ORIGINAL CIVIL.

Before Mr. Justice Norris.

RAMNARAIN KALLIA *v.* MONEE BIBEE AND OTHERS; 1883 *February 2.*

AND

RAMNARAIN KALLIA *v.* GOPAL DOSS SING.

Evidence Act (I of 1872), s. 32, cl. 6—Horoscope.

In a suit to recover possession of immovable property the plaintiff tendered in evidence a horoscope which he said had been given to him by his mother and had been seen by members of his family and used on the occasion of his marriage. He was unable to say by whom the horoscope, or an endorsement on it, which purported to state what his name was, had been written. *Held*, that the horoscope was not admissible under s. 32, cl. 6 of the Evidence Act.

THESE two suits were instituted by the plaintiff to recover possession of certain immovable property. The defence was, that the plaintiff was illegitimate. At the hearing the plaintiff tendered in evidence a horoscope. He stated that the horoscope had been given to him by his mother, Sibsoondery Dassee; that it had been used at the time of his marriage; and that it had been seen by certain members of his family. He was unable to say by whom the horoscope, or by whom an endorsement on it, which purported to state what his name was, had been written.

Mr. *Kennedy* (for the plaintiff).—The horoscope was brought to the notice of the family, and acted on at the time of the plaintiff's marriage. This comes within the class of cases, where entries in family bibles, and so forth, are admitted in evidence in questions of pedigree, Evidence Act, s. 32, cl. 6. The statement is that he is the legitimate son of Sibsoondery. [NORRIS, J.—There is no evidence to show by whose instructions the horoscope was prepared; it might have been under the directions of the mother anxious to prove the legitimacy of her child]. So might an entry in a family bible. This document was seen by, and acted on by other members of the family, who had an interest in proving that the plaintiff was illegitimate, and it has come out of proper custody.

Mr. *Phillips* (for the defendants).—The document does not come within s. 32, cl. 6 of the Evidence Act. "Other thing" must be of

1883

RAM NARAIN KALLIA v. MONEE BIBEE.

the same kind, as a family pedigree, tombstone, or family portrait. It must be something which is palpable and open to all the world. This is not a document public to all the family. It is a private document. Entries in a family bible are open to all the family. The horoscope does not relate to family affairs. The documents which are admissible in questions of pedigree are admitted because of the security derived from the general knowledge of the family. The section is not intended to relieve a person who is alive from producing the best evidence.

NORRIS, J.—I am of opinion that this document it not admissible in evidence. It is tendered as being admissible under s. 32, cl. 6 of the Evidence Act. That sub-section makes a statement admissible when it "relates to the existence of any relationship by blood, marriage, or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait, or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised." The document tendered is not a statement relating "to the existence of any relationship by blood, marriage, or adoption, between persons deceased." It only purports on the face of it to be a statement of relationship between a deceased person and a living person. I do not think that s. 32 embraces such a case. It is not suggested that the document is a will or deed relating to the affairs of the family. It is tendered as a statement relating to the parentage of a person who is alive. Then it is said it is a statement in the nature of a family pedigree. But I am of opinion that it does not come within those words in the sub-section. But there is another objection to the admissibility of the document which is fatal. Section 32 says that "statements written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense, which, under the circumstances of the case, appears to the Court unreasonable," may be admitted in certain cases. On the plaintiff's evidence it appears that he does not know who wrote the horoscope, or the endorsement on it, and therefore cannot say whether the

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 BIBEE.

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 Pundit* 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.