

the present case, which, as we have mentioned, only forbids the "transfer" or "surrender" of the licence. The concluding words of the rule show that they refer to a person who was by virtue of the contract actually to be the holder of the licence. In our opinion, if the contract be as is alleged by the plaintiff, it is not void by virtue of rule 82. We accordingly allow the appeal, set aside the decree of the lower appellate court and remand the case to that court with directions to re-admit the appeal under its original number and to proceed to hear and determine the same according to law having regard to what we have said above. Costs here and heretofore will be costs in the cause.

Appeal decreed and cause remanded.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

RAM DEI (DEFENDANT) v. MUNNA LAL (PLAINTIFF).*

Act No. I of 1872 (Indian Evidence Act), sections 68, 69—Act No. IV of 1882, (Transfer of Property Act) section 50—Proof of execution—Document proved to have been executed in the presence of one attesting witness who was examined.

One of the attesting witnesses to a mortgage deed was dead. The other attesting witness was called and proved that the mortgage deed was signed by the mortgagor in his presence and that he signed the deed as an attesting witness. It was not expressly proved that there was another attesting witness present who saw the mortgagor sign, but it was not proved to the contrary that there was not another attesting witness. *Held* that the mortgage was sufficiently proved according to the requirements of sections 68 and 69 of the Indian Evidence Act.

THIS was a suit on a mortgage. The defence was that the mortgage-deed was not properly attested inasmuch as one attesting witness only was produced and he did not state that the mortgagor signed the document in his presence as well as in the presence of the other attesting witness, who had since died. The court of first instance dismissed the suit. The lower appellate court reversed the decree. The defendant appealed to the High Court.

Pandit *Kailas Nath Kutju*, for the appellant:—

According to the authorities since the Privy Council so decided a mortgage-deed must be attested by two witnesses, who

* Second Appeal No. 768 of 1915, from a decree of S. R. Daniels, District Judge of Allahabad, dated the 15th of February, 1915, reversing a decree of V. N. Mehta, Subordinate Judge of Mirzapur, dated the 26th of February, 1914.

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should see the mortgagor sign the deed. In this case there are two marginal witnesses it is true, but only one has been examined in court. He swears that the mortgagor signed the deed in his presence but he does not say that the other witness was also present. As the execution and attestation by two witnesses must take place at one sitting, the deed is not properly attested according to law, since it does not appear that the other witness was present at the time when the mortgagor and the witness who has been examined signed the deed.

It is true that only one witness need be produced, but that witness must prove that the other attesting witness was present. I submit that "execution" means execution according to law, that is, in the case of a mortgage-deed signing in the presence of the attesting witnesses: *Casement v. Fulton* (1). The burden lay on the mortgagee to prove that the mortgage-deed was properly attested. He has failed to do so: *Abdul Karim v. Salimun* (2). The difference between section 68 and section 69 of the Evidence Act is this that under the former section the witness produced can say who else was present at the time of the execution of the deed. The last point in the case is that the court of first instance has found that the real mortgagee in the case is the marginal witness, Man Mohan Lal, and the plaintiff respondent is the *benamidar*. It is settled law that no person can attest a deed which creates a right in his own favour.

Babu *Piari Lal Banerji*, for the respondent was not called upon.

RICHARDS, C. J., and BANERJI, J.:—This appeal arises out of a suit on foot of a mortgage. The court of first instance dismissed the plaintiff's suit holding that it was not proved that the mortgage had been duly attested as required by section 59 of the Transfer of Property Act. The first court also considered that the real mortgagee (that is to say the person who had advanced the money) was one Man Mohan Lal and not Munna Lal, the plaintiff. The lower appellate court held that the document had been duly attested and that the other question ought not to have been gone into at all. We think that the

(1) (1845) 3 Moo. I. A., 395.

(2) (1899) I. L. R., 27 Calo., 190.

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decision of the lower appellate court was correct. The plaintiff proved that the mortgage was signed by Bachchu Lal the mortgagor. It was proved that one of the attesting witnesses was dead. The other attesting witness was called and proved that the mortgage was signed by the mortgagor in his presence and that he had signed the deed as an attesting witness. It was not expressly proved that there was another attesting witness present who saw the mortgagor sign, but it was not proved to the contrary that there was not another attesting witness. The document on the face of it appears to have been signed by the mortgagor in the presence of two attesting witnesses. The main question which has been argued in the present appeal is whether under these circumstances the mortgage can be said to have been proved. Section 59 of the Transfer of Property Act requires that a document securing Rs. 100 or upwards, in order to operate as a mortgage, should be signed and attested by the mortgagor in the presence of two witnesses. Section 68 of the Evidence Act is as follows:—"If a document is required by law to be attested, it shall not be used as 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 is as follows:—"If no such attesting witness can be found, or if 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 hand-writing, and that the signature of the person executing the document is in the hand-writing of that person." Reading the two sections together, we think the meaning is clear. In our opinion it was intended to lay down how a document which was by law required to be attested could be proved, and the intention was, that if the provisions of the section as to proof were complied with, the document, in the absence of evidence to the contrary, must be considered proved. The contention on behalf of the appellant is that it was necessary, not only to produce one of the attesting witnesses, but either he or some other witness should have to prove further that the document was in fact signed by the mortgagor in the presence of at least two witnesses who signed their names as such to the

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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 *Abul 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 Calc., 190. (2) (1845) 3 Moo. I. A., 395.