1919.

Present: De Sampayo J.

WEERARATNE *v.* RANMENIKE.

122—C. R. Ratnapura, 15,644.

Deed—Failure of notary to get deed executed in duplicate.

The failure on the part of a notary to have a deed executed in duplicate does not affect its operation as a deed.

THE facts appear from the judgment.

Samarawickreme, for plaintiff, appellant.—The deed on which the plaintiff bases his title being more than thirty years old must be presumed to have been duly executed. The burden of proving that the deed was not genuine was, therefore, on the defendant. That burden has not been discharged.

The Commissioner is wrong in holding that the absence of a duplicate vitiates the deed. The provision in section 15 of Ordinance No. 7 of 1840 with regard to the execution of a deed in duplicate merely imposes a duty on the notary. Failure on the part of the notary to observe this duty in noway affects the validity of the deed.

H. V. Perera, for defendant, respondent.—Section 90 of the Evidence Ordinance enacts that the Court " may presume " that a document more than thirty years old was duly executed. The expression " may presume " is defined in section 4 and contrasted with the expression " shall presume. " It was open to the Court to call for proof of the genuineness of the deed. The Commissioner was right in adopting this course, in view of the " very suggestive elements of fraud " referred to in his judgment, especially the absence of a duplicate, and the existence of another deed, admittedly genuine, bearing the same date and number, but embodying a totally different transaction.

Section 15 of the Frauds Ordinance, when read in the light of the preamble to the Ordinance, cannot be regarded as merely imposing a duty on the notary. The requirement is imperative, and a deed is bad unless it is complied with. The provisions of law that merely impose duties on notaries in connection with the execution of deeds are all contained in the Notaries Ordinance.

G. Koch, for intervenient, respondent.

October 21, 1919. DE SAMPAYO J.—

The plaintiff claimed title to a land called Welegedarawatta by inheritance from his father Tennekoon Mudiyanselaye Kiri Banda. The plaintiff pleaded as his father's title a deed of gift bearing

No. 1,720 dated November 4, 1886, attested by W. D. T. Perera, Notary Public. The Commissioner held that this deed was not executed as required by law, and was insufficient to convey title, and he accordingly dismissed plaintiff's action, with costs. The reason for this holding is that the deed is not shown to have been executed in duplicate. The plaintiff produced the original, but it has been proved by the Registrar of Lands that the notary had not sent any duplicate to the Registrar's Office, and no duplicate is to be found there. There is in the Registrar's Office a duplicate of a deed bearing the same number and date, but it is not the duplicate of the deed of gift pleaded by plaintiff. It appears that the notary was guilty of many irregularities in his professional career, and in particular failed to send the duplicates of deeds attested by him to the Registrar's Office. Once he was fined, and went to jail for non-payment of the fine. He is now dead. The Commissioner concludes that no duplicate of the deed has been proved to have been executed. The question is whether the deed is invalid for that reason. The Commissioner bases his opinion on section 15 of the Ordinance No. 7 of 1840, which provides that "every deed or other instrument, except any will, testament, or codicil required by this Ordinance to be executed or acknowledged before or to be attested by a notary, shall be executed, acknowledged, or attested in duplicate." But there is no provision invalidating a deed which is not executed in duplicate, nor does section 2, which is the substantial provision of the Ordinance relating to deeds affecting land, require such deeds to be executed in duplicate. The fact is that Ordinance No. 7 of 1840, like its predecessor Ordinance No. 7 of 1834, apart from the main purpose of requiring written instruments for certain classes of transactions, contained many provisions concerning the duties of notaries, which have since been embodied in separate Ordinances specially relating to notaries. In this connection it is instructive to note the whole of section 15, part of which I have above cited. It is as follows: "And it is further enacted that every deed or other instrument, except any will, testament, or codicil required by this Ordinance to be executed or acknowledged before or to be attested by a notary, shall be executed, acknowledged, or attested in duplicate, and every such notary shall at the end of each month transmit the duplicates of all deeds or other instruments executed or acknowledged before or attested by him during the month to the Court of the district wherein he shall have been licensed to practise, with a list in duplicate of such deeds of instruments." It is clear to my mind that this clause merely imposed a duty on the notary, and was not intended to invalidate deeds where the notary might have failed to observe the direction therein contained. It is well settled that a notary's failure to observe his duties with regard to formalities which are not essential to due execution, so far as the parties are concerned, does not vitiate a deed. For instance, the absence

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of the attestation clause does not render a deed invalid. D. C. Kandy, 19,866 [1]; D. C. Negombo, 574.[2] Similarly, I think the failure on the part of the notary to have a deed executed in duplicate does not affect its operation as a deed. The case D. C. Kandy, 22,401,[3] is an authority on this point. I therefore think that the decision of the Commissioner in this case is erroneous.

There was also a question as to the execution of the deed by the party at all. The deed is more than thirty years old, and on behalf of the plaintiff reliance is placed on the presumption of due execution under section 90 of the Evidence Ordinance, No. 14 of 1895. That section, however, declares that the Court "may presume," and not that it must do so, and in circumstances of doubt it is within the power of the Court to refuse to apply the presumption. In this case there is nothing suspicious on the face of the document, and the notary's signature was sufficiently verified by the Registrar of Lands. One of the witnessess is dead, and the other is said to be alive. The Commissioner refused to allow a postponement to enable the plaintiff to call the surviving witness, though, I think, he might fairly have allowed it, if proof of execution was absolutely necessary. On the whole, however, I think the burden was on the defendant to prove that the deed was not genuine. There should be further inquiry on that and any other issues which arise in the case or may be submitted by the parties.

The judgment of dismissal is set aside, and the case is remitted to the Court of Requests for further proceedings. The plaintiff is entitled to his costs of the day in the Court below and of this appeal.

Appeal allowed.

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[1] *Austin's Rep. 113.*

[2] *Grenier (1874), p. 39.*

[3] *Austin's Rep. 139.*