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district and committed for trial to the Court of Session to which commitments from that district are made. The Sessions Judge of Bánda, in accepting the commitment of the case made to him by a Magistrate of Hamírpur for the reason that the prisoner was not prejudiced thereby, has apparently relied on the provisions of s. 33 of the Procedure Code, which appear to me to be inapplicable under the circumstances. That section contemplates the contingency of a case which has been inquired into at the proper place, as indicated by s. 63, being committed to the proper Court of Session by a particular Magistrate not duly empowered by law to make such a commitment. In the present instance none of the Hamírpur Magistrates had jurisdiction to inquire into the offence. The proceedings in the case were illegal *ab initio* and are accordingly quashed. The prisoner must be released and made over to the Fatehpur authorities to be dealt with by them according to law.

Conviction quashed.

FULL BENCH.

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June 17.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Oldfield, and Mr. Justice Straight.

BANSIDHAR (DEFENDANT) *v.* BU ALI KHAN (PLAINTIFF).*

Promissory Note—Act XVIII of 1869, *s.* 3, (5), (25) *and sch.* ii, *No.* 11—*Bond—Agreement—Interest—Penalty.*

The defendant, having borrowed fifty rupees from the plaintiff, gave him on the 9th November, 1878, an instrument which was in effect as follows:—"*B* (defendant) writes this "*rukka*" in favour of *A* (plaintiff) for Rs. 50, cash received, to be repaid on the 13th November, 1878: in the event of default, he shall pay interest at one rupee per diem." *Held* (STUART, C. J., dissenting) that such instrument was a "promissory note," within the meaning of the Stamp Act of 1869, and not a "bond" or "an agreement not otherwise provided for," within the meaning of that Act.

Held also that, looking to the whole instrument, it was equitable to hold that the term "interest" was not intended to mean interest in the strict sense of that term, but a penalty, and the amount of interest should be so treated, and a reasonable amount only be allowed. The observations of Pontifex, J., in *Bichook Nath Panday* v. *Ram Lochun Singh* (1) concurred in.

* Reference, under s. 617 of Act X of 1877, by R. G. Currie, Esq., Judge of Aligarh.

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THIS was a reference to the High Court by Mr. R. G. Currie, District Judge of Aligarh, under s. 617 of Act X of 1877. The facts which gave rise to this reference were as follows :—The defendant, having borrowed Rs. 50 from the plaintiff, on the 9th November, 1878, executed the following instrument in favour of the latter person :—"Bansidhar, son of Baldeo Das, of Hathras, writes this '*rukka*' in favour of Bu Ali Khan for Rs 50, cash received, to be repaid on (the 13th November, 1878), without objection or excuse : in the event of default he shall pay interest at one rupee per diem without objection or excuse, and receive back the '*rukka*' on discharge." This instrument was stamped with a one-anna receipt stamp. The plaintiff sued the defendant upon this instrument in the Court of the Munsif of Aligarh, describing it as a "promissory note" and claiming Rs. 300, that is to say, Rs. 50, the principal of the debt, and Rs. 250, interest at the rate of one rupee per diem from the date of default to the date of suit. The Munsif held that the instrument, so far as regards the principal of the debt, was a promissory note, and as such duly stamped with a one-anna receipt stamp ; but, so far as regards the interest claimed, that it was an agreement, and being as such insufficiently stamped was not admissible in evidence of the claim for interest. The Munsif accordingly gave the plaintiff a decree for Rs. 50, together with interest on that amount from the date of default to the date of suit at one per cent. per mensem, and dismissed the suit as regards the interest claimed. On appeal by the defendant the District Judge referred the following questions to the High Court, under s. 617 of Act X of 1877 :—' The questions are under Act XVIII of 1869 which applies :—(i) Is this a promissory note, and properly stamped with a one-anna receipt stamp, or is it an agreement,—sch. ii, No. 11 ? (ii) Can it be divided and held to be a promissory note as regards the principal, and admissible in evidence for the principal, but inadmissible for the interest ? (iii) If it is not a promissory note, but is inadequately stamped, can the Appellate Court accept payment of the deficiency, &c., under s. 20, Act XVIII of 1869 ? (iv) Supposing the document to be adequately stamped and admissible in evidence, is it obligatory on the Court to allow this

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exorbitant rate of interest, or is this a penal rate or penalty which should not be allowed? (v) Can the Appellate Court entertain the plea against the admission of this document by the Munsif as adequately stamped? The suit was instituted on the 25th July, 1879, and the new Stamp Act (I of 1879) came into force on the 1st April, 1879, and s. 20 is referred to." The reference was laid before Pearson, J., and Oldfield, J., who directed that it should be dealt with by the Full Bench. The reference was accordingly laid before the Full Bench.

Babu *Oprokash Chandar Mukarji*, for the defendant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the plaintiff.

The following judgments were delivered by the Full Bench:—

STUART, C. J.—The "*rukka*" or contract which forms the subject of this reference is in the following terms:—"Bansidhar, son of Baldeo Das, of Hathras, writes this *rukka* to Bu Ali Khan for Rs. 50, cash received, to be repaid on Miti Magsar Badi 3rd (about four days after date) without objection or excuse: in event of non-payment according to promise, he will pay interest at one rupee per diem without objection or excuse, and receive back the '*rukka*' on discharge, dated Miti Kartik Sudi 15th, 1935, corresponding with 9th November, 1878." And the first question is what is the legal character of such a document? Is it a "promissory note" within the strict meaning of that term, or is it an agreement or other obligation? Taken as a whole, I am clear that it is not a promissory note either within the meaning of that expression in s. 3, Act XVIII of 1869, or as it is known to European lawyers, for the condition as to interest deprives it of that character of certainty as to amount which is essential to the legal efficacy of a bill of exchange or promissory note; in other words, that the condition as to interest prevents us from regarding it as an engagement "*absolutely* to pay a *specific* sum of money," within the meaning of the definition of promissory note given in s. 3 of the Stamp Act of 1869. It appears to me that the document is of a two-fold character. It is a promissory note so far as the engagement to pay Rs. 50

four days after date is concerned, and as such may be detached from the undertaking to pay the interest at one rupee per diem. That undertaking I regard as in the nature of a collateral obligation. Such a collateral obligation might have been made in the form of a separate instrument, or it might be, as in the present case, incorporated with or added on the promissory note. In either case it is in its nature, in my opinion, quite distinct from the latter, and is to be regarded and dealt with solely on its own legal merits as a mere penalty or otherwise. That such is the true view of this *rukka* appear to me to be clear from a strict view of its precise terms, according to which the promise to pay "the specified sum" ended with the first sentence. The document then goes on to provide that, "in event of non-payment according to promise, he (the promisor) will pay interest at one rupee per diem, and receive back the *rukka* on discharge," not, be it observed, this *rukka*, but "*the rukka*," showing, as I think may fairly be held, that a distinction was intended by the parties between the document so far as it was a promissory note for Rs. 50, and the engagement to pay extortionate interest of one rupee per diem, that is, at the rate of Rs. 730 per cent. per annum. The document therefore is not at all of the same nature occasionally and somewhat rarely found noticed in English law books, whereby the maker, in addition to the principal sum, engages to pay interest from the date of the bill or note, or, which is the same thing in legal effect, engages in the body of the instrument, and as part of the promise, to pay interest at a particular rate, in which case it has been held by the English Courts that such a contract is good, the interest being payable from the date of the note. In the present case, however, we have a very different document, for the undertaking to pay interest at one rupee per diem is not only not essential to the primary obligation to pay the Rs. 50 four days after date, but is a condition of a highly penal character, and legally objectionable therefore not only on that ground, but being a penalty and therefore reducible in equity, it must have the effect, if viewed as a necessary part of the whole *rukka*, of destroying its character as a promissory note, inasmuch as there cannot, under such circumstances, be shown to be on the

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face of the instrument a debt which is a *certain* and *specified* sum, the sum recoverable taken in connection with the interest as a penalty being essentially uncertain and incapable of being specified before decree.

That the interest stipulated for was a penalty, and one of a very outrageous kind, being at the rate of, as I have said, Rs. 730 per cent. per annum, cannot for a moment be doubted. A ruling by Mr. Justice Pontifex of the Calcutta High Court, in a case before him—*Bichook Nath Panday* v. *Ram Lochun Singh* (1)—was referred to at the hearing in support of this view, and I entirely concur in all that that learned Judge says on the subject, and I have had occasion frequently in this Court to refer to that excellent judgment as expressing a just and accurate view of the law. But we scarcely needed such an exposition in the present case, where the condition as to interest, by its very enormity, writes itself down not only as a penalty, but as a penalty of the most impudent and shameless character.

I have only to add that, as a penalty, the interest can only be recovered to an amount which will cover a reasonable rate, and also costs, and nothing more.

STRAIGHT, J. (PEARSON, J., and OLDFIELD, J., concurring).—This is a reference by the Officiating Judge of Aligarh under s. 617 of the Civil Procedure Code, which has been remitted to the Full Bench by Pearson and Oldfield, JJ.

With regard to the first question put to us, it appears to us that the real and substantive character of the instrument is that of a promissory note, or, in other words, that it is an absolute promise in writing to pay a specified sum on a given date. The stipulation as to interest does not, in our opinion, alter the direct object of the document, the undertaking to pay the principal amount on a particular day, which naturally falls within the definition of a specially designated form of contracts known as Promissory Notes and described in s. 3 of the Stamp Act of 1869; and we see no satisfactory reason for straining construction of its terms so as to throw it into the category of "Bond" or "Agreement not

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otherwise provided for" by that statute. Every promissory note is an agreement, which in the present case is a promise to pay a certain sum on a certain date with interest from maturity at the rate of one rupee per diem. Had interest not been mentioned in the note it would have been recoverable, and it seems to us the mention of the amount of interest can scarcely be held to alter the whole character of the instrument. The answer to the first question of the Officiating Judge therefore should be that the document was adequately stamped, as a promissory note, and admissible in evidence for all purposes. Such being our view, it is unnecessary to reply to questions 2, 3, and 5. The fourth point involves many difficult considerations, and in expressing an opinion upon it, we do so with some doubt and hesitation. It is true that s. 2 of Act XXVIII of 1855 provides that, "in any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed on by the parties." But were the terms of that section strictly applied in every case, it would be impossible to say to what extravagant and extortionate extent the most usurious claims under the name of "interest" might not be carried. In a country like this, where there is so much borrowing by the ignorant lower classes, who as much require to be protected against themselves as against the money-lenders, a too literal application of the above provision could only be productive of oppression and injustice of the most grievous kind. We entirely concur in the observations made by Pontifex, J., in a valuable judgment in *Bichook Nath Panday* v. *Ram Lochun Singh* (1), that the question as to whether "interest," as expressed in a document, is to be regarded as interest or a penalty should be decided according as the intention of the parties can be gathered from the document as a whole. In the present case, for example, for each day's default in payment of the principal sum, which by the way was only borrowed for four days, one rupee interest per diem was to be paid, or at the rate of Rs. 730 per cent. per annum. Now in one sense this may be said to be the "rate of interest agreed upon between the parties," if the word interest, being mentioned in the contract, is to be arbitrarily accepted in its strict sense. But we

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doubt if any Court of Equity would allow itself to be made the medium to enforce terms so monstrous. On the contrary it seems to us that, were the decision of the case referred before this Court, our plain duty would be to hold that, looking at the entire instrument, the parties intended, when they spoke of interest, a penalty for each day's default in payment of the principal sum; for it must be admitted that one rupee per diem for failure to repay Rs. 50 is, as interest, an extortionate amount, for which no adequate consideration is shown, and which no man would contract absolutely to pay.

Holding this view, and as an answer to the fourth question, we think that the amount of interest mentioned in the promissory note is in the nature of a penalty, and may be so treated by the Officiating Judge in disposing of the plaintiff's claim.

P. C. *
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June 30 & *July* 1.

PRIVY COUNCIL.

KAMAR-UN-NISSA BIBI (PLAINTIFF) *v.* HUSSAINI BIBI (DEFENDANT).

[On appeal from the High Court for the North-Western Provinces at Allahabad.]

Gift—Possession—Dower.

On an issue whether an oral gift of an estate, consisting of certain taluquas and mauzas, had been made by a Muhammadan proprietor in favour of his wife, the gift having been stated to have been made in consideration of a dower of a certain amount, which remained unpaid, it was not necessary to affirm in the decision that that amount of dower had been agreed upon prior to the marriage. It is not necessary to constitute dower, by Muhammadan law, that the dower should be agreed upon before marriage; it may be fixed afterwards.

The possession of the estate, which was the subject of gift, having been changed in conformity with the gift, that change of possession would have been sufficient to support it, even without consideration.

Held, on the evidence, that the gift was effectively made.

APPEAL from a decree of the High Court of the North-Western Provinces (2nd March, 1877), reversing a decree of the Subordinate Judge of Jaunpur (25th February, 1876).

The question on this appeal was whether or not an oral gift had been made by the appellant's uncle, Mehdi Ali, in favour of the

* *Present:* SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.