

high, or where there has been delay, is abundantly clear from the case of *Cook v. Fowler*, and it seems absurd to me to talk of there being any hardship to a mortgagee for a fixed term in putting him on the same footing in the matter of damages for breach of contract as any other party to a contract whose right to sue arises on such contract being broken. Moreover, it is open to a mortgagee at the time of the making of the contract of mortgage to have a covenant entered therein making provisions for "*post diem*" interest, and this is more frequently than not to be found in such contracts; if he does not do so he has no one but himself to blame.

I entirely concur in what was said by the learned Chief Justice in *Mansab Ali v. Gulab Chand* and *Bhagwant Singh v. Daryao Singh*, and I dismiss this appeal with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Tyrrell.

QUEEN-EMPRESS v. MUHAMMAD MAHMUD KHAN.

Sessions Court—Assessors—Assessors prevented by death or illness from attending a trial—Criminal Procedure Code, ss. 268 and 285.

During the course of a trial before a Sessions Court with three assessors, one assessor died at an early stage of the proceedings. Later on, another assessor became too ill to take any further part in the trial, and the third assessor was obliged to retire at the beginning of the accused's pleader's address to the Court and did not return until it was finished.

Held that the law contemplated the continuous attendance of at least one assessor throughout the trial. This condition not having been fulfilled, the proceedings before the Sessions Court must be set aside as having (with regard to the provisions of s. 268 of the Code of Criminal Procedure) been held before a Court not having jurisdiction.

THE facts of this case, so far as they are necessary for the purposes of this report, are stated in the judgment of Tyrrell, J.

Mr. Pogose, for the appellant.

The Government Pleader, *Munshi Ram Prasad*, for the Crown.

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SRI NIWAS
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QUEEN-
EMPRESS
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MAHMUD
KHAN.

TYRRELL, J.—A preliminary point was raised by the learned counsel who appeared for the appellants. He contended that the conviction of his clients was bad in law for want of jurisdiction in the Court below. The trial began before the learned Sessions Judge of Moradabad and three assessors on the 10th day of August 1890. This was in due conformity with the rule contained in s. 268 of the Code of Criminal Procedure, that all trials before a Court of Sessions shall be either by jury or with the aid of assessors. In an early stage of the trial one assessor died, and later on another assessor became too ill to take any further part in the trial. The trial reached its latest stage at the sitting of the 18th day of September 1890, when the assessor Govind Ram alone attended. The case for the prosecution having closed, and the examination of the accused and of some of their witnesses having been had, the learned pleader for the accused addressed the Court for about an hour and a half on the law and merits of the case. Before he had spoken more than ten minutes Mr. Govind Ram obtained leave from the Judge to leave the Court house on the plea of illness and consequent confusion of mind. He did not return till the address on behalf of the accused was finished, and having heard the Government Pleader reply for the prosecution he gave his opinion that the accused were guilty, on vague and unsatisfactory grounds. On these facts Mr. *Pogose* claims that the trial was bad with reference to ss. 268 and 285 of Act X of 1882. The point is new and of considerable importance. It is clear that a trial held by a Sessions Judge without any assessor would be bad for want of jurisdiction. It is equally certain that if all the assessors with whose aid a Sessions Court commenced a trial "are prevented from attending (throughout the trial) or absent themselves, the proceeding shall be stayed and a new trial" must be held. The question arises, however, as to what is the meaning of the words "prevented from attending, or absent themselves." Mr. Govind Ram attended throughout the most part of the trial and absented himself for a portion thereof only; but can he be said to have attended and not to have been absent in the substantial sense of s. 285? I have had the advantage of con-

sulting my brother Straight, and I am of opinion that this question must be answered in the negative.

The first part of s. 285 explicitly provides that the assessors shall attend throughout the proceedings, that is to say, that there shall be no break in their attendance, which shall be exactly commensurate with the entire continuance of the trial down to the time when the finding is made. In the case before me the portion of the trial covered by the provisions of s. 290, a very important portion from the point of view of the accused, was conducted without the aid of any assessor, and to that extent the attendance was not continuously complete. I must allow this plea, with the result that I am constrained to find that the trial was before a Court without jurisdiction and must therefore be set aside. The conviction, sentence and all other proceedings before me are annulled, and a new trial must be had according to law.

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QUEEN-
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APPELLATE CIVIL.

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Before Mr. Justice Mahmood.

KALYAN SINGH (PLAINTIFF) v. KAMTA PRASAD (DEFENDANT). *

Execution of decree—Attachment—Previous assignment in satisfaction of decree of third party—Suit by assignee to establish right to attached property—Civil Procedure Code, ss. 258 and 283.

Where a regular suit under s. 283 of the Code of Civil Procedure was brought to establish the plaintiff's right to certain attached property, on the allegation that the property attached had been transferred to him in satisfaction of a decree held by him against the judgment-debtor,—

Held that it was not necessary that such transfer should be certified under the provisions of s. 258 of the Code of Civil Procedure. The prohibition to take cognizance of adjustments and payments referred to in s. 258 above-mentioned relates only to the Court executing the decree.

The facts of this case sufficiently appear from the judgment of Mahmood, J.

* Second Appeal No. 1222 of 1889 from a decree of G. J. Nicholls, Esq., District Judge of Cawnpore, dated the 27th August 1889, reversing a decree of Babu Khetter Mohan Ghose, Munsif of Fatehpur, dated the 30th June 1888.