

writer "is dead, or cannot be found, or became incapable of giving evidence." I am therefore of opinion that the document is inadmissible." 1883
RAM NARAIN
KALLIA
v.
MONEE
BIRRE.

Attorneys for the plaintiff: Messrs. *Remfry* and *Remfry*.
Attorney for the defendants: Mr. *E. O. Moses*.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Field.

MUTHURA PERSAD SINGH AND ANOTHER (PLAINTIFFS) v. LUGGUN
KOOER AND OTHERS (DEFENDANTS). * 1883
February 16.

Interest—Penal clause in contract—Increased interest on default of payment—Contract Act IX of 1872, s. 74.

A mortgage bond contained a proviso that in case of default in payment of the principal sum, with interest at the rate of 1 per cent. per mensem on a certain day, interest should be paid at the rate of 2 per cent. per mensem from the date of the bond.

Held, that the stipulation to pay increased interest must be construed as a penal clause.

Baboo *Aubinash Chunder Bannerjee* for the appellants.

Baboo *Huri Mohun Chuckerbutty* and Baboo *Pran Nath Pandit* for the respondents.

THE facts of this case sufficiently appear from the judgment of the Court (WILSON and FIELD, J.J.) which was delivered by

WILSON, J.—We think that the Subordinate Judge has decided this case rightly. He says: "I am of opinion that the stipulation made as to the payment of interest at the rate of Rs. 2 per cent. per mensem from the time of the execution of the bond, in case of default of repayment of the loan in time, was laid down in the deed as a check upon the debtor, and it should undoubtedly be held as a penal clause."

Several cases were cited to us in which full effect has been

* Appeal from Appellate Decree No. 2325 of 1881, against the decree of Baboo Ram Persad Roy, Subordinate Judge of Shahabad, dated the 21st September 1881, modifying the decree of Baboo Lall Gopal Sen, second Munsiff of Arrah, dated the 9th January 1880.

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given to an agreement, that if money is not paid at the due date it shall from that time bear an increased rate of interest—*Boolakee Lall v. Radha Singh* (1); *Mackintosh v. Wingrove* (2).

The former of these cases probably dealt with a document executed before the Contract Act; but however that may be such cases differ materially from the present. In them the agreement to pay an increased rate of interest from a future day may well be regarded as a substantive part of the contract, not as a penalty for its breach; but, where, as here, an increased rate of interest from the date of the bond is made payable on default, we cannot regard it in any other light than as a sum named in the contract to be paid in case of breach within the meaning of s. 74 of the Contract Act.

The appeal will be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Wilson and Mr. Justice Field.

1882
 December 19.

RAM DAS (PLAINTIFF) v. BIRJNUNDUN DAS *alias* LALOO BABOO
 AND ANOTHER (DEFENDANTS)*

Limitation (Act IX of 1871) Sch. II, Art. 148—Suit for redemption of mortgage—Acknowledgment of title of mortgagor or of his right to redeem.

An acknowledgment to be within the meaning of Art. 148, Sch. II, Act IX of 1871, must be an acknowledgment of a present existing title in the mortgagor.

An acknowledgment of the original making of the mortgage deed and of possession having been taken under it, coupled with the allegation of the subsequent execution of two other deeds practically superseding the mortgage and altering the relation of the parties, contained in a written statement filed previous to the expiry of the 60 years allowed, is not a sufficient acknowledgment within the meaning of that Article, so as to prevent limitation from operating.

In this suit the plaintiff sought to redeem a mortgage of immovable property which was executed on July 15th, 1815. The

* Appeal from Appellate Decree No. 181 of 1882, against the decree of Baboo Kali Prosunno Mookerjee, Subordinate Judge of Sarun, dated the 21st November 1881, affirming the decree of Baboo Dinsh Chunder Roy, Munsiff of Chupra, dated the 6th July 1880.

(1) 22 W. R., 223.

(2) I. L. R., 4 Calc., 137.