1958 *Present :* Basnayake, C.J., and de Silva, J.

EMALIA FERNANDO, Appellant, *and*
CAROLINE FERNANDO and others, Respondents

S. C. 454—D. C. Panadura, 3,795

Deeds—Prevention of Frauds Ordinance—Section 2—" In the presence of "—" Duly attested "—Notaries Ordinance, s. 30 (12) and (20).

An instrument which is required by section 2 of the Prevention of Frauds Ordinance to be notarially attested must be signed by the Notary and the witnesses at the the same time as the maker and in his presence.

Certain deeds of gift conveying lands were signed by the executant in a room in a hospital in the presence of the Notary and the witnesses, but were signed by the Notary and witnesses in a different room out of the view of the executant.

Held, that the deeds were of no force or avail in law.

APPEAL from a judgment of the District Court, Panadura.

H W. Jayewardene, Q.C., with *S. D. Jayasundera*, for Plaintiff-Appellant.

Walter Jayawardene, with *D. R. P. Goonetilleke* and *L. Mututantri*, for 1st, 4th, 5th, 6th and 7th Defendants-Respondents.

D. R. P. Goonetilleke, for 2nd and 3rd Defendants-Respondents.

Cur. adv. vult.

February 14, 1958. BASNAYAKE, C.J.—

The only question that arises for decision in this appeal is whether section 2 of the Prevention of Frauds Ordinance requires that the notary and the witnesses should sign an instrument requiring their attestation at the same time as the maker of the instrument and in his presence.

Shortly the facts are as follows : Boniface Fernando, who died on 18th June 1953, executed on 13th June 1953 three deeds of gift No. 6430, 6431, and 6432, conveying certain lands to the plaintiff his wife. The deeds were executed by the deceased in room No. 14 in the Fernando Memorial Hospital in Wellawatte in the presence of the notary and the witnesses, but they did not sign them in his presence. After the deceased signed the deeds the notary and the witnesses went to the resident doctor's consulting room which was a little distance away from the room of the deceased and out of his view and there the notary and the witnesses

signed the deeds. The doctor describes the situation of the consulting rooms thus : " You get out of Room No. 14, turn left along the corridor, walk 3 or 4 steps, and turn right and enter my consultation room. It is on the other side of the passage. It is an independent room. Anybody in my room is not visible to people in Room No. 14."

All the copies of the deeds were, between the date of their execution and 5th July 1953, lost from the notary's office before the duplicates were sent to the Registrar of Lands and before they were tendered for registration.

Admittedly the deeds were not signed by the witnesses and the notary in the presence of the deceased. Learned counsel for the appellant contended that there was no legal requirement that the notary and the witnesses should sign in the presence of the maker of the instrument ; but he was unable to cite any decision of this Court in support of his contention.

The material portion of section 2 of the Ordinance reads as follows :—

" No sale, purchase, transfer, assignment, or mortgage of land or other immovable property, ... shall be of force or avail in law unless the same shall be in writing and signed by the party making the same, or by some person lawfully authorised by him or her *in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnesses.*"

An instrument for effecting a sale, etc. of immovable property to be of force or avail in law must be—

(*a*) in writing, and

(*b*) signed by the party making it, or by some person lawfully authorised by him,

(*c*) in the presence of a licensed notary public and two or more witnesses present at the same time, and

(*d*) its execution must be duly attested by the notary and the witnesses.

(*a*) and (*b*) need not be considered for the purpose of the instant case. (*c*) requires that the person signing the deed should do so in the presence of the notary and the witnesses who shall be present at the same time. It is necessary that the witnesses and the notary should not only be present but should also see the party making the instrument sign it and be conscious of the act done (see *Hudson v. Parker*[1]). The effect of the words " in the presence of " is that they should be present not only in body but also in mind. As the effect of the words " in the presence of a licensed notary public and two or more witnesses present at the same time " is that witnesses should not only be bodily present but should also see the party making the instrument sign it and be conscious of that act, the statute is not satisfied if the witnesses are intoxicated or are of unsound mind or are blind or asleep (*Hudson v. Parker* (*supra*)).

[1] *163 E. R. 948. 1 Rob Ecc. 12.*

If as learned counsel contends the section requires no more than that the party executing the deed should sign it in the presence of the witnesses and the notary and that witnesses and notary may sign the deed in proof of their presence at any time thereafter and at any place and not necessarily in the presence of the party signing the deed, it would have been sufficient for the legislature to have said " in the presence of a licensed notary public and two or more witnesses present at the same time " and it was unnecessary to enact the words " and unless the execution of such writing, deed, or instrument be *duly* attested by such notary and witnesses."

The words " and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnesses " must surely impose an additional requirement. In construing a statute effect must be given to every word in it and no words are to be treated as surplusage unless in attempting to give a meaning to every word we should make the enactment unintelligible. The words " and unless " indicate the importance attached to the attestation by the notary and the witnesses. What is the true meaning of this requirement ? The instrument must be " duly attested " by the notary and the witnesses. Now what is the meaning of the word " attest " ? It is defined in Sweet's Law Dictionary (1882) thus :

" To attest is literally to witness any act or event, but the term is now exclusively applied to the signature or execution of a document. When A executed a deed in the presence of B, and B signs his name on the document as a token of his having witnessed A's execution, B is said to attest the execution. The term is even more commonly applied to wills than to deeds. A clause called an attestation clause is generally written at the foot of the instrument as a declaration by the attesting witness that the instrument was signed or executed in his presence".

The word " duly " must also in this context be given its force and effect. It means in due manner, order, or form. Its effect is that the notary and the witnesses must at the proper time and place sign the instrument as proof of the fact that they were present and saw its maker sign the instrument. The requirement of the section is not satisfied if the notary and the witnesses sign the deed at another place and at some other time. They must sign it then and there in the presence of the maker. The signing by the maker in the presence of the notary and the witnesses and the attestation by the notary and the witnesses are one and the same transaction to be carried out at one and the same time and place.

I find support for the view I have formed in the English case of *Wright v. Wakeford*[1]. It was there held that the signing of the instrument by the attesting witnesses must be contemporaneous with the signing by the person executing it and part of the same transaction. In that case the words the Court was called upon to construe are " attested by two or more credible witnesses ".

[1] *4 Taunt. 213, 128 E. R. 310.*

I am reinforced in my view by the fact that any other construction of this section will promote and not prevent fraud. The declared object of the Ordinance being " to provide more effectually for the prevention of frauds and perjuries " its provisions should be so construed as to give effect to that object and not so as to defeat it.

Learned counsel for the appellant contended that the requirement of the Notaries Ordinance in regard to the attestation of documents is not relevant to a consideration of the true meaning of the section. I am unable to agree that the provisions of the Notaries Ordinance are irrelevant to a consideration of the meaning of section 2 of the Prevention of Frauds Ordinance. I think in giving effect to the word " duly " we should take into account provisions of law which regulate the execution of documents required to be notarially attested. Section 30 (12) of the Notaries Ordinance provides that a notary " shall not authenticate or attest any deed or instrument unless the person executing the same and the witnesses shall have signed the same in his presence and in the presence of one another, and unless he shall have signed the same in the presence of the executant and of the attesting witnesses ". Section 30 (20) requires the notary to state in his attestation that the deed was signed by the party making it and the witnesses in his presence and in the presence of one another.

The view I have expressed above is in accord with the decision of this Court in the case of *Punchi Baba v. Ekanayake*[1], in which this Court expressed the view that section 2 of the Prevention of Frauds Ordinance required that the notary and the witnesses should sign in the presence of the maker and at the same time and that a deed not so signed was not valid.

In my opinion the learned District Judge is right in holding that the deeds are of no force or avail in law.

The appeal is therefore dismissed with costs.

DE SILVA, J.—I agree.

Appeal dismissed.