Dictionary is "a right to exercise a Public or Private Employment, and to take the fees and emoluments thereunto belonging 'and' has been sometimes confined to a public employment regulated by law"; while in Wharton's Law Lexicon the term "office" is said to be "an employment, either judicial or municipal, civil, military, or ecclesiastical". A public servant such as a *Tahsildar* or *Naib-Tahsildar* is appointed to, and holds, an office and does not, in our opinion, carry on a profession or calling, such as would bring him within the purview of the Notification in question.

Our answer to the reference is, therefore, in the negative.

C. H. O.

Reference answered in the negative.

APPELLATE CIVIL.

Before Mr. Justice Broadway and Mr. Justice Harrison.

1923

March 9.

FITZ-HOLMES (DEFENDANT) Appellant,

versus

BANK OF UPPER INDIA, LIMITED (PLAINTIFF) Respondent.

Civil Appeal No. 3138 of 1918.

Indian Contract Act, IX of 1872, *section* 74—*Penalty—deed fixing rate of interest to be reduced in case all the conditions in the covenant are observed—Admissibility of oral evidence varying the terms of the written contract—Evidence of subsequent conduct—Indian Evidence Act, I of* 1872, *section* 92.

The suit was for recovery of the mortgage money with interest due upon 2 mortgage deeds. The rate of interest, 9 *per cent.* was the same in both documents, there being a clause to the effect that if all the conditions in the covenant are observed and interest and insurance premia are paid on due dates, this rate of interest will be reduced to 7 *per cent.*

Held, that section 74 of the Indian Contract Act has no application to a contract in which a higher rate of interest is fixed with a condition for its reduction in case of punctual payments.

Kutub-ud-Din Ahmad v. *Bashir-ud-din* (1), followed.

---

(1) (1910) I. L. R. 32 All. 448.

1923

FITZ-HOLMES
v.
BANK OF UPPER
INDIA, LTD.

Held also, that no oral evidence was admissible of a contemporaneous oral agreement to the effect that 7 *per cent* was the rate of interest agreed upon, and that a further 2 *per cent* would be added as a penalty in case of a default being made, nor, in order to prove evidence of this contemporaneous oral agreement, could oral evidence of subsequent conduct be admitted.

Maung Kyin v. *Ma Shwe La* (1), and *Balkishen Das* v. *Legge* (2), which impliedly overrule *Preonath Shaha* v. *Madhu Sudan* (3), *Khankar Abdur Rahman* v. *Ali Hafiz* (4) and *Abdul Ghafur Khan* v. *Abdul Qadir* (5), and *Kutub-ud-Din* v. *Bashir-ud-Din* (6) followed.

Ram Singh v. *Ganga Ram* (7), distinguished.

First appeal from the decree of J. Addison, Esquire, Senior Subordinate Judge, Simla, dated the 27th September 1918, granting plaintiff a preliminary decree.

BARKAT ALI, DIWAN MEHAR CHAND AND NIAMAT RAI, for Appellant.

OBEDULLA, for Respondent.

The judgment of the Court was delivered by—

HARRISON J.—The Liquidator of the Bank of Upper India brought this suit against Mr. Fitz-Holmes for recovery of Rs. 2,68,053-13-0 with costs and interest secured on two mortgage deeds, dated the 30th April 1912, and in default of payment of this sum for sale of the mortgaged property and also a personal decree for the balance, if any. The suit has been decreed in full by the Senior Subordinate Judge of Simla, a preliminary decree being given on the 27th September 1918 declaring the sum claimed to be due, that is to say, Rs. 2,86,642-14-4, including interest and costs up to the 27th March 1919, and further ordering that Rs. 2,82,997-12-9 out of this sum shall carry interest at the rate of Rs. 6 *per cent.* until realization, and that unless the amount decreed be paid before the 27th March, the mortgaged property or a sufficient portion thereof shall be sold. After the period had elapsed a final decree was passed and appeals have been presented both from the preliminary and the final decrees. The deeds on which the suit is based are a

(1) (1917) I. L. R. 45 Cal. 320 (P. C.).
(2) (1899) I. L. R. 22 All. 149 (P. C.).
(3) (1898) I. L. R. 25 Cal. 603 (F. B.).
(4) (1900) I. L. R. 28 Cal. 256.
(5) 72 P. R. 1901.
(6) (1910) I. L. R. 32 All. 448.
(7) (1922) I. L. R. 3 Lah. 389.

1923

FITZ-HOLMES v. BANK OF UPPER INDIA, LTD.

cash credit mortgage bond with a potential maximum of Rs. 50,000 and an ordinary mortgage for Rs. 2,00,000. The rate of interest 9 *per cent* is the same in both documents, there being a clause to the effect that if all the conditions in the covenant are observed and interest and insurance premia are paid on due dates, this rate of interest will be reduced to 7 *per cent*. The defendant pleaded that instead of the terms agreed upon being those recited in the deeds, the agreement made at the time was that interest was to be charged at 7 *per cent* and in case of default an enhanced rate of 9 *per cent* was to be charged, and that anyhow on the terms as recited in the deeds the rate of 9 *per cent* was penal. He further claimed certain items by way of set-off. The following issues were framed :—

(1) What was the rate of interest agreed upon? In particular was the 9 *per cent.* rate a rate by way of penalty? If so, what interest should the Court allow?

(2) Can the 8 items mentioned at the end of paragraph (2) of the pleas be equitably set-off? If so, are they correct and should they be so set-off? Are any of them time-barred?

(3) What is the actual amount due to the plaintiff?

Before calling evidence the Senior Subordinate Judge decided to hear arguments on the preliminary legal point arising out of the pleas taken as to interest and also as to whether the items claimed could be equitably set off. These were duly argued before him and a decision has been given that the first question of whether evidence can be led to show that the agreement was not as stated in the deeds is finally disposed of by a recent Privy Council ruling reported as *Maung Kyin* v. *Ma Shwe La* (1), that *Kutub-ud-Din Ahmad* v. *Bashir-ud-Din* (2) is conclusive on the subject of the penal nature of the deeds as drawn and that out of the items claimed as set-off, five refer to another suit and the remaining three cannot be equitably set-off in this suit, more especially as no stamp has been paid upon them.

* * * * * * * * *

The main points urged are the questions of the rate of interest, and whether the items claimed as set-off

(1) (1917) I. L. R. 45 Cal. 320 (P. C.) (2) (1910) I. L. R. 32 All. 448.

can be allowed. In appeal these have been reduced to two, and it is admitted that items Nos. 2 to 4, and 6 and 7 relate to another case. Nothing is said of item No. 8, and items 1 and 5 alone are claimed and referred to in the grounds of appeal.

The first contention is that the words used in the mortgage deed actually mean that 7 *per cent* is to be charged in the first instance, and that a penalty of 2 *per cent* is to be added in case of default. The meaning to be attached to the condition as recited is explained very clearly in *Kutub-ud-Din Ahmad* v. *Bashir-ud-Din* (1). In order to avoid the consequences of section 74 of the Contract Act all that a mortgagee need do is to reserve the higher rate as payable under the mortgage, and to provide for its reduction in case of punctual payments.

After endeavouring to show, without success, that this ruling does not apply, counsel adopts an alternative line of attack, which again falls under two heads. He contends, in the first place, that at the time the agreement was made the parties intended and understood that 7 *per cent* would be charged, and a further 2 *per cent* would be added as a penalty in case of a default being made. In the event of his failing to establish this point he wishes to show that there was a subsequent oral agreement which he describes as a waiver, and which he contends comes within the definition in section 92 of the Evidence Act. This is an impossible position inasmuch as the two pleas are wholly contradictory, for if the terms of the original agreement were, that in the first instance 7 *per cent* was to be charged, there could be no reason for the making of a subsequent oral agreement varying the terms so as to make them comply with this original agreement. He finally decided to adhere to his first line of argument, and to give up the alternative contention of a subsequent oral agreement. On the question of whether he can be allowed to produce evidence of a contemporaneous oral agreement varying the terms of the written document, the learned Senior Subordinate Judge has summarised the authorities very clearly, and we find ourselves in complete agreement with the conclusion to which he comes that this question which was formerly debateable

(1) (1910) I. L. R. 32 All. 448.

1923

FITZ-HOLMES
v.
BANK OF UPPER
INDIA, LTD.

and one on which the High Courts differed, has been finally decided by *Maung Kyin* v. *Ma Shwe La* (1).

It is contended before us, as it was contended before the Senior Subordinate Judge, that the Privy Council has not definitely set aside *Abdul Ghafur Khan* v. *Abdul Qadir* (2). As explained by the learned Senior Subordinate Judge that ruling followed *Preonath Shaha* v. *Madhu Sudan* (3) and *Khankar Abdur Rahman* v. *Ali Hafez* (4) and the distinction made by the Calcutta High Court between evidence of previous and contemporaneous conduct as opposed to evidence of subsequent conduct was drawn in exactly the same way in *Abdul Ghafur Khan* v. *Abdul Qadir* (2). In *Maung Kyin* v. *Ma Shwe La* (5), their Lordships of the Privy Council say :—" This series of cases (including *Preonath Shaha* v. *Madhu Sudan* (3) and *Khankar Abdur Rahman* v. *Ali Hafez* (4) definitely ceased to be of binding authority after the judgment of this Board pronounced by Lord Davy in the case of *Balkishen Das* v. *Legge* (6)"—and it follows that *Abdul Ghafur Khan* v. *Abdul Qadir* (2) has also ceased to have any force, and in order to prove evidence of a contemporaneous oral agreement, oral evidence of subsequent conduct can, under no circumstances, be admitted. It appears to us that there is all the difference in the world between the present type of case, and that reported as *Ram Singh* v. *Ganga Ram* (7). There and in other cases which have been quoted the question to be decided was the inference to be drawn from the unquestioned terms of the document as to the intention of the parties and the nature of the agreement, *e.g.*, whether it was a gift or a sale, or a sale or a mortgage. Here an attempt is made to show by evidence of subsequent conduct that the terms were different from those entered in the deed. We, therefore, hold, agreeing with the learned Senior Subordinate Judge, that the plea could not be taken, that evidence could not be led in support of it, and that the terms, as recited, must be enforced.

As to the items claimed as set-off, Mr. Obedulla, Counsel for the respondent Bank, has agreed that the

(1) (1917) I. L. R. 45 Cal. 320 (P. C.).
(2) 72 P. R. 1901.
(3) (1898) I. L. R. 25 Cal. 603 (F. B.)
(4) (1900) I. L. R. 28 Cal. 256.
(5) (1917) I. L. R. 45 Cal. 320, 332 (P. C.).
(6) (1899) I. L. R. 22 All. 149 (P. C.)
(7) (1922) I. L. R. 3 Lah. 389.

appellant should be allowed a reduction of the total amount claimed as items 1 and 5 in case the remainder of the decree is upheld. We, therefore, dismiss the appeal with costs except in so far as to reduce the total amount by Rs. 1,587-10-8.

In this case a final decree had been given on the expiry of the period of grace allowed and a further interval of over three years and ten months has elapsed. The question, therefore, does not arise of any further action being taken before execution is sought.

A. R.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Scott-Smith and Mr. Justice Fforde.

GHULAM MUSTAFA AND OTHERS (DEFENDANTS) Appellants,

versus

GHULAM NABI AND OTHERS (PLAINTIFFS) Respondents.

1923

March 15.

Civil Appeal No. 1112 of 1919.

Civil Procedure Code, Act V of 1908, *Order XXIII, rule* 3—*Compromise dealing with other immoveable property besides that in suit—proper procedure—whether the compromise is admissible in evidence, being unregistered, where the Court has not recorded it nor passed a decree in accordance therewith—Indian Registration Act, XVI of* 1908, *section* 17 (1) (*b*) *and* (2) (*vi*) *and section* 49.

In 1909 the present respondents brought a suit for possession of certain land. The parties arrived at a compromise on the 9th February 1910, which declared the shares of the parties in 5 villages. The compromise was made in writing and tendered to the Court which held that as the suit was in respect of one village only, and the compromise dealt with the lands of the parties in five villages, a decree could not be passed in accordance with the terms of the compromise, and ordered "that the record of the