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to provide for the satisfaction of the decree in the manner recommended by him. The Subordinate Judge accordingly postponed the sale, and on the 11th March, 1879, made an order sanctioning the Collector's recommendation. On appeal by the decree-holder from this order, the District Judge set it aside, having regard to the case of *Womda Khanum* v. *Rajroop Koer* (1).

The judgment-debtor appealed to the High Court, contending that there was nothing in s. 326 of Act X of 1877 confining its provisions to money-decrees.

Munshis *Hanuman Prasad* and *Ram Prasad*, for the appellant.

Pandit *Ajudhia Nath*, for the respondent.

The judgment of the Court (PEARSON, J., and STRAIGHT, J.,) was delivered by

PEARSON, J.—Reading s. 326 with s. 322 of the Code, we are of opinion that the lower appellate Court's order, referring to a decree which directs the sale of immoveable property in pursuance of a contract specifically affecting the same, is right; and we therefore dismiss the appeal with costs.

Appeal dismissed.

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

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April 29.

MUMFORD (PLAINTIFF) *v.* PEAL AND ANOTHER (DEFENDANTS).*

Bond—Waiver—Act IX of 1871 *(Limitation Act), sch.* ii, *art.* 75—*Cause of Action.*

The mere acceptance by the obligee of a bond payable by instalments, which provides that in case of failure to pay one or more instalments the whole amount of the bond due shall become payable, of instalments after default does not constitute a "waiver," within the meaning of art 75, sch. ii, of Act IX of 1871, of the obligee's right to enforce such provision.

In the case of such a bond the cause of action arises on the first default, and limitation runs from the date of such default.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Straight, J.

(1) I. L. R., 3 Calc., 335.

* Second Appeal, No. 912 of 1879, from a decree of H. Cushington, Esq., Judge of Allahabad, dated the 18th April, 1879, affirming a decree of Rai Makhan Lal, Subordinate Judge of Allahabad, dated the 2nd September, 1878.

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Mr. *Colvin* and the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the appellant.

Messrs. *Hill* and *Howard*, for the respondents.

The following judgments were delivered by the Court:—

STRAIGHT, J.—This is a suit brought by the plaintiff to recover from the defendants the sum of Rs. 3,917-8-6, being the amount of principal and interest due upon a bond bearing date the 27th September, 1871, and executed by one James Giddens, deceased, of whom defendant No. 1 is the widow, by Robert Peal, defendant No. 2, and by one George Richards, who has not been included in the proceedings. The plaintiff also seeks to realize the amount of his claim by sale of a certain bungalow, hypothecated by the before-mentioned James Giddens as security for the above sum of Rs. 3,917-8-6, and the cause of action is alleged to have accrued on the 27th September, 1874, the date before which the amount covered by the bond was agreed to be repaid.

Defendant No. 1 in reply states that the plaintiff voluntarily undertook to discharge the amount of the said bond, of which the Uncovenanted Service Bank was the obligee, and that as security for doing so he had possession given him of the hypothecated bungalow and received the rents therefrom for a long period of time; that he promised not to charge interest for any payments made by him to the Bank; and that she is willing the bungalow should be sold to satisfy the principal debt due to the plaintiff, but not to pay any interest, which he had promised not to demand. Defendant No. 2 pleads that, as he was no party to the deed by which the plaintiff became assignee of the bond of the 27th September, 1871, and had no notice of the assignment, he is not liable to plaintiff, and that the bond was not assignable by law; that upon the death of the obligor James Giddens he wrote to the manager of the Bank, requiring him, in consequence of defaults that had been made in the payment of instalments, to enforce hypothecation by sale of the mortgaged bungalow, but that the Bank failed to do what he requested, and he (the defendant No. 2) is accordingly freed from all liability; that he was only a surety for the obligor and not a co-obligor; that the suit is

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barred by limitation, as any cause of action the plaintiff might have had arose on the 11th October, 1872, the date of the death of James Giddens, or on some prior day when the last payment in liquidation of the bond was made. The first Court, holding the plea of limitation to be fatal to the plaintiff's claim as against the persons of the two defendants, dismissed it to that extent, but gave him a decree against the property, and this decision was upheld by the lower appellate Court.

The plaintiff now appeals to this Court, and the only argument seriously urged before us was that, inasmuch as the obligee of the bond took no steps to sue on the default by the obligor to pay his instalments, and accepted payments after default made, he must be taken to have waived the breach of the contract that had then been made.

The case is one of some complication, and in order satisfactorily to consider it, it is necessary to detail the following facts. One James Giddens, a Government employé and resident of Allahabad, in the year 1871 seems to have been in pecuniary difficulties, and in order to tide over them he had recourse for assistance to the Uncovenanted Service Bank, of which a Mr. Fairlie was the Agent and Manager. He ultimately effected a loan of Rs. 3,350, and the transaction was completed on the 27th September, 1871, by the execution of a joint and several bond for that amount by himself, his brother-in-law by marriage, Mr. Robert Peal, and one George Richards, in which it was agreed that the Rs. 3,350 should be repaid by regular monthly instalments of Rs. 80 each, together with interest "at 12 per cent. payable monthly by deduction from each remittance or payment or otherwise added to the principal at the end of each half year, namely, on the 30th June and the 31st December." The first instalment was to become payable on the 10th November, 1871, and it was further provided, "that in the event of failure in the payment of any one or more instalments, and whether advice be or be not given of such default, we hereby jointly and severally render ourselves liable to pay up the full amount or such balance thereof as may become due according to the account current of the said Bank, with all interest and other charges that may or shall be incurred on account of the said loan."

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Concurrently with the execution of this bond James Giddens by deed mortgaged a bungalow in Allahabad to the Bank, and gave authority therein to the Bank to sell the same to the best advantage either publicly or privately, "should the loan of Rs. 3,350 be not liquidated with all other charges within the time and in the manner agreed upon in the bond, or in case of my death in the interim before the discharge of the said debt."

It is an admitted fact in the case that the Rs. 3,350 were paid to James Giddens, and that he alone had the benefit and the use of the money. The instalments, it will be observed, had to be paid on the 10th of each month, and those for November and December, 1871, were punctually discharged. But this regularity was not continued with those that followed, the payments being made on the following dates:—

			Rs.
January	10th,	1872 ...	... 50
„	17th	„ ...	... 30
February	12th	„ ...	... 80
March	8th	„ ...	... 80
May	8th	„ ...	... 80
August	3rd	„ ...	... 40
	or in all	...	... 360

On the 11th October, 1872, James Giddens died, and at that time there were five monthly instalments due—that is Rs. 400, and this independent of interest, in respect of which nothing had been paid. Soon after Giddens' death Mr Fairlie wrote to Mr. Richards and Mr. Peal, inquiring of them what arrangements they proposed to make to liquidate the unpaid balance owing on the bond, and on the 14th November, 1872, the latter replied as follows:—"As you hold a collateral security in the mortgage of Mr. Giddens' house, and as this mortgage was executed with the object of securing his securities from becoming liable, or at least incurring any loss in the event of any contingency preventing Mr. Giddens liquidating the debt, I request you will foreclose the mortgage and pay off the Bank's debt. The widow of Mr. Giddens wrote to me

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the other day stating that she had called on you with the object of requesting you to take possession of the house and with it pay off the Bank's claim, but that you were out. I shall feel obliged if you will communicate with her and let me know the result." Upon receipt of this letter Mr. Fairlie does appear to have threatened to put the powers of the Bank under the mortgage into force, and thereupon the plaintiff, Mumford, a step-brother of the deceased James Giddens, at the earnest solicitations of his widowed sister-in-law, first introduced himself into the matter by paying on the 19th December, 1872, the sum of Rs. 450 to the Bank on account of the bond. In passing it may be remarked that at that date seven instalments, or in other words Rs. 560, was the amount actually due. Mumford afterwards made the following further payments: —

		Rs.
January 20th, 1873	...	225
February 20th ,,	...	225
March 20th ,,	...	225
		675

From this latter date to the 26th January, 1874, the principal and interest were allowed to accumulate till they reached Rs. 2,540, which sum on the 26th January, 1874, was liquidated in full by Mumford, who thus out of the Rs. 4,185 actually received by the Bank in respect of the bond had found no less than Rs. 3,665. On the 18th February, 1874, Mr. Fairlie on behalf of the Bank, whose claim had been satisfied, assigned to Mumford by deed all its rights, interests, and powers in the bond of the 27th September, 1871, and the collateral mortgage of the same date. About this time an account was opened in the books of the Bank headed "James Giddens, Esq., in loan account with E. A. Mumford, Esq.," the first item of which on the debit side was as follows:— "27th January, 1874.—To amount paid to the Uncovenanted Service Bank, Rs. 3,653-4-0." It is clear that Mumford had then been put in possession of the hypothecated bungalow by defendant No. 1, and indeed the facts establish it beyond question, for on the credit side of the same account will be found a succession of

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entries down to October 2nd, 1874, recording the receipt of the rent of it, apparently by Mumford direct, and after that date until the 12th August, 1875, through defendant No. 1. The total of the former is Rs. 410 and of the latter Rs. 750, or Rs. 1,116 in all. The balance appearing as due for the principal debt on the 12th August, 1875, was Rs. 3,145-8-6 and for interest Rs. 772, making a total of Rs. 3,917-8-6, for recovery of which sum the plaintiff instituted his present suit on the 17th September, 1877.

It has been necessary to go at this length into the facts in order to make the point taken in appeal intelligible. The case was most ably and exhaustively argued before the learned Chief Justice and myself on three different occasions, and we took time to consider our judgment, in order to examine the numerous authorities quoted on either side. The simple and sole point for our consideration is whether the Uncovenanted Service Bank, the obligee of the bond of the 27th September, 1871, by accepting payments after default had been made in the instalments, waived the benefit of its provisions, within the meaning of art. 75, sch. ii, Act IX of 1871.

It does not appear to me that any question properly arises as to the competency of the plaintiff to bring this suit, or as to the primary liability of defendant No. 2 under the bond. I see no reason to hold that the assignment of the Bank by the deed of 18th February, 1874, was otherwise then legal, and the plaintiff stands in no better or worse position than his assignor. The terms of the bond preclude the contention that defendant No. 2 was only a surety, and it is clear that he made himself jointly and severally liable as an obligor with the other two persons executing it. It is much to be desired that the bond were equally plain and explicit in other respects. Its terms as to mode of payment are so singularly contradictory that if strictly interpreted they could not have been carried out. For it was absolutely impossible to discharge a sum of Rs. 3,350 within three years from the 27th September, 1871, by monthly instalments of Rs. 80, the first of them commencing on the 10th November, 1871. To the 27th September, 1874, by which date the bond was redeemable, would be exactly 35 months, which multiplied by 80 gives Rs. 2,800, or Rs. 550 short of the principal sum covered by it, to say nothing

of interest. The contracting parties are not to be congratulated on their arithmetic, and by their carelessness they have raised a difficulty which with ordinary circumspection might have been avoided. It seems to me, however, that the bond must be regarded as one payable by instalments, on default in payment of one or more of which the whole principal amount then due could at once be demanded. To this extent its language is certain and precise, and I do not know that, for the purpose of disposing of this appeal, we are called upon to determine what the intentions of the parties were, as to when and how the balance over and above the 35 instalments should be discharged, though that it was, in some way and at some time, within the three years, to be forthcoming seems plain. Then comes the question whether default was made in the instalments, and if so, whether the conduct of the Uncovenanted Service Bank in accepting subsequent payments amounts in law to a waiver.

Both the lower Courts have in substance answered the first of these propositions in the affirmative and the latter in the negative. The ground upon which we are invited to disagree with their decisions is, that the finding on the latter point is in the teeth of the evidence, and that the mere fact of money having been received on account of the bond by the Bank is sufficient of itself to constitute a legal waiver. I cannot for a moment accede to this view. On the contrary, I think that the most cogent and conclusive proof must be demanded to establish that a party to a contract has abandoned a right accruing to him under its provisions on breach, and has entered into some fresh parol arrangement condoning such breach and creating new relations with the party in default. "A waiver must be an intentional act with knowledge, and it is incumbent on any party insisting on a verbal agreement in substitution of a written contract to show that both parties understood the terms of the substituted agreement."—*The Earl of Darnley* v. *The London, Chatham and Dover Railway Co.* (1). In the present case the first default occurred on the 10th January, 1872, when only Rs. 50 instead of Rs. 80, the proper instalment, was forthcoming; and though it is true that the remaining Rs. 30 were paid on the 17th of that

(1) L. J., 36 Eq., 404.

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month, the fact is not altered that a cause of action had accrued to the Bank under the terms of the bond. In February the payment was two days late; in March two days before time. In April, however, nothing was forthcoming, and it was not until the 8th May that another Rs. 80 found its way to the Bank. Then there was a further suspension during June and July, and finally on the 3rd August there was a payment of Rs. 40, the last ever made by James Giddens prior to his death. At that date, irrespective of interest, only Rs. 520 had been paid as against Rs. 720 due, and consequently during the period between November, 1871 and July, 1872, no less than three instalments, or Rs. 240, had fallen into arrears. Even could we hold that the two payments in January, 1872, were so near to one another as not to constitute a default, it would be impossible to place a similar construction upon the absence of any payment in April, 1872. Looking at all these facts, I see nothing whatever to establish that the Bank entered into any arrangement or understanding to forego the cause of action that had arisen on the 10th January, 1872, or that any fresh parol agreement qualifying the provisions of the bond of 27th September, 1871, was ever made. But even were there evidence of this to bind Giddens and his representatives, it appears to me that an insurmountable obstacle lies in the plaintiff's way, in the circumstance that there is not a particle of proof that defendant No. 2 was ever a party to any such subsequent verbal contract. On the contrary, as far as there is material for forming an opinion, it would seem as if Mr. Peal was all along in ignorance that any default in the payment of instalments had been made, until he received the letter from Mr. Fairlie, shortly after Giddens' death, asking him what arrangement he proposed to make to liquidate *the unpaid balance of the loan.* It is not attempted to be set up by the plaintiff that as between Peal and the Bank there was any agreement or understanding come to in abrogation or substitution of the terms of the bond under which he had contracted, and the argument for appellant therefore really comes to this, that we are to hold defendant No. 2 bound by a parol arrangement of which he had no knowledge and to which he never gave his acquiescence. The plaintiff is on the horns of

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a dilemma, either the bond of September, 1871, was superseded and rescinded, or it was not. If it was, the defendant No. 2 was no party to its supercession and recission; if it was not, the cause of action arose on the 10th January, 1872, and his claim is barred by limitation. To contend that the acceptance of subsequent payments by the Bank from the plaintiff has any binding effect upon defendant No. 2 proceeds upon an entire misconception of the principle on which the doctrine of waiver is based, nor is the fact itself worthy a moment's serious consideration in face of the demand made upon defendant No. 2 by the Bank, immediately after Giddens' death, for "*the unpaid balance of the loan,*" a pretty strong indication that at that time its right to the whole principal sum covered by the bond was considered to have accrued. The plaintiff by his assignment of the 18th February, 1874, took the position theretofore occupied by his assignor with all the rights, interests, and disabilities pertaining thereto, and he had abundant time, between that date and the 10th January, 1875, when limitation finally barred him, even after the 27th September, 1874, the day before which the bond had to be satisfied, to take his claim into Court. Upon what principle the plaintiff alleged his cause of action to have accrued on the 27th September, 1874, is far from intelligible. The bond was, as has already been pointed out, payable by instalments, on default in one or more of which the whole amount became due and payable, and the law is perfectly clear upon the point, that the cause of action in such a case accrues on the first default, from the date of which limitation begins to run. Decisions without end to this effect may be found, but it is sufficient for me to refer to *Hemp* v. *Garland* (1); *Madho Singh* v. *Thakoor Pershad* (2); and *The Uncovenanted Service Bank* v. *Khetter Mohan Ghose* (3). It therefore appears to me that the cause of action, which accrued to the Bank and was passed on with the bond to the plaintiff by the assignment, arose on the 10th January, 1872, and that the present suit is barred by limitation. The plea of waiver entirely fails. I would accordingly dismiss this appeal and confirm the judgment of the Courts below with costs.

(1) 12 L. J., Q. B., 134; S. C. 4 Q. B., 519.
(2) H. C. R., N.-W. P., 1873, p. 35.
(3) H. C. R., N.-W. P., 1874, p. 88.

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STUART, C. J.—I am so entirely satisfied with the examination of this case, in fact and in law, afforded by the judgment of my colleague Mr. Justice Straight, that I feel I need add nothing to what he has so clearly and satisfactorily stated. The case of *Madho Singh* v. *Thakoor Pershad* (1) was a judgment of my own concurred in by my colleague Mr. Justice Spankie, and is correctly stated as an authority in support of the opinion that the cause of action in the case of an instalment-bond accrues on the first default, whence limitation begins to run. The appeal is dismissed with costs in all the Courts.

Appeal dismissed.

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April 30.

Before Mr. Justice Pearson and Mr. Justice Straight.

BUJHAWAN LAL (DEFENDANT) *v.* SUKHRAJ RAI (PLAINTIFF).*

Attachment—Cross-decrees—Act VIII of 1859 (*Civil Procedure Code*), *s.* 209.

In April, 1877, *M* sued *S* for money and on the 10th May, 1877, *S* sued *M* for money, both suits being instituted in the same Court. In the meantime, on the 9th May, 1877, *B* applied for the attachment of the money claimed by *M* in his suit, and obtained an order prohibiting *M* from receiving, and *S* from paying, any sum which might be found in that suit to be due by *S* to *M*. On the 23rd June, 1877, *M* obtained a decree in his suit against *S*, and *S* obtained a decree in his suit against *M*, *S's* decree being for the larger sum. On the same day, under the provisions of s. 209 of Act VIII of 1859, satisfaction for the smaller sum was entered on both decrees, and execution taken out of *S's* decree for so much as remained due. At the same time *S* objected to *B's* attachment, but his objection was disallowed. *Held*, in a suit by *S* against *B* to have the order disallowing his objection set aside and the propriety and legality of the set-off above mentioned established, regard being had to the provisions of s. 209 of Act VIII of 1859, that the attaching order of the 9th May could have no operation or effect, and that, even if *B* had followed up that order and attached *M's* decree against *S*, that step would not have put him in a better position, for the same section being followed, and the decrees being essentially cross-decrees, that for the smaller sum became absorbed in the one for the larger, and attachment could not affect it.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

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* Second Appeal, No. 1139 of 1879, from a decree of Maulvi Abdul Majid Khan, Subordinate Judge of Ghazipur, dated the 25th July, 1879, reversing a decree of Babu Nimadhab Roy, Munsif of Ghazipur, dated the 14th May, 1879.

(1) H. C. R., N.-W. P., 1873, p. 35.