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document. We do not think that this was the intention of the Legislature. If it was, it must have equally been the intention of the Legislature in section 19, in the case where both the attesting witnesses were dead or persons whose attendance could not be procured. In support of the contention of the appellant the case of *Aldul Karim v. Salimun* (1) has been referred to. It is quite clear from a perusal of this case that the question argued in the present appeal did not there arise. The question there was whether a document, which had not been signed in the presence of the witnesses could operate as a mortgage or could be regarded as having been "attested" within the meaning of section 19 of the Transfer of Property Act. Reliance was also placed on some of the remarks of their Lordships of the Privy Council in the case of *Casement v. Fulton* (2). Their Lordships there referred to the meaning of the expression "execution" of a will. Their Lordships' remarks refer to a special section of the Indian Succession Act which will be found set forth at page 400 of the report. In our opinion this case also has no bearing on the point discussed before us. The only other point raised is that the court of first instance held that, notwithstanding that the mortgage on the face of it was made in favour of the plaintiff, the real mortgagee was Man Mohan Lal. We think that under the circumstances of the present case, this was a question which ought not to have been gone into at all, and we agree with the view taken, in this respect, by the lower appellate court. The appeal fails and is dismissed with costs.

Appeal dismissed.

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February, 12.

Before Sir Henry Richard Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

UTTAM SINGH AND ANOTHER (DEFENDANTS) v. HUKAM SINGH
AND OTHERS (PLAINTIFFS)*

Act No. I of 1872 (Indian Evidence Act), sections 68 and 69—Evidence—Mortgage-deed—Proof of mortgage-deed after death of executant and marginal witnesses.

Held that, the executant of and all the marginal witnesses to a mortgage deed being dead, the mortgage-deed was sufficiently proved by evidence that

* Second Appeal No. 1789 of 1914, from a decree of Mr. E. Holme, District Judge of Aligarh, dated the 31st of July, 1914, confirming a decree of Rama Das, First Subordinate Judge of Aligarh, dated the 2nd of June, 1913.

(1) (1899) I. L. R., 27 Cal., 190. (2) (1845) 3 Moo. I. A., 395.

the signature of the mortgagor was in his handwriting and that the signatures of two of the marginal witnesses were in their hand writing. By such evidence a presumption of due execution was raised which it lay on the defendants to rebut. *Wright v. Sanderson* (1) referred to.

THIS was a suit for sale on a mortgage alleged to have been executed by one Torhi Singh as father and managing member of a joint Hindu family for lawful necessity in the year 1885. Both Torhi Singh and the marginal witnesses to the deed were dead and the plaintiffs, to prove the deed in suit, offered evidence as to the handwriting of the signatures of the executant and of two of the marginal witnesses. The court of first instance accepted this evidence and decreed the claim. On appeal the lower appellate court, though differing to some extent as to its estimate of the evidence, found that it was established that two at least of the marginal witnesses whose names appeared on the deed did actually sign it and that it was signed for the mortgagor, who was illiterate, in his presence by one Kushal Singh, the mortgagor's grandson. The appellate court likewise held the deed satisfactorily proved and dismissed the appeal. The defendants appealed to the High Court, urging principally that the mortgage in suit had not been legally proved.

The Hon'ble Dr. *Tej Bahadur Sapru* and *Munshi Gulzari Lal*, for the appellants.

Dr. *Surendra Nath Sen* and *Munshi Harnandan Prasad*, for the respondents.

RICHARDS, C. J. and MUHAMMAD RAFIQ, J. :—This appeal arises out of a suit on foot of a mortgage. The only question which we have to decide in the present appeal is as to whether or not the lower appellate court was justified in holding that the mortgage had been proved. Section 59 provides that a mortgage can only be effected by a registered instrument signed by the mortgagor and attested by at least two witnesses. Section 68 of the Evidence Act provides that “if a document is required by law to be attested, it shall not be used in 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.” Section 69 provides :—“If no such attesting witnesses can be found, or if

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the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person." In the present case it was proved and admitted that all the attesting witnesses were dead. A witness was called who proved to the satisfaction of the court that the attestation of two of the attesting witnesses was in their handwriting. It was also proved that the signature of the person executing the document was in the handwriting of that person. It is contended that this was not sufficient proof and that it was necessary to produce some witness, (though not an attesting witness) who would be able to state that the mortgage was in fact executed by the executant in the presence of the attesting witnesses. We think that there is no force in this contention. Once it was proved that the witnesses were dead, the evidence on the record, if believed, would be sufficient to prove the mortgage. Once this evidence was given there was a presumption of the due execution of the document, which it lay upon the other side to rebut, see *Wright v. Sanderson* (1). We think the decree is correct and should be affirmed. We dismiss the appeal with costs.

Appeal dismissed.

1916
July, 13.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

NANNU LAL AND OTHERS (DEFENDANTS) v. BHAGWAN DAS (PLAINTIFF).*

Civil Procedure Code (1909), order XXI, rules 92 and 93—Execution of decrees—Auction purchaser deprived of property purchased—Suit for refund of purchase money—Sale not set aside—Procedure.

Held that, under the present Code of Civil Procedure an auction purchaser who has been deprived by means of a suit against the judgment-debtor of the property purchased by him cannot obtain a refund of the purchase money without getting the auction sale set aside. Munna Singh v. Gajadhar Singh (2) distinguished. Muhammad Najib-ullah v. Jai Narain (3), Shanto Chandar Mukerji v. Nain Sukh (4) and Dorab Ally Khan v. Abdool Azeez (5) referred to.

* Second Appeal No. 1695 of 1915, from a decree of H. E. Holme, District Judge of Aligarh, dated the 4th of October, 1915, modifying a decree of Charu Deb Banerji, Munsif of Jalesar, dated the 22nd of July, 1915.

(1) (1884) L. R., 9 P. D., 140. (3) (1914) L. L. R., 36 All., 529

(2) (1889) I. L. R., 5 All., 577. (4) (1901) I. L. R., 23 All., 855.

(5) (1878) L. R., 5 L. A., 116.