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in which the Government might have refrained from preferring this appeal. The appeal is decreed, and the judgment and decree of the Court below are modified in this way that a declaration must be inserted in the decree to the effect that the sum of Rs. 250, court-fee payable in respect of that portion of the plaintiff's claim which was dismissed, is due from the plaintiff, Bhagwanti, to the Secretary of State, who will recover it in the same manner as the costs of suit are recoverable under a decree. The other defendants to the suit have been cited here as respondents for no earthly purpose or reason that I can see, because under s. 412 no power existed in any Court to order them to pay the costs of that portion of the claim of the pauper plaintiff which was dismissed. The appeal is decreed in part, *quâ* Musammat Bhagwanti, but without costs, and the decree will be amended in the manner I have indicated. As to the other respondents, the appeal is dismissed with costs.

TYRRELL, J.—I concur.

*Appeal decreed* quâ *Musammat Bhagwanti.*
*Appeal dismissed* quâ *the other respondents.*

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*March* 11.

*Before Mr. Justice Straight and Mr. Justice Tyrrell.*

SRI NIWAS RAM PANDE (PLAINTIFF) v. UDIT NARAIN MISR AND ANOTHER (DEFENDANTS). *

*Mortgage-bond—Interest post diem—Damages—Act IV of* 1882 (*Transfer of Property Act*) *ss.* 67 *and* 86.

Interest *post diem* on a mortgage-bond for a term certain and containing no express provision as to the payment of *post diem* interest is nothing else than damages for the breach of a contract.

Such interest cannot be regarded as a mere continuance of the *ad diem* interest due on the mortgage-bond, and, as such, as forming an integral part of the mortgage-debt, nor even as resembling such interest and forming a "charge" upon the property, though nominally damages. In respect of *post diem* interest given by way of damages no distinction is to be drawn between simple bonds and mortgage-bonds. *Mansab Ali* v. *Gulab Chand* (1) and *Bhagwant Singh* v. *Daryao Singh* (2) followed; *Cook*

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* First appeal No. 203 of 1888 from a decree of Babu Brij Pal Das, Subordinate Judge of Gorakhpur, dated the 7th September 1888.

(1) I. L. R. 10 All. 85. (2) I. L. R. 11 All. 416.

v. *Fowler* (1); *Bishen Dayal* v. *Udit Narain* (2); and *Rajpati Singh* v. *Kesh Narain Singh* (3) referred to.

IN this case the plaintiff sued for himself and as heir to his deceased brother, Shiam Narain Pande, to recover the sum of Rs. 15,156 together with interest at the rate of 8 annas per cent. per mensem, in all Rs. 25,822 as. 7, from the defendants, Udit Narain Misr and Sarju Prasad Misr, by sale of property mortgaged under a bond dated the 8th September 1879. The debt secured by the mortgage was expressed to be payable with interest at 8 annas per cent. per mensem, in one lump sum at the expiration of two years for the date of the bond, but no provision was made for the payment of *post diem* interest. The defendants pleaded as their main ground of defence that the plaintiffs were not entitled to interest after the day fixed for payment of the money due under the bond. The Court of first instance gave the plaintiff a decree for the principal amount secured with interest for two years at the rate agreed upon, but dismissed the rest of the claim. The plaintiff then appealed to the High Court.

Pandit *Ajudhia Nath* and Munshi *Jwala Prasad,* for the appellant.

Munshi *Kashi Prasad* and Munshi *Ram Prasad,* for the respondents.

STRAIGHT and TYRRELL, JJ.—In this appeal by the plaintiff in the suit only two questions arise. The first is whether, upon a proper interpretation of the mortgage of the 18th December 1879, provision is expressly or impliedly made for the payment of *post diem* interest, and the second, whether, such a provision being absent, and the right of the plaintiff to such interest sounding in damages, such damages form an integral part of the amount due under the mortgage, and in that way should be regarded as secured thereby, or at least as money "charged" on the immovable property covered by the mortgage.

(1) L. R. 7. H. L. 27. (2) I. L. R. 8 All. 486.
(3) Weekly Notes 1890, p. 149.

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Upon the first point I have no doubt as to the true nature of the instrument, namely, that it was for a term certain, *i.e.*, two years, within which period the principal, Rs. 15,156, together with interest at 8 as. per cent. *per mensem* was to be paid up in " a single sum;" and further, that it only provided for payment of interest " *ad diem,*" and not " *post diem.*" It says :—"in case of our being unable to pay the whole of the principal and interest due hereunder on the promised date, the said Pandeys, creditors, shall be at liberty to recover the principal and interest of this bond in a single sum and to a farthing by auction sale of the hypothecated property and from our other movable and immovable properties in any way they may like." In face of such terms as these, it seems to me impossible to say that any covenant for " *post diem*" interest can be implied, unless we are prepared to go the length of holding that when once the relation of mortgagor and mortgagee is established under an instrument for a specified term, there is always an imperative implication of such a covenant. There the mortgagors undertook to pay up the principal and interest within a specified time in " a single sum," and, if not paid upon that date, certain clearly defined consequences were to follow. It is not denied in the present case that the money was not paid as agreed, nor had it been paid up to the date of the institution of this suit on the 30th July 1888. I have no doubt that the claim of the plaintiff for interest after the 18th December 1881 could only be treated as one for damages to be assessed by the Court trying the suit and not for interest due under a covenant, express or implied. In *Cook* v. *Fowler* (1) Lord Cairns, after finding the instrument then in question to be a warrant of attorney and defeazance to secure a debt up to a certain day without any mention of subsequent interest, observes :— " If so, according to the well-known principle which has been referred to in many cases, and which may be taken most conveniently from a note to the case of *Mounson* v. *Redshaw,* any claim in the nature of a claim for interest after the date up to which interest was stipulated for would be a claim, really, not for a stipulated sum and interest but for damages, and then it would be for the

(1) L. R. 7 H. L. 27.

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tribunal before which that claim was asserted to consider the position of the claimant and the sum which properly and under all the circumstances should be awarded for damages." In the same case Lord Selborne remarked :—"Although interest for the delay of payment *post diem* ought to be given, it is on the principle, not of implied contract, but of damages for a breach of contract." This view has been adopted and followed by this Court in *Mansab Ali* v. *Gulab Chand* (1); *Bhagwant Singh* v. *Daryao Singh* (2); *Rájpati Singh* v. *Kesh Narain Singh* (3); and *Bishen Dayal* v. *Udit Narain* (4). The first point is therefore decided against the appellant. Upon the second point Pandit *Ajudhia Nath* addressed to us a very able argument, the main object of which was to show that the cases of *Mansab Ali* v. *Gulab Chand* and *Bhagwant Singh* v. *Daryao Singh* decided by the learned Chief Justice and my brother Tyrrell and above referred to were wrongly decided, and that the question involved is one that we might well refer to a Full Bench. I have heard the learned pleader at length and have carefully examined all the authorities cited by him, and I not only see no reason to doubt, but I entirely concur in the judgments in those two cases and in the reasoning upon which they proceeded. As this opinion of mine, however, has the effect of committing at least a majority of the Court to a particular view, I think it well briefly to consider Pandit *Ajudhia Nath's* argument and the cases to which he has referred. His first position was that a broad distinction must be drawn between simple bonds and mortgage-bonds, as in the case of the latter an absolute presumption is always to be drawn that interest is intended to run on after due date as a charge on the property; and he laid stress upon the fact that in the case of *Cook* v. *Fowler* the document in suit was not a mortgage. At a subsequent stage of his argument the learned pleader admitted that he had perhaps put his contention too high, and he then urged that, conceding *post diem* interest to sound in damages, it was not to be regarded as damages in the ordinarily accepted sense, but as interest in fact, though damages in name, running *pari passu*

(1) I. L. R. 10 All. 85.
(2) I. L. R. 11 All. 416.
(3) Weekly Notes 1890 p. 149.
(4) I. L. R. 8 All. 486.

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with the interest stipulated for under the contract and in like manner entitled to be treated as secured on the property. Let me then examine this position. A man covenants to pay a sum of money certain, with an amount of interest certain, upon a date certain, and mortgages his land for the stipulated period as security for such principal and interest and declares it liable to sale in enforcement of the mortgage immediately on default at the expiration of the given period. Now I suppose the reasonable presumption is, first, that a man will perform his contract and not break it, and secondly, that if parties place a limit of time upon the engagement entered into between them, they do so with their eyes open and intend what they put in black and white into their contract. If, then, A says to B, "I will pay you Rs. 1,000 on the 1st January 1890, with interest at 12 per cent. per annum, meanwhile mortgaging to you my 4 anna zamindári share, and, if I fail to pay on due date, you may realize the amount by sale of such share," the presumption is that A intends to pay and B intends that he shall pay the Rs. 1,000 on the 1st January 1890, and that what is in contemplation between them is a fulfilment of the covenant as to payment on the date specified, and, if it is not fulfilled, an enforcement of the condition of sale. It is open to both of them to make provision for the case of default over and above what I have already mentioned by a covenant as to "*post diem*" interest, and if they do not do so, it must be presumed that the omission was intentional, and that the time to which the contract was limited was deliberately defined. What, then, is the special excellence that belongs to a contract of mortgage for a stipulated term in preference to any other contract to pay a sum of money certain on a particular date, such as a promissory note for example? In either case upon default of payment on due date the right of action accrues, because the time for performance has come and gone, and the contract has been broken. It seems to me, if effect is to be given to the contention of the learned pleader for the appellant, that no real distinction can be drawn between a mortgage for a fixed period, with a covenant as to interest limited to that period, and a mortgage with no such limitation but charging the property until repayment of prin-

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cipal and interest, with the result that an express covenant for "*post diem*" interest has practically no higher scope or operation than an assessment by a Court of such interest under the name of damages, because, if he is right, in either case the *post diem* interest becomes a portion of the amount in respect of which the mortgagee may foreclose or sell the mortgaged property, or goes to swell the mortgage money a mortgagor must pay before he can redeem. In this view of the matter a mortgagee can allow his claim to *post diem* interest in the shape of damages to accumulate up to the last day of limitation, and, though the amount of it has in the end to be assessed and need not necessarily be any particular sum, it is when assessed to be regarded and treated as if it had all along constituted a charge or been secured on the mortgaged property. I would ask from what date such charge is to hold; from that of the mortgage, or from the breach, or from the end of each year for which interest remains unpaid, or from the date of the decree; and what is to be the position of a mortgagee who has taken an incumbrance subsequently to be date of breach, but prior to the bulk of the *post diem* interest, as damages, becoming assessable? If the interest *post diem* were recoverable as interest pure and simple, the recovery of it would be limited to three years from the date when it fell due (Act XV of 1877, sch. II. No. 63), yet if we push the argument for the appellant to its logical conclusion, upon the view that "*post diem*" interest assessed as damages becomes part of the "money secured by the mortgage," it is difficult to see from what point of time, for the purposes of art. 147, the money secured by the mortgage could be said to "become due." It seems to me a contradiction in terms to hold that something the mortgagor becomes liable to pay in consequence of his breach of contract can either legally or equitably be regarded as payable according to the terms and conditions of that contract. The learned pleader relied more particularly on the cases of *Morgan* v. *Jones* (1), *Price* v. *Great Western Railway Company* (2), *Gordillo* v. *Weguelin* (3), and certain passages to be found in Chapter XI,

(1) 22 L. J. Ex. 232. (2) 16 L. J. Ex. 87.
(3) L. R. 5 Ch. D. 287.

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Part 2, of Fisher on Mortgage. I have carefully looked into and examined all these authorities, and I am unable to regard them as making it incumbent on me to hold that interest accruing on a mortgage after the date fixed in the deed forms a portion of the "mortgage debt." In my opinion, on the contrary, it can only be recovered as damages for the detention of that debt, which damages cannot be treated as "secured by the mortgage" or "charged on immovable property," but as compensation for breach of the contract of mortgage. This is borne out by the note to *Mounson* v. *Redshaw* (1), which is mentioned by Lord Cairns in his judgment in *Cook* v. *Fowler*. "The usual covenant in a mortgage deed is to pay the interest and principal on a certain date, but there is no covenant after that date, therefore in debt on such a deed the interest subsequent to the day of default in strictness should not be claimed as part of the debt but as damages for the detention of the debt." The learned Pandit for the appellant pressed upon us the remarks of Lord Justice Amphlett in *Gordillo* v. *Weguelin* as indicating that the Court of Chancery would, in dealing with the question of redemption on equitable grounds, hold the mortgagor bound to pay *post diem* interest assessed as damages as a part of the amount payable by him before he could redeem. However that may be, the action of our Courts in such matters is guided and governed by the Transfer of Property Act, and I cannot hold the expressions therein of "mortgage money" (s. 67) or "principal and interest due on the mortgage" (s. 86) as covering and including interest "*post diem*," assessed as damages. It was said that this view will involve considerable hardship to a mortgagee, which I fail to see. Like every other party to a contract it is open to him on breach to proceed at once for the default, and the presumption is that he will do so, and not that he will lie by, for the purpose, as in this country we know, of allowing interest indefinitely to accumulate till it reaches an amount which, if given as damages assessed at the rate of interest on the mortgage-deed, will be far beyond what the mortgagor can pay. That this assessment need not necessarily adopt the contractual rate where it is abnormally

(1) 1 Wm. Saund. 201, n.

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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.*

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## APPELLATE CRIMINAL.

1891
*March* 17.

*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.