APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice, and Mr. Justice Butler.

1934, January 26.

PONNUSWAMI GOUNDAN AND ANOTHER (APPELLANTS), APPELLANTS,

v.

KALYANASUNDARA AYYAR AND NINE OTHERS (RESPONDENTS), RESPONDENTS.*

Indian Evidence Act (I of 1872), sec. 67—Attesting witness who is either dead or cannot be produced—Secondary evidence of attestation by—Admissibility—Proof of such attestation by secondary evidence—If proof of execution of document by its alleged executant.

The alleged executant of a document was a marksman and besides the document-writer there were two other attesting witnesses. The evidence of one of them was contradictory and was not relied upon. Of the other two attesting witnesses one was dead and the other could not be produced. A person was called who proved that the signature of one of those attesting witnesses was his.

Held that that person's evidence was sufficient proof of the execution of the document by its alleged executant.

The Evidence Act permits secondary evidence to be given with regard to the attestation of an attesting witness who is either dead or cannot be brought to Court. The signature of the attesting witness when proved is evidence of everything on the face of the document and that he saw the executant make his mark. Section 67 of the Indian Evidence Act requires nothing more than proof of the handwriting or signature of the writer of the document or its executant. The section does not specify or limit the kind of evidence required and only requires proof by admissible evidence.

APPEAL under Clause 15 of the Letters Patent against the judgment of ANANTAKRISHNA AYYAR J., dated 14th October 1929 in Second Appeal No. 1852 of 1925 preferred to the High Court

* Letters Patent Appeal No. 12 of 1931.

against the decree of the District Court of Salem in Appeal Suit No. 115 of 1922 (Original Suit No. 250 of 1916, District Munsif's Court of Salem).

K. S. Krishnaswami Ayyangar for *V. N. Venkatavaradachariar* for appellants.

D. Ramaswami Ayyangar for *A. Srirangachariar* for respondents.

JUDGMENT.

BEASLEY C.J. BEASLEY C.J.—This is an appeal from a judgment of ANANTAKRISHNA AYYAR J. in second appeal. The suit under appeal was an ejectment suit. The plaintiff claimed to be landlord and owner of the suit property claiming that the defendants were mere tenants from year to year. The defendants, however, claimed that they had a permanent right of occupancy and, therefore, could not be ejected. The whole question turned on Exhibit M, the document under which the defendants occupied the premises. If it was a genuine document, then they had no defence because the document establishes the fact that the tenancy was one from year to year. Its genuineness was denied by the defendants who said that it was a forgery. No question in this case turns upon the identity of the person who is alleged to have executed the document. It is conceded that it is supposed to refer to the first defendant. The first defendant was a marksman and besides the document-writer there were two other attesting witnesses. One of them was P.W. 10 whose evidence was discredited. He admitted his attestation but said that the document had not been executed in his presence. This was in direct contradiction to the evidence which he had given

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in another case where he admitted that the document was executed in his presence. Faced with this contradictory evidence, the evidence of that witness was not relied upon and of course quite rightly. Of the other two attesting witnesses one of them was dead and the other one could not be produced. Therefore, secondary evidence could be admitted with regard to that attestation ; and admittedly P.W. 3 who was called proved that the signature of one of the attesting witnesses was his. Both the lower Courts and the second appellate Court accepted that evidence as proof of the execution of the document by the first defendant. In second appeal and here it was contended that by reason of section 67 of the Indian Evidence Act that proof was insufficient to establish the execution of the document by the first defendant. Section 67 of the Indian Evidence Act reads as follows :

> "If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting."

It is contended that that section relates only to the proof of the handwriting of the executant and not to the proof of the signature of an attesting witness. It is quite true that it does not mention the signatures of attesting witnesses but to accept the contention put forward by the appellants that the section has that restricted meaning would be to override the provisions of the Evidence Act with regard to the reception of secondary evidence. All that that section requires is that the writing or the signature of the executant should be proved to be his writing or

his signature. In the case of a signature how is that to be proved? It is to be proved either by means of a witness who saw the person write and was present necessarily when he did write or if such a person is not available—I am talking of course of the case where the executant denies execution of the document—by calling somebody who is familiar with the handwriting of the executant and who proves that it is his handwriting. In this case the latter alternative cannot be considered because the first defendant was a marksman and therefore such proof would be dependent upon the proof of a witness who actually saw him make his mark. Such a witness cannot be produced for the reasons already stated. Such witnesses would be the attesting witnesses; and they would be the best witnesses as their presence is guaranteed by their signatures. In this case neither of the remaining attesting witnesses can be called and secondary evidence with regard to their attestation obviously is admissible. What is the secondary evidence? The evidence of somebody who either saw them attest or is familiar with their signatures. We have that evidence here because, as already stated, there is a witness whose evidence has been believed. He states that the signature of one of the attesting witnesses is his signature. What follows from that? It follows that it is proved that that attesting witness attested the document. What follows from that? A passage from Mr. Starkie in his Law of Evidence, fourth edition, page 519, is set out in the judgment of our learned brother as follows:

"The signature of the attesting witness when proved is evidence of everything upon the face of the instrument, since it

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is to be presumed that the witness would not have subscribed his name in attestation of that which did not take place."

Therefore the signature of the attesting witness having been proved is evidence of everything on the face of the document and that he saw the executant make his mark. The argument put forward before us by the appellants directly gives the go-by to this very obvious inference which in the English law arises and I see no reason whatever for excluding that inference from the Indian Law of Evidence. It gives the go-by entirely to the provision of the Evidence Act which permits secondary evidence to be given in the absence of witnesses who are either dead or cannot be brought to Court. Section 67 of the Indian Evidence Act requires nothing more than proof of the handwriting or signature of the writer of the document or its executant. The section does not specify or limit the kind of evidence required. It clearly only requires proof by admissible evidence. For these reasons our learned brother's judgment in second appeal was right and this Letters Patent appeal must be dismissed with costs.

BUTLER J.—I agree.

A.S.V.