Present : Lascelles C.J.

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Evidence Ordinance, s. 68—Proof of document required by law to be attested—Witnesses to document not to be found—Evidence to satisfy the Court that such witness is not to be found.

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

The proper evidence that a witness cannot be found is that the person whose duty it was to call him has made use of his legal powers under section 131 of the Civil Procedure Code. If it is proved that the Fiscal has been unable to serve the summons or to produce the witness on a warrant, it would be sufficient proof that he is not to be found.

The evidence of one of the parties to the action was considered not sufficient to prove that the witness cannot be found.

THE facts are set out in the judgment.

Sandrasegra, for the appellants.

Bawa, K.C., for the respondent.

May 29, 1912. LASCELLES C.J.—

In this case the only issue is whether deed No. 41,375 was executed by one Dingiria. The learned Commissioner of Requests, after hearing all the avidence available, decided that, on the materials before him, there was just sufficient evidence to prove the execution of the deed by Dingiria. Against this finding the defendants now appeal, on the ground that the deed was not admissible under section 68 of the Evidence Ordinance. That section is in the following terms:—" If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence." It is common ground that one of the attesting witnesses, Sendia, is now alive, and the defendants maintain that there is not sufficient evidence to prove that he cannot be found so as to make the deed provable under section 69. The plaintiff called a certain amount of evidence to show that he had

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searched for Sendia, and that he had been unable to find him, and the Commissioner of Requests believes that the plaintiff had done his best to find the man; and he throws out the opinion that Sendia has been purposely kept out of the way, and that he will appear in his village as soon as the case is decided. Now, the Commissioner of Requests may be perfectly right in the opinion that he has formed as to the attempt made to find the man Sendia. But the course that he has taken seems to me to be a highly dangerous one. If the evidence of one of the parties to an action is accepted as sufficient to prove that the witness to a deed cannot be found, a wide opening would be made for the evasion of the wholesome rule laid down by section 68 of the Evidence Ordinance. In my opinion the best evidence and the proper evidence that a witness cannot be found is that the person whose duty it was to call him has made use of his legal powers under section 131 of the Civil Procedure Code. If these powers have been exercised, and if it is proved that the Fiscal has been unable to serve the summons or to produce the witness on a warrant, it would be sufficient proof that he is not to be found for the purpose of section 68. I do not think that the Commissioner of Requests ought to have been satisfied with the evidence produced in this case. I think the fairest course would be to set the judgment aside, and to allow the plaintiff an opportunity of exercising his powers under section 131 of the Civil Procedure Code to procure the attendance of this witness, and if he is unable to do so, then the Commissioner will be at liberty to decide the case on the evidence already recorded. The appellant, I think is, entitled to the costs of the appeal, and the other costs must abide the result of the trial.

Set aside.