that he is empowered to authenticate or attest a deed or instrument at any place within the area of which he is authorized to practise.

If the intention of the Legislature was to make such acts as the accused has committed in this case punishable, it has expressed its intention in language so obscure that I for one am unable to follow it.

The Crown referred to a case reported in 5 *Supreme Court Circular* 23, where a notary was charged under the Old Ordinance, No. 2 of 1877, with attesting an instrument in a district other than that in which he was authorized to practise.

In that case the attestation clause which bore the notary's signature described the attestation as having taken place within the notary's district. The prosecution proved that the notary attested the signature at a place outside his district. There was no evidence as to where the notary affixed his signature to the attestation clause. It was held that the " essence of the offence was the attending by the notary at the place of the affixing of the signatures by the parties and witnesses ".

That case seems to me to support the contention of the defence in the present case. The function which the notary performed was one of attestation, and it was held that the attestation took place at the place of affixing the signatures of parties and witnesses.

I do not understand the Crown to contend that in every case parties and witnesses must affix their signatures in the notary's office, and unless that is so, it is obvious that the notary is entitled to practise his profession and attest documents outside his office. That is a strong argument against the meaning which the Crown seeks to attach to the words in section 29 (35) (*a*) " Live and hold office. "

The appeal is dismissed.

Appeal dismissed.