

equitable mortgage, there is usually some contemporaneous acknowledgment such as a promissory note, which would clearly amount to a promise to repay, but in a transaction like the present, which was almost contemporaneous with the execution of the registered mortgage, we can only look to the terms of the registered mortgage to ascertain the contract between the parties. There is absolutely no evidence on the record to show that there was any separate agreement in respect of the deposit of title deeds.

In these circumstances we are unable to imply such a covenant to repay as would enable us to grant a personal decree. In these circumstances, we think, that the judgment appealed from is correct and the appeal must be dismissed with costs.

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 v.  
 ADMINISTRATOR-  
 GENERAL OF  
 BURMA.  
 RUTLEDGE,  
 C.J., AND  
 BROWN, J.

## APPELLATE CIVIL.

*Before Mr. Justice Carr and Mr. Justice Mya Bu.*

MAUNG PO GYI AND ONE

v.

MAUNG MIN DIN.\*

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 April 25.

*Mortgage deed not duly attested—Admission of the deed whether sufficient—Evidence Act (I of 1872), s. 70—Admission cannot validate mortgage deed insufficiently attested—Transfer of Property Act (IV of 1882), s. 59.*

*Held*, that section 70 of the Indian Evidence Act applies only to a document which is duly attested and that a mortgage deed not duly attested is invalid, in spite of the admission of the deed by the mortgagor.

*Aung Rhi v. Ma Aung Kwa Pru and one*, 1 Ran. 557—*distinguished*.  
*Hira Bibi v. Hari Lall*, 5 Pat. 58 P.C.—*followed*.

*Ba Han*—for Appellants.

*Tun Aung*—for Respondent.

CARR AND MYA BU, JJ.—On the 19th September, 1924, the respondent filed this suit on a mortgage

\* Letters Patent Appeal No. 109 of 1926.

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deed executed on the 10th March, 1919, by the defendant-appellants. The defendants admitted execution of the deed and raised certain contentions with which we are not now concerned. But in paragraph 2 (c) of their written statement they also said : " The deed produced by the plaintiff not having been executed according to law should not be admitted in evidence."

The mortgage deed itself was attested by only one witness and so did not comply with the provisions of section 59 of the Transfer of Property Act, which has been in force in Upper Burma since the year 1914.

Certain issues of fact were framed and tried and on these the Township Judge found in favour of the plaintiff. Then, it appears, during the final argument, the pleader for the defendant contended that the deed was invalid as a mortgage for want of due attestation. On this the Township Judge framed the curiously general issue " Is the plaintiff entitled to get a decree as prayed for in the plaint ?" After a short adjournment he heard arguments on this issue and finally dismissed the suit on the ground that the deed was invalid as a mortgage.

On appeal to the District Court the decision was reversed and the plaintiff obtained a decree. The District Judge said : " It appears to me that the learned Judge has overlooked the fact that the mortgage deed in question has been admitted by the only two defendants who remained joined, and thus the document does not need proof. In such a case imperfect attestation does not arise."

The defendants appealed to this Court in Civil Second Appeal No. 514 of 1926. Curiously enough they did not in their grounds of appeal raise the question of the invalidity of the mortgage. But this question was clearly argued and the learned Judge

agreed on it with the Judge of the District Court. He said : " Except on the question of the effect of inadequate attestation of the mortgage deed in suit the lower Courts came to concurrent findings of fact in favour of the respondent-plaintiff Maung Min Din. On the question of attestation the lower Appellate Court was clearly right [see the case of *Aung Rhi v. Ma Aung Krwa Pru and one* (1).]"

The defendants then applied under section 13 of the Letters Patent of this Court for a certificate that the case was a fit one for appeal. The learned Judge granted a certificate and this appeal results.

Substantially the only ground taken is that the mortgage deed was not attested as required by section 59 of the Transfer of Property Act and was therefore invalid as a mortgage.

Appellants rely on the case of *Hira Bibi v. Ram Hari Lall* (2), which is a very recent decision of the Privy Council. In that case the mortgagor had admitted execution of the mortgage but denied its validity. On the evidence it was shown that although the deed purported to be attested by two witnesses those witnesses were not present when she signed it and did not see her sign. It was held both by the High Court of Patna and by the Privy Council that this was not due attestation of the deed as required by section 59 of the Transfer of Property Act. This, it may be noted, is well settled law under numerous decisions, but the law has been somewhat modified by Act XXVII of 1926.

The High Court held, however, following previous decisions, that the deed was good as against the mortgagor because she had admitted having signed it. This decision is published in 6 Patna Law Journal, page 465—though the name of the defendant as

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(1) (1923) 1 Ran. 557.

(2) (1925) 5 Patna 58.

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there given is somewhat different. It was one of the decisions relied upon in *Aung Rhi's* case.

The Privy Council reversed this decision. Their Lordships held "that section 70 of the Indian Evidence Act, 1872, applies only to a document which is duly attested, and that as the mortgage deed was not attested within the meaning of section 59 of the Transfer of Property Act, 1882, it was invalid as against her (the mortgagor) in spite of her admission."

That decision is sufficient to conclude the present case and to show that the judgments of the District Court and of this Court were wrong and must be reversed.

Here it may be noted that *Aung Rhi's* case is not really an authority for the decision under appeal. What was held in that case was "that where the executant of an instrument admits its execution it is not necessary to prove due attestation of the same." That is a very different thing from the proposition that admission by the executant of execution is sufficient to validate a mortgage deed which has not been duly attested as required by section 59 of the Transfer of Property Act, which is in effect the proposition upheld in the judgment under appeal. It may be added that the ruling in *Aung Rhi's* case was *obiter*, since the judgment shows that the learned Judge had found that the deed in question had in fact been duly attested.

We allow this appeal, set aside the judgments and decrees of the District Court, and of this Court and restore the judgment and decree of the Township Court. The respondent will also pay the costs of the appellants in all three appeals.