Present : Lascelles C.J. and Middleton J. *June 6, 1911*

KIRI BANDA *v.* UKKU BANDA.

103—*D. C. Kegalla*, 2,761.

Evidence—Variation of a notarial instrument by a non-notarial document—Ordinance No. 14 of 1895, s. 92.

There is nothing in the Evidence Ordinance to prevent a variation or modification in a notarial instrument from being proved by a subsequent non-notarial writing, provided that the latter writing is not itself of such a nature as to require notarial execution under Ordinance No. 7 of 1840.

THE plaintiff-appellant in this case sued the defendant, *qua* administrator of the estate of one Mudiyanse, deceased, for the balance sum of Rs. 430 and interest due on a mortgage bond.

Mudiyanse, the original mortgagor, had paid a sum of Rs. 600 on September 29, 1904, and had obtained a writing (D 1) from the plaintiff acknowledging the receipt of the said sum, and stating that out of it Rs. 320 was in payment of the principal and Rs. 280 in payment of the interest due on the bond up to that day, and further stating that the plaintiff would accept the balance yet due on the mortgage without interest.

Thereafter Mudiyanse died, and the defendant, who was duly appointed administrator of the estate, paid plaintiff on February 8, 1906, the sum of Rs. 100 and obtained a receipt therefor (P 1), which stated that this sum was in payment of the interest then due. The plaintiff was called upon, in the testamentary case in which the estate of Mudiyanse, the mortgagor, was administered, to accept the sum of Rs. 330 in full satisfaction of his claim, which the plaintiff declined to do, and the parties were referred by the

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District Judge to a separate action. The sum of Rs. 330 was, however, not deposited in Court by the administrator till after the present action was instituted. The learned Additional District Judge (A. C. Allnutt, Esq.) heard the case on February 6, 1911, and in his judgment, delivered on February 20, 1911, dismissed the plaintiff's claim in excess of Rs. 330, which was admitted by the defendant, and ordered plaintiff to pay the defendant the costs of this action.

The plaintiff appealed.

Alwis (with him *A. St. V. Jayewardene*), for the appellant.—No subsequent oral agreement can be admitted to prove a variation of the contract contained in the mortgage bond. In the case of a notarial instrument a writing which is not notarial is inadmissible to prove a subsequent variation. The document D 1, which is not notarially executed, cannot be admitted to vary the terms of the mortgage bond, and has been properly rejected in the lower court by the District Judge and by the parties.

If D 1 is not admissible, it is quite clear that the oral admission of the plaintiff is not enough to vary the terms of the mortgage bond, Counsel referred to *De Silva v. De Silva*,[1] *Somasundram Chetty v. Todd*.[2]

Tambyah, for the respondent.—Parol evidence may be admitted to show that the conduct of the plaintiff amounts to a waiver of a right created by the mortgage bond. See *Shyama Charan Mandal v. Heras Mollah*.[3] (Lascelles C.J.—Is the document D 1 "oral evidence" within the meaning of section 92 of the Evidence Ordinance ?) No. It is a written variation of the contract. The respondent may rely on D 1 in proof of the variation of the original contract.

A. St. V. Jayewardene, in reply.—The mortgage bond being a notarial instrument, can be modified only by another notarial instrument. See *De Silva v. De Silva*.[1] The Evidence Ordinance does not draw any distinction between notarial and other written instruments. But in Ceylon, the Evidence Ordinance must be read with Ordinance No. 7 of 1840.

Cur. adv. vult.

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The appeal turns upon the admissibility of the document D. 1 which is a receipt given by a mortgagee to his debtor for a portion of the principal and interest, to which are appended the following words over the mortgagee's signature : "It is agreed that no interest be charged hereafter on the balance amount still due on the bond above mentioned."

[1] *(1907) 1 A. C. R. 107.* [2] *(1910) 13 N. L. R. 361.*
[3] *(1898) 26 Cal. 161.*

It was agreed by the proctors who represented the parties at the trial that a notarial instrument, such as a mortgage bond, could not be modified by a writing such as D 1, which was not notarially executed. The learned District Judge seems to have acquiesced in this view ; but in his judgment he has practically given effect to the undertaking embodied in D 1, on the ground, as I understand the judgment, that the plaintiff admitted that he made the promise in question. In this the learned District Judge is not right. If D 1 is not in fact admissible in evidence, it must be ruled out of the case altogether, and no verbal evidence can be given of its contents, in which case the judgment cannot stand.

The case, however, has raised a point of real importance. It is indisputable that for a long time past a rule of evidence has obtained in Ceylon to the effect that notarial documents can be modified or varied only by notarial writings, and that non-notarial documents are not admissible for this purpose.

There is not much authority on the point, but the rule was stated in *De Silva v. De Silva*[1] as a matter of common knowledge by Wendt J., than whom no one is better qualified to speak as to the practice of our Courts. Against the rule itself nothing can be urged ; it is based on the maxim *unumquodque ligamen dissolvitur eo ligamine quo et ligatur*, and rests on the same principles as the English rule that a deed under seal cannot be discharged, or even partially dissolved, except by an instrument of equally solemn character (see cases collected in *Taylon on Evidence, section* 1043).

But in the Evidence Ordinance this rule with regard to the variation of notarial agreements is not reproduced ; indeed section 92 lays down a different and less stringent rule with regard to the evidence, which may be admitted to vary the terms of written agreements. It was suggested in argument that, in adopting the Evidence Ordinance from the Indian Act, the distinction which our law draws between notarial and non-notarial writings was inadvertently overlooked. But in view of illustration (*h*) to section 92, which expressly refers to a notarial lease, this cannot be the case. The fact, however, remains that the old rule has not been embodied in the Ordinance, and we are confronted with the question whether we are justified in acting on an unwritten rule of evidence which has not been incorporated in the Ordinance.

Section 2 (1) of the Evidence Ordinance repeals " all rules of evidence not contained in any written law so far as such rules are inconsistent with any of the provisions of this Ordinance. " The rule under consideration is, I think, inconsistent with the fourth proviso to section 92, which, as is shown by example (*h*) goes only to the length of excluding oral evidence to modify the terms of a notarial agreement ; it follows, I think, by necessary implication, that documentary, but not necessarily notarial, evidence is under

[1] *(1907) 1 A. C. R. 107.*

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that section admissible for this purpose. But even if the old rule does not fall within the scope of the repealing section, the question remains whether, in determining the admissibility of evidence to vary written instruments, whether notarial or otherwise, we are not precluded from going outside those sections of the Evidence Ordinance which specifically deal with the subject. On the principles laid down in the often-quoted case of *Bank of England v. Vagliano*,[1] I think that we are bound to look for the law on this subject, which is specifically and fully dealt with in the Ordinance, within the limits of the Ordinance itself.

To have recourse to unwritten rules of evidence in matters which are within the scope of the Ordinance would be to perpetuate the uncertainty which it was the object of the Ordinance to remove. The result is that there is nothing to prevent a variation or modification in a notarial instrument from being proved by a subsequent non-notarial writing ; provided that the latter writing is not itself of such a nature as to require notarial execution under Ordinance No. 7 of 1840. On this principle the receipt D 1 in the present case does not require notarial execution, inasmuch as it was not given " for establishing any security, interest, or incumbrance affecting land," or for any of the other purposes named in section 2. It is therefore admissible in evidence, and the judgment of the District Judge, which is practically based on this document, is not open to the objection of being founded on inadmissible evidence. Generally, I think, that the judgment of the learned District Judge is in accordance with the evidence on the merits of the case, and I think that the appeal should be dismissed with costs.

MIDDLETON J.—

This was an action on a mortgage bond against the administrator of the mortgagor, deceased, to recover balance of principal and interest due on the bond.

The original mortgagor had paid Rs. 600 on September 26, 1904, on the bond and received from the plaintiff a writing (D 1), in which the plaintiff had added the words : " It is agreed that no interest be charged hereafter on the balance amount still due on the bond." To this the plaintiff appended his signature. But on February 8, 1906, after the mortgagor's death, when his administrator paid the plaintiff a further sum of Rs. 100 on account of the mortgage debt, the plaintiff gave him a receipt (P 1) reciting that the sum paid was interest due on the mortgage bond.

On the issues settled the District Judge held that the Rs. 100 were paid on account of principal, and that plaintiff had foregone his interest in consideration of an elephant transaction.

[1] *(1891) A. C. 107.*

The questions raised in appeal were—(1) Whether D 1 was admissible in evidence under section 92 of the Evidence Ordinance ; (2) the probative effect of D 1.

The contention of the appellant's counsel was that the mortgage bond being of necessity by law notarially executed, no variation of it could be proved except through the medium of another notarially executed document, and the case of *De Silva v. De Silva*[1] was relied on.

Chapter VIII. of the Evidence Ordinance, in which we find section 92, is headed by the words, " Of the exclusion of oral by documentary evidence. "

In the case before us the evidence objected to in the shape of D 1 is distinctly documentary and not oral, and giving proviso 4 of section 92 its literal meaning, a notarial document could not be modified by an oral agreement, but inferentially it might be modified by a written agreement ; at least the proviso does not forbid it.

I think, however, that if the modification took the form of an agreement which according to law had to be notarially executed, not even written evidence of such agreement would be admissible.

Here the alleged modification by D 1 is an agreement to forego interest and it does not modify the original agreement in any respect as regards its effect on land or immovable property. Taking this view of the proviso to the section, I think D 1 is admissible in evidence.

The case of *De Silva v. De Silva*[1] relied upon can clearly be supported by the view that the facts as reported show an oral modification of the original agreement, not a documentary one. As regards P 1, the fact that the appellant improperly apportioned to the payment of interest a sum which should have been set off against principal, and handed the receipt to the defendant worded to that effect, did not, in my opinion, estop defendant from denying that he accepted the payment on account of interest. The District Judge, moreover, found that defendant knew of the agreement not to recover interest, and had objected at the time to P 1, and that plaintiff tricked him.

I would dismiss the appeal with costs.

Appeal dismissed.

[1] *(1907) 1 A. C. R. 107.*