ALLAHABAD HIGH COURT

Deo Narain Rai

Vs

Kukur Bind

(John Stanley,CJ. Knox, Blair and Banerji, Aikman, JJ.)

20.06.1902

JUDGMENT

John Stanley, C.J.

1. The question raised in this appeal is a narrow one, but it is none the less very important. It is whether or not, having regard to the provisions of Section 59 of the Transfer of Property Act, 1882, a mortgage to be effective must bear either the autograph signature of the mortgagor or his mark. The facts of the case are simple and undisputed. On the 25th of August, 1896, one Kukur Bind borrowed a sum of Rs. 381 from the plaintiffs on the security of a mortgage, which provided that the interest on the mortgage-debt should be payable annually, and in default of payment of interest the mortgagee should be entitled to possession of the mortgaged property. Default was made in payment of the second instalment of interest, and in consequence the plaintiffs instituted this suit for possession of the mortgaged property. The mortgagor is illiterate, and the signature to the mortgage was made by the scribe of the deed by the direction and in the presence of the mortgagor. The following are the words which were written by the scribe in signing the deed on behalf of the mortgagor: " Signed by Kukur Bind alias Umar Bind; the deed of simple mortgage is correct; by the pen of Shiunandan Lal, patwari." The deed was duly registered on the 28th of August 1896, when Kukur Bind appeared before the Registrar and acknowledged the due execution of the deed. The Court of first instance dismissed the suit on the ground that the mortgage had not been executed in accordance with the provisions of Section 59 of the Transfer of Property Act, relying on the decision in the case of *Moti Begam v. Zorawar Singh*[1] On appeal the lower appellate Court upheld the decision of the Munsif. Hence the present appeal.

2. The words of Section 59 which bear upon the question run as follows: "Where the principal money secured is one hundred rupees or upwards a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two, witnesses." In the decision to which I have referred it was held by a Bench of this Court that "where a mortgage was signed on behalf of a mortgagor, who was illiterate, by the scribe of the document not being specially

empowered in this behalf, such a signature was not sufficient within the meaning of the section to validate the mortgage." One of the learned Judges who decided this case, my brother Aikman, held that "in the case of a mortgage the law requires the personal signature of the mortgagor," while my brother Knox held that "none but the mortgagor or some one vested by the mortgagor by deed in writing with full power to act as and for the mortgagor can execute such a document." It is contended on behalf of the appellants that this decision cannot be supported, that in accordance with the maxim qui per alium facit per se ipsum facere videtur (which I may translate, "he who does an act through another in the eyes of the law does it himself"), or, as the maxim is more familiarly known, qui facit per alium facit per se, signature by the authorized agent of a mortgagor is sufficient. This is an old and well-recognised maxim, and, as it seems to me, ought to prevail, unless the Legislature makes it reasonably clear that its operation was intended to be excluded in the interpretation of a Statute. At common law where a person authorizes another to sign for him, the signature of the person so signing is the signature of the person authorizing it. But there are, no doubt, cases in which a different construction must be put on particular Statutes, as in the case of the Statute of Frauds. Such was the case of *Hyde v. Johnson*[2] upon which reliance was placed by the learned Judges who decided the case of Moti Begam v. Zorawar Singh. It seems to me not to be open to argument that if there were nothing to be found in the other provisions of the Transfer of Property Act to exclude the operation of the common law rule, a signature by an agent acting under the authority of the mortgagor would satisfy the requirements of Section 59 of the Act. A section, however, has been discovered which, it is contended, has this effect, and that is Section 123. Section 123 is the second section of Chapter VII of the Act, which deals, not with mortgages at all, but with a different subject-matter, namely, gifts of movable and immovable property. We have not been pointed out, nor am I aware of any words in any of the sections of Chapter IV of the Act, which deals with mortgages of immovable property and charges, which throw any light upon the provisions of Section 59. Section 123 runs as follows: "For the purpose of making a gift of immovable property the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses." It is contended that, inasmuch as the Legislature used in this section the words "on behalf of" and did not use these words in Section 59, the difference of language must be prima facie regarded as indicative of intended difference of meaning. In his judgment in the case to which I have referred, my brother Aikman observes: "The difference in the language of these two sections is striking. In the case of a gift the instrument must be signed by or on behalf of the donor. In the case of a mortgage, like the one in suit, the instrument must be signed {by the mortgagor Why the Legislature made this distinction I am unable" he says "to understand; but the distinction is there and I am reluctantly forced to the conclusion that in the case of a mortgage the law requires the personal signature of the mortgagor. In my opinion," he goes on to say, "the case relied on by the appellant *Hyde v. Johnson*[3] is in point. To hold that the Legislature meant the same thing in Section 59 as in Section 123 would, in my judgment, be opposed to the ordinary canons of construction." Now let me see what is the language of Section 123 to which so much weight has been attached by my learned brother. It provides that a transfer of immovable property must be effected by a registered instrument signed by or on behalf of the

donor. Do these words "by or on behalf of the donor" accurately express the meaning of the Legislature, or are they a loose form of expression? What was intended by the Legislature is that the instrument should be signed either by the donor or by an agent authorized by him in that behalf, but the section does not say so. An instrument may be signed on behalf of a party without his authority. It was certainly not the intention of the Legislature that such a signature should be effectual. The language is clearly elliptical. It is not accurate draughtsmanship. We must supply after or in addition to the words "on behalf of" some such-words as "by an agent duly authorized in that behalf." The section otherwise does not express the intention of the Legislature. Are we justified then in placing any reliance upon the use of the loose and vague words "on behalf of" contained' in Section 123--a section dealing with gifts of property-to elucidate the meaning of the plain and intelligible language used in Section 59 of the Act--a section which falls within the part of-the Act which deals with a different subject-matter, namely, mortgages? I am of opinion, with all deference to the views of my brother Aikman, that we cannot safely adopt such a course, and that it would not be consistent with the canons of construction to do so. Sir George Jessel in *Spencer v. Metropolitan Board of Works (1832) L.R. 22 Ch. D. 142 at p. 142(Supra)* observed to the effect that we ought to-find out the meaning of a section of an Act, if we can, from the section itself. If we can do that, we need not have recourse to other sections of the Act. If we cannot, then, he says, "I agree with the principle which was laid down by Mr. Justice Chitty that, as a general rule, a word is to be considered as used throughout an Act of Parliament in the same sense, and that therefore we may look through the other sections to see in what sense the word is there used." In the case of Hyde v. Johnson, upon which so much reliance has been placed, the Court was considering one of a series of enactments which made a distinction between the signing of a document by a party personally and the signing by an agent; and it was therefore considered that where signature by an agent was not mentioned the Act intended that the signature should be an autograph signature. The Act which we are considering is not of that nature. The Statute in that case required an acknowledgment to be signed "by the party chargeable thereby." The mischief aimed at by the Statute was to exclude temptation to perjury in the proof of agency, and it was contended in that case that if the signature of an agent were admitted, parol evidence also must be admitted to prove the agent's authority, and that then all the inconvenience would be reproduced which the Statute was passed to obviate. Moreover, in that case the 7th Section of the Statute, 9 Geo. IV, Cap. XIV, under which the controversy arose, recites the 17th Section of the Statute of Frauds, and the Court held that the Legislature must therefore have had that section in view at the very time of passing the Statute, and therefore must have intended the distinction between writings signed by a party or signed by his agent. A similar case is that of *Budoobhoosun Bose v. Enaet Moonshee*[4] and also that of *Luchmee Buxsh Roy v. Runjeet Ram Panday*[5] in which last-mentioned case it was held by their Lordships of the Privy Council that the acknowledgment referred to in the Limitation Act, Act No. XIV of 1859, Section I (Clause 15) must bear the signature of the mortgagee himself, and that the signature of an agent would not be sufficient. In that case their Lordships refer to the case of Hyde v. Johnson and to the language used by Chief Justice Tindal in his judgment, and then observe: "It has been said that this case ought to be decided upon an equitable construction and not upon the strict

words of the Statute; but their Lordships think Statutes of limitation, like all others, ought to receive such a construction as the language in its plain meaning imports. Statutes of limitation are in their nature strict and inflexible enactments. The object of the Legislature in passing them is to quiet long possession and to extinguish stale demands. Such legislation has been advisedly adopted in India as in this country. Their Lordships think that in construing these Statutes the ordinary rules of interpretation must prevail." I may observe that if such legislation was advisedly adopted in India, it was not followed in the amending Act. The Legislature altered the law in the subsequent Act, Act No. IX of 1871, and also in the Limitation Act, Act No. XV of 1877, whereby it is provided that the expression "signed by the party" in Section 19 means "signed either personally or by an agent duly authorized in this behalf." But let me assume that we arc entitled to call Section 123 in aid of the interpretation of Section 59. What light does it throw? As I have said, the signature of a deed of gift of immovable property made on behalf of a donor, but without his authority, clearly would have no efficacy. The signature to be effectual must be by a duly authorized agent. Now the Statute says nothing about a duly authorized agent; no doubt because the Legislature recognised the existence of the rule which enables A party to sign through the instrumentality of an agent, and by virtue of this rule a donor could authorize another to sign for him. Therefore the rule in question was manifestly before the minds of the framers of the Act. If the rule was before the minds of the framer of the Act, it appears to me obvious that if the intention had been to exclude its operation in the case of a mortgagor, it would have expressed that intention by requiring signature by the mortgagor personally, or with his own hand. The Legislature has however, abstained from doing this', and therefore, as it seems to me, so far from there being anything in the Act to show an intention to exclude the rule, the reasonable inference to be drawn from the language of the Act is quite the contrary. If in Section 123 the words "by his agent duly authorized in that behalf" had been inserted, I could better have understood the argument which has been advanced on behalf of the respondents. In the case of The *Queen v. The Justices of Kent*[6] the question of signature by an agent was considered. In that case the Commissioners of the Rother Levels made a rate of certain sums per acre on all lands lying within their jurisdiction, and the lands of one Wells, amongst others, were so rated. Wells, appealed against the rate to the Quarter Sessions. According to the provisions of Section 1 of the Statute 12 and 13 Vict., Cap. XLV, under which the appeal was presented, a notice of appeal to a Quarter Sessions "should be in writing signed by the person or persons giving the same, or by his, her or their attorney, on his, her or their behalf." The notice of appeal in that case was signed in Wells' name by the clerk to his attorney by Wells' authority. It was objected on the part of the Commissioners that the notice of appeal was insufficient, as the signature of the appellant was not in his handwriting. The Quarter Sessions held that the notice of appeal was bad and dismissed the appeal. Upon a rule calling upon the Justices of Kent to show cause why a mandamus should not issue commanding them to cause to be heard and determined the appeal of Wells on the merits, the Court of Queen's Bench, consisting of Blackburn, Quain and Archibald, JJ., held that a notice of appeal signed in the appellants' name by the clerk, to his attorney with the appellant's authority was sufficient. Blackburn, J., in his judgment says: "No doubt at common law where a person authorizes another to sign for him, the signature of the person so

signing is the signature of the person authorizing it; nevertheless there may be cases in which a statute may require a personal signature." He then refers to the case of Hyde v. Johnson as one coming within the purview of a Statute which requires personal signature and referring to the case before the Court, observes: "Here the clerk having full authority from the appellant signed for him, and this is a sufficient signing at common law. I see nothing in this Statute that makes a personal signature necessary, and the rule must therefore be made absolute." Quain, J., says: "I am of the same opinion. We ought not to restrict the common law rule qui facit per alium facit per se unless the statute makes a personal signature indispensable." Archibald, J., says: "I think this case comes within the common law rule qui facit per alium faeit per se, and there is nothing in the Statute to qualify the operation of that maxim." In the case of Ex parte Wallace (1884) L.R. 14 Q.B.D. 22 a similar question arose on the Bankruptcy Rules of 1883, Rule 125 provides that "a creditor's petition shall be in form No. 10 in the Appendix with such variations as circumstances may require." Form No. 10 provides that "the petition shall be signed by the petitioner, and that his signature shall be attested by a witness," and the attestation clause contains the words "signed by the petitioner in my presence." In this case a petition in bankruptcy was presented by one William Richards against one Wallace, who carried on business in the city of London. The petition was signed "William Richards by his attorney Thomas Picton Richards." The signature was attested by a witness, and the attestation clause was as follows: "Signed by the petitioner by his attorney Thomas Picton Richards in my presence." The objection was taken by the debtor to the petition that it was not duly signed as required by Rule 125. The Registrar overruled the objection. Whereupon the debtor appealed. It was held by the Court of appeal, consisting of Baggallay, Bowen and Fry, L. JJ., that the petition was properly signed, that a bankruptcy petition by a creditor might be signed on his behalf by his duly constituted attorney. Baggallay, L.J., in the course of his judgment, remarks: "The next question is, whether the signature of a bankruptcy petition by an attorney on behalf of the petitioner is a sufficient signature. I can entertain no doubt whatever that it is, provided that the power of attorney authorizes the signature," Again, in the case of In re Whitley Partners Limited (1886) L.R. 32 Ch. D. 337, it was held that Section 11 of the Companies Act, 1862, was complied with by the signature of an agent. Section 6 of that Act provides that "any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company" and by Section 11 it is provided that the memorandum of association shall be "signed by each subscriber in the presence of and attested by one witness at least." It was contended that the Statute required the personal signature of each subscriber, and Hyde v. Johnson was relied on in support of this contention; but the Court, consisting of Cotton, Bowen and Fry, L. JJ., unanimously held that, there being nothing in the Company's Act, 1862, to show that the Legislature intended anything special as to the mode of signature of the memorandum, the ordinary rule applied that signature by an agent is sufficient. Lord Justice Bowen says in the course of his judgment as regards the question of law: "It is contended by the appellant that it is not sufficient for a man to sign the memorandum of association by an agent, but that he must sign it himself. In every case where an Act requires a signature, it is a pure question of

construction on the terms of the particular Act whether its words are satisfied by signature by an agent. In some cases on some Acts the Courts have come to the conclusion that the personal signature was required. In other cases on other Acts they have held that signature by an agent was sufficient." Commenting upon Hyde v. Johnson he says: "Hyde v. Johnson was decided on the ground that Lord Tenterden's Act was to be read along with the Statute of Frauds, which expressly refers to the signature by an agent, and that a clause which contained no reference to an agent was therefore to be held to require personal signature. In the present Statute there is nothing in the way in which the memorandum of association is dealt with to show that the Legislature intended anything special as to the mode of signature."

3. It appears to me upon these authorities to be indisputable that if there is no clear indication that the Legislature intended that the signature shall be an autograph signature, the common law rule qui facit per alium facit per se should be applied. If the Legislature in this case had intended that an illiterate mortgagor in this country should not enjoy the privilege of employing an amanuensis to sign his name, it seems to me that it would have expressed its intention by the introduction of some such words in the section after the word "signed" as "personally" or "with his own hand." The introduction of the loose words to which I have referred in Section 123 appears to me to furnish totally inadequate grounds for the conclusion that the Legislature intended to exclude the application of the rule to Section 59. In an unreported case in this High Court *Khunni Led v. Jhao Lal*[7] a Bench of this Court, consisting of my brothers Knox and Burkitt, decided this very question, and held that the signing of a mortgage on behalf of an illiterate person by the scribe of the deed at the instance of the mortgagor was a good signature within the meaning of Section 59. The learned Judges in their judgment say that "it is true that the manual act of signing was effected in this case by the hand of another, but the lady by her acts has acknowledged that the act was done with her consent and for her, and in this way is her act. We are unable to draw the distinction the Judge does between the words contained in Section 59 and those contained in Section 123 of Act No. IV of 1882."

4. I have said nothing as to the view adopted by my brother Knox in the case of Moti Begam v. Zorawar Singh as this view has not been pressed in argument before us on the part of the respondents, and I am aware that the learned Judge does not now support it. Having regard to the scope and object of the Transfer of Property Act and to its language, I see no good grounds for placing the limited construction on Section 59, which was adopted in the case of Moti Begam v. Zorawar Singh and with all deference to the views of my brother Aiknian, I am of opinion, for the reasons which I have stated above, that the decision in in that case cannot be supported. I would therefore allow the appeal in this case, set aside the decrees of the Lower Courts, and remand the case to the Court of first instance for trial on the merits.

Knox, J.

5. In *Moti Begam v. Zorawar Singh*[8] I laid it down in my judgment that the terms of Section 59

of the Transfer of Property Act, 1882, required that a deed intended to operate as a mortgage deed must be signed either by the mortgagor himself or by some one vested by him with full power to act as and for the mortgagor. This power, I further held, must be a power contained in a written instrument. I was led to this result mainly, if not entirely, by arguments based upon the different language used in Section 59 and in Section 123 of the Act. A closer examination, however, of Section 123, and of the words used in it, as the learned Chief Justice has pointed out in the able and well-reasoned judgment which I have had the privilege of reading, and in which I fully concur, satisfies me that the words "signed by or on behalf of the (donor)" were never intended, either expressly or by implication, to conflict or to mark any difference between them and the words "signed by the (mortgagor)." In the present case I am not concerned with Section 123. The words used in Section 59 "signed by the mortgagor," when read by themselves, are clear and free from ambiguity. This being so, it is my duty to infer that the Legislature intended to mean what it has plainly expressed and to interpret these words as I should interpret them in any other document or Act. So interpreted they would mean signed by the mortgagor or by another for him and by his authority. To limit them to the mortgagor personally requires that there should be something either in the language or in the object of the Act which showed that a personal act was intended. There is nothing in the language of the section which expresses such an intention, and nothing that I know of--nothing has been pointed out to me--which expresses that such an intention was in the mind of the framers of the Act. The Act is set out in its preamble as an Act intended to define and amend certain parts of the law relating to the transfer of property by act of parties. Before Act No. IV of 1882 came into force, a transfer by mortgage was a good and valid instrument, whether it, were executed by the mortgagor personally, or by some one signing for him. If there had been an intention to curtail this freedom, express words of limitation would have been used; and it would not have been left to be inferred by a construction drawn from words contained in another remote section of the Act dealing with another class of transfer. If the framers of the Act then had intended to exclude the operation of the well-known maxim qui facit per alium faoit per se, they could easily have done so, and would have done so. The presence of a deed in writing to act as and for the mortgagor is not required by any law that has been pointed out. In the present case the signature of Kukur Bind, the mortgagor, who is an illiterate man, was made by the direction of Kukur Bind in his presence and by his direction: the patwari who performed the manual act of signing was, so to speak, the hand of Kukur Bind. For these reasons I join in the order proposed by the learned Chief Justice.

Blair, J.

6. I have also had the advantage of perusing at leisure the exhaustive judgment of the Chief Justice, and I concur iii the order proposed by him, and the reasons upon which that order is founded.

Baneeji, J.

7. This appeal arises in a suit brought by the appellants for recovery of possession of three bighas and odd biswas of land as mortgagees thereof under a deed of simple mortgage dated the 25th of August, 1896, executed in their favour by the respondent Kukur Bind for a sum of Rs. 381. The deed was not signed by him, nor does it bear his mark. But his signature was written on it by one Shiunaudan Lal, patwari. It has been found that Kukur Bind is an illiterate person, unable to write his name, and that he authorized the patwari Shiunandan Lal, who is the writer of the document, to affix his signature to it. Default having been made in the payment of interest in compliance with the terms of the deed, the present suit was brought against the mortgagor and subsequent transferees from him. The defendants disputed the validity of the mortgage on the ground that it had not been effected in accordance with the provisions of Section 59 of the Transfer of Property Act, 1882. Both the Courts below have allowed this contention, relying upon the ruling of this Court in Moti Begam v. Zorawar Singh Weekly Notes 1899 p. 196(Supra) and have dismissed the suit. The ruling referred to undoubtedly supports the decision of the Courts below. It may, however, be observed that a contrary opinion was expressed by this Court in S.A. No. 48 of 1895, decided by Knox and Burkitt, JJ., on the 3rd of April, 1897. That case unfortunately has not been reported.

8. Doubts having been entertained as to the correctness of the ruling in Moti Begam v. Zorawar Singh, this case was referred to a Full Bench. The question we have to determine is, whether a mortgage is validly effected, where the principal, money secured is Rs. 100 or upwards, if the mortgage deed is not signed personally by the mortgagor, but is signed for him by another under his authority, such authority not having been granted by deed in writing.

9. With all respect for the learned Judges who decided the case of Moti Begam v. Zorawar Singh I am unable to agree with the view adopted by them in that case. With reference to the provisions of Section 59 of the Transfer of Property Act, the learned Judges do not appear to have held the same view. Whilst Mr. Justice Knox was of opinion that the Legislature "purposely intended that no one but the mortgagor, or some one vested by the mortgagor by deed in writing with foil power to act as and for the mortgagor, can execute such a document," Mr. Justice Aikman held that Section 59 requires the personal signature of the mortgagor.

10. In my opinion there is no warrant for holding that if the mortgagor authorized another to affix his signature to-the instrument of mortgage, the authority should have been given by deed in writing. By Section 4 of the Transfer of Property Act the chapters and sections of the Act which relate to contracts should be taken as part of the Indian Contract Act, 1872. Section 187 of the Indian Contract Act provides that the authority of an agent may be "given by words spoken or written." So that it is clear that an agent may be verbally authorized to act for his principal. Further, the act of an agent may be ratified by the principal and under Section 196 of the Contract Act, upon such ratification the same effect will follow as if the act had been performed by the authority of the principal. By Section 197 ratification may be expressed or may be implied from the conduct of the person on whose behalf the act is done. In this case the mortgagor having

caused the mortgage deed to be registered by admitting execution of it, thereby ratified the act of Shiunandan Lal. It has also been found, as stated above, that the mortgagor Kukur Bind authorized Shiunandan Lal to affix his signature to the mortgage deed. Therefore upon the view of Mr. Justice Knox that a mortgage deed may be validly signed for the mortgagor by another who has been authorized in that behalf, the mortgage in this case was validly effected. And it was not invalid by reason of the fact that the authority was not granted in writing.

11. We have next to consider whether, as held by Mr. Justice Aikman, Section 59 of the Transfer of Property Act requires that a mortgage deed should be signed personally by the mortgagor.

12. That sectionn runs as follows: "Where the principal money secured is one hundred rupees or upwards a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses."

13. The general rule is, that a man may sign by an agent. In The Queen v. The Justices of Kent (1873) L.R. 8 Q.B. 305(Supra) Blackburn, J., observed: "No doubt at common law, where a person authorizes another to sign for him, the signature of the person so signing is the signature of the person authorizing it; nevertheless there may be cases in which a statute may require personal signature." Quain, J., said in the same case: "We ought not to restrict the common law rule, qui faeit per alium facit per se unless the Statute makes a personal signature indispensable." Similar observations were made by Archibald, J. In In *re Whitley Partners, Ld*[9]*.,* Cotton, L.J., said: "I think it would be wrong to hold that an enactment simply referring to signature is not satisfied by signature by means of an agent." He added: "Suppose seven persons sitting round a table with a view to signing a document, and one of them says to another 'sign it for me,' are we to say that the signature affixed under this authority is insufficient? I am of opinion that it is quite effectual." These cases are clear authority for holding that where an enactment provides that a document should be signed by the executant, that alone does not make it indispensable that the signature should be affixed by the executant himself. Upon the question before us, the two cases referred to above are, in my opinion, very instructive, and are more in point than the case of *Hyde v. Johnson (1836) 2 Bing. N.C. 776(Supra)* on which reliance has been placed on Delia]f of the respondents.

14. In The Queen v. The Justices of Kent the question was, whether a notice of appeal, signed in the appellant's name by the clerk to his attorney and not by the appellant himself, was sufficient under the Statute 12 and 13 Vic, Cap. XLV., Section 1, which required that a notice of appeal to a Court of Quarter Sessions shall be in writing, signed by the person or persons giving the same, or by his, her or their attorney on his, her or their behalf. It was held that; the signature by the clerk who had full authority from the appellant was sufficient.

15. The case of In re Whitley Partners, Limited, was one under the Companies Act, 1862. Section 11 of that Act provides that "the memorandum of association shall be signed by each

subscriber in the presence of, and attested by, one witness at least." It was contended in that case, as has been contended on behalf of the respondents in this case, that as nothing was said in the Statutes about signature by an agent, these expressions must mean that the signature is to be affixed by the subscriber himself, and Hyde v. Johnson was referred to. Their Lordships repelled the contention, and held that there being nothing in the Companies Act to show that the Legislature intended anything special as to the mode of the signature of the memorandum, the ordinary rule applied that signature by an agent is sufficient.

16. Did the Legislature, in enacting Section 59 of the Transfer of Property Act, intend anything special as to the mode of signing a mortgage deed, that is to say, did it intend that the signature should be affixed personally by the mortgagor? It is common knowledge that in this country an illiterate person when executing a document causes his signature to be written for him by the scribe, the executant himself only touching the pen, and that such signature is regarded as the signature of the executant himself (see Gour's edition of the Transfer of Property Act, p. 266). That this is so is also apparent from the fact that, except the case of Moti Begam v. Zorawar Singh and the unreported case to which reference has boon made above, there was, as far as I am aware, no other case in this Court in which, before the ruling in Moti Begam's case, the validity of a mortgage was questioned on the ground now raised, and that since the decision of that case the question has been raised on the basis of it in a large number of cases now pending in this Court. I may add that I am not aware of, nor have we been referred to any case decided by any of the other High Courts in which the question now before us was raised, or the view adopted in Moti Begam's case found favour. Now, did the Legislature by enacting Section 59 intend to abrogate the existing practice and make a new departure? In support of the contention that such was the intention of the Legislature, reference has been made to Section 123 of the same Act, which provides that--"For the purpose of making a gift of immovable property the transfer must be effected by registered instrument signed by or on behalf of the donor, and attested by at least two witnesses." From the difference in the language of the two sections and the use in Section 123 of the words "or on behalf of," which do not appear in Section 59, it is urged that the law requires the personal signature of the mortgagor in the case of a mortgage. With regard to this contention it may first be observed that as the two sections deal with different matters, the language used in one of them cannot, according to ordinary rules of construction, be "looked at as a guide to the construction of the other." In the next place, the words "on behalf of" in Section 123 are, in my opinion, surplusage. "Many instances may be found of provisions put into Statutes merely by way of precaution." (See Hardcastle on the construction and effect of Statutory Law, 2nd ed., p. 121.) Section 123 seems to me to be one of such instances. Further, the adoption of the construction of Section 59 for which the respondents contend will manifestly lead to great anomaly. Under Section 123 a gift by which a person may divest himself of the whole of his property may be validly made by an instrument signed, not personally by himself, but on his behalf by an agent. In the case of a sale by which the vendor's immovable property is absolutely transferred, his personal signature is not requisite, nor is it requisite in the case of a lease or exchange of immovable property. Yet we are asked to hold that in the case of a mortgage, which

is only the transfer of an interest in immovable property for the purpose of securing the payment of money borrowed, the Legislature requires that the personal signature of the mortgagor is indispensable. As observed by Lord Macnaghten in Commissioners for Special Purposes of the *Income Tax v. Pemsel*[10] "a construction which leads to a result so whimsical ought not to be adopted without good reason." No reason whatever has been suggested on behalf of the respondents for attributing to the Legislature such anomalous provisions. And in the case of Moli Begam v. Zorawur Singh my brother Aikman concedes that he is unable to understand why the Legislature should have made a distinction in the case of a mortgage. I am therefore unable to hold that by inserting the words "on behalf of" in Section 123, and omitting those words from Section 59, the Legislature intended to lay down in the latter section a different rule from that provided in the former.

17. Considerable stress was laid by the Learned Counsel for the respondents upon the ruling in Hyde v. Johnson (1836) 2 Bing. N.C. 776(Supra) and on that of the Privy Council in Luchmee Buxsh Roy v. Runjeet Ram Panday (1867) 8 W.R. 1(supra) which followed Hyde v. Johnson. He also relied on Budoobhoosun Bose v. Enaet Moonshee (1867) 8 W.R. 1(Supra). Those were cases relating to the Law of Limitation, and proceeded upon the principle that "where there is a statutory bar, and there is a statutory exception to that bar by an acknowledgment of a certain character, the acknowledgment must, to be effectual, be strictly in accordance with the wording of the Statute." (Banning on the Limitation of Actions, 2nd edition, p. C8.) The rule of interpretation adopted in the cases referred to cannot therefore be held to be applicable to a case like the present. Even in regard to an acknowledgment within the meaning of the Law of Limitation, it appears to have been held in Ireland that "if a person signs the name of the principal by his direction in his presence, it is sufficient, for the person signing must be looked on, not as the agent, but as it were the hand or instrument of the principal himself." Lessee of *Corporation of Dublin v. Judge*[11] cited in Darby and Bosanquet's Statutes of Limitation, 2nd edition, p. 382. Upon the authority of the same case it is said in Banning on Limitation (2nd ed., p. 127), with reference to the general rule which at one time prevailed that an acknowledgment must be signed personally by the debtor, that "notwithstanding this, a signature may, it seems, be so signed by an agent under the immediate direction and the supervision of the principal as to be in effect the signature of the principal, especially where the latter is incapacitated by illness or otherwise from signing himself."

18. I am of opinion that Section 59 of the Transfer of Property Act does not require the personal signature of the mortgagor, and that if his signature is affixed to the instrument of mortgage by another under his authority, that is in effect the signature of the mortgagor himself, and is sufficient to constitute a valid mortgage. With all deference, I think the case of Moti Began v. Zorawar Singh was wrongly decided and should be overruled. I would allow the appeal, set aside the decrees of the Courts below, and remand the case to the Court of first instance for trial on the merits.

Airman, J.

19. In this case I have the misfortune to differ from the opinion arrived at by the learned Chief Justice and my learned colleagues. The question which we have to decide in the appeal is a short one, namely, whether Act No. IV of 1882 requires a deed of mortgage to be signed personally by the executant. I have already expressed my views as to this in the case of Moti Begam v. Zorawar Singh Weekly Notes 1899 p. 196. I have listened to the argument of the Learned Counsel for the appellants based on Section 4 of the Act and the provisions of the Contract Act; but his argument, ingenious though it was, has failed to remove my difficulties, or induce me to depart from the conclusion I came to in the case mentioned above--a conclusion arrived at after much anxious consideration and with great reluctance.

20. I have not much to add to the judgment I delivered in that case. In the case of The Queen v. The Justices of Kent (1873) L.R. 8 Q.B. 305(Supra) Blackburn, J., observed: "No doubt at common law, where a person authorizes another to sign for him, the signature of the person so signing is the signature of the person authorizing it. Nevertheless there may be cases in which a Statute may require personal signature." In the case of In re Whitley Partners, Ld. (1886) L.R. 32 Ch. D. 337(Suupra) Bowen, Lord Justice, says: "In every case where an Act requires a signature, it is a pure question of construction on the terms of the particular Act whether its words are satisfied by signature by an agent." It being clear then that, notwithstanding the maxim qui facit per alium facit per se, there may be Acts which require the personal signature of an executant, the question for decision here is whether Act No. IV of 1882 does require such a signature in the case of a mortgage. Had we only to construe Section 59 of the Act, I should have no difficulty in coming to the conclusion on the authority of the case last mentioned, that the provisions of the section are sufficiently complied with if the deed is signed by the authority of the mortgagor. But that section does not stand alone. In the case of Hyde v. Johnson (1836) 2 Bing. N.C. 776(Supra) the Court was considering one of a series of enactments dealing with the same subject. As one of those enactments referred to signature by an agent and another enactment with was in pari materid did not, it was held that under the latter Statute personal signature was required. The present case is even stronger than the case of Hyde v. Johnson for here we have not to consider different Statutes, but one and the same Act dealing with one subject. The present case stands more on a par with the cases which, were decided under Act No. XIV of 1859. That Act in dealing with acknowledgments which extend the period of limitation, provided as to two of the acknowledgments in Section 1, Sub-section (15) and Section 4, that the acknowledgment should be signed by the person making it. In Section 19 a third acknowledgment is referred to, and this last section provides that the acknowledgment may be signed by the person making it or his agent. In the case Luchmee Buxsh Roy v. Runjeet Ram Panday (1873) 20 W.R. P.C. 375(Supra) the Privy Council had to consider a plea that an acknowledgment falling within Section 1(15) was sufficient if signed by an agent. Their Lordships repelled that contention. They said: "The Statute must receive a construction according to its plain words. It requires the signature of the party himself, namely the mortgagee, and it would be a wrong construction of it to hold that any

other signature would satisfy those words." They then go on to quote a passage from the judgment of Chief Justice Tindal in the case of Hyde v. Johnson (1836) 2 Bing. N.C. 776 (Suupra)referred to above, which runs as follows: "When therefore we find in the Statute now under consideration that it expressly mentions the signature of the party only, we think it a safer construction to adhere to the precise words of the Statute, and that we should be legislating^ not interpreting, if we extended its operation to writings signed, not by the party chargeable thereby, but by his agent." Their Lordships say that they entirely adopt that principle of construction which they held to be applicable to the case before them. In the case of Budoobhoosun Bose v. Enaet Moonshee (1867) 8 W.R. 1(supra) the effect of Section 4 of Act No. XIV of 1895 had to be considered. Peacock, C.J. and Hobhouse, J., concurred in the view that it would be legislating, not interpreting, to extend the operation of that section to ackuowments signed, not by the party chargeable therewith, but by his agent. In the present case we have to construe an Act of the Indian Legislature dealing with the subject of transfers of property by act of parties. As to one species of transfer the Legislature has been fit to enact that the necessary deed must be signed by the executant. As to another species of transfer the Legislature has seen fit to allow the necessary deed to be signed "by or on behalf of" the executant (vide Section 123). It must be admitted that we have here a striking difference in the language of the, two sections. As observed by my brother Knox in his judgment in the case of Moti Begam v. Zorawar Singh "it must be presumed that the difference in language was intentional." In my humble opinion we are bound to give effect to this differ-once. I do not think that it would be in accord with the true canons of construction, to hold 'that the Legislature, in using such different language in those two sections, meant exactly the same thing. It was suggested that the difference in the language might have arisen from careless drafting. I do not think that a Court is entitled to make any such assumption. If, however, the Legislature has made a mistake, then, in my humble judgment, it is for the Legislature, and not for the Courts, to correct that mistake. As was observed by Lord Brougham in the case of Crawford v. Spooner (1846) 6 Moo. P.C. 1 at p. 9 : "We cannot aid the Legislature's defective phrasing of the Act; we cannot add and mend, and by construction make up deficiencies which are left there." For the reasons set forth above, and also for the other reasons given in my judgment in the case of Moti Begam v. Zorawar Singh I am of opinion that the lower Courts were right in holding, with reference to the language of Act No. IV of 1882, that there was no valid mortgage, and I would dismiss this appeal with costs.

Cases Referred.

1Weekly Notes 1899 p. 196
2(1836) 2 Bing. N.C. 776
3(1836) 2 Bing. N.C. 776
4(1867) 8 W.R. 1
5(1873) 20 W.R. 375
6(1873) L.R. 8 Q.B. 305
7S.A. No. 48 of 1895
8Weekly Notes 1899 p. 196
9 (1886) L.R. 32 Ch. D. 337
10L.R. 1891 A.C. 531 at p. 587