

(1905) 07 CAL CK 0023
In the Calcutta High Court

In Re: Mylne

Date of Decision : 22-07-1905

Acts Referred:

Evidence Act, 1872 — Section 114, 85

Citation : (1906) ILR (Cal) 625

Hon'ble Judges : Sale, J;Harington, J;Francis W. Maclean, J

Bench : Full Bench

Judgement

Francis W. Maclean, K.C.I.E., C.J.—This appeal raises a question of importance. It turns upon the true construction of Section 85 of the Evidence Act. On the 3rd June last, a petition was presented by Mr. Harry, a member of the firm of Messrs. Orr, Dignam & Co. asking for an order that letters of administration with the copy of the will of the property and credits of one William Hansbrow Mylne deceased be granted to him as the duly constituted Attorney of William Charles Robert Mylne, the sole executor named in the said will, to have effect within the province of Bengal. The statements in the petition were duly verified. The Power-of-Attorney was alleged to have been duly executed by the said William Charles Robert Mylne in the presence of the attesting witnesses thereto and also certified and attested by II. A. E. De Pinna, Notary Public, practising at London. His certificate was annexed to the said Power-of-Attorney. The Power-of-Attorney appears to have been in proper form. The certificate of the Notary Public, H. A. E. De Pinna, was in these terms.

I, Horatio Arthur Erith De Pinna, of the City of London, Notary Public, duly admitted and sworn practising in the said City, do hereby certify and attest that the hereunto annexed Power-of-Attorney was this day, signed, sealed and delivered in my presence and in that of the two thereto subscribing witnesses by General William Charles Robert Mylne, the constituent therein named and described. Whereof an act being required, I, the said Notary, have granted these presents under my Notarial firm and seal to serve and avail when and where need may require. Done and passed in London the 27th day of February in the year of our Lord 1905.

2. The matter came before Mr. Justice Bodilly on the 9th day of June, and the learned Judge was of opinion that Section 85 of the Evidence Act did not do away with the necessity of an affidavit of identification as to the person purporting to make the Power-of-Attorney being the person named therein and he refused the application. The applicant has appealed.

3. The question turns, as we have said, upon the true construction of Section 85 of the Evidence Act. The section runs as follows: "The Court shall presume that every document purporting to be a Power-of-Attorney and to have been executed before, and authenticated by a Notary Public * * * * was so executed and authenticated. "It is a mandatory section, the Court shall presume that every document, etc. The question is whether, in the face of that section, an affidavit of identification as to the person purporting to make the Power-of-Attorney being the person named therein is necessary. This document purports to be a Power-of-Attorney, and to have been executed before, and authenticated by a Notary Public. Unless the authentication by the Notary is to be treated as the equivalent of an affidavit of identity it goes for very little. In the present case, the person he authenticates as executing it is William Charles Robert Mylne, the constituent named in the Power, the executor of the will. The power is attested by two witnesses and we think having regard to Section 114 of the Evidence Act, the Court may, in the absence of any thing to excite suspicion, fairly assume that the Notary satisfied himself of the identify of the executant before he certified and attested the Power. If, in addition to this, an affidavit of identity is necessary, another affidavit that the person making the affidavit of identity was in a position to speak of that identity might be required and so on ad infinitum. If the application is the result of a fraudulent conspiracy, we scarcely think the requirement of an affidavit of identity would be likely to prevent the fraud, or afford any real protection. In our judgment, the object of the section was to avoid the necessity of anything of that sort.

4. No affidavit of identity in our opinion was necessary, and if the matter had come before us originally, we should have made the order, and this view is fortified by the fact that for nearly 35 years, no affidavit of identity has ever been required, and it has been the undoubted practice of the Court to act under the section and not to require any such affidavit. We do not think that practice ought to be departed from save on very cogent grounds. But Rule 748 (Belchambers' Rules and Orders) says: "The Power-of-Attorney shall be verified to the satisfaction of the Court or a Judge."

5. If the learned Judge intended to lay down that, in every case, an affidavit of identity is necessary we respectfully differ, but if he only intended that, in this particular case he was not satisfied, and required further evidence, we cannot say, in the face of the above rule that, if he requires it, he is not entitled to call for it. But any way, he ought not to have dismissed the application : at the most he should have ordered it to stand over for the affidavit he asked for to be produced. With these observations we remit the case to the learned Judge.

Sale, J.

6. I am of the same opinion.

Harington, J.

7. I also am of the same opinion.