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occur :—" When the plaintiff fails to make such application within the period prescribed therefor, the suit shall abate, unless he satisfies the Court that he had sufficient cause for not making the application within such period."

This is not the first occasion upon which I have expressed a regret that this question as to the extension of the period of limitation or as to the interpretation of what the " *sufficient cause* " should be, is out of place in the Code of Civil Procedure, because that is not an enactment dealing with that department of the adjective law of Limitation. The proper place for the sentence above quoted would have been s. 5 of Act XV of 1877. It is however not there, and because it is not there, we have had the difficulty with which my brother Straight has fully dealt, and which required the case to be dealt with by three Judges instead of my brother Straight and myself, when we originally heard the case in the Division Bench.

The judgment of my brother however disposes of the difficulty, and I agree with him entirely.

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*June* 11.

## APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*

BHAGWANT SINGH (PLAINTIFF) *v.* DARYAO SINGH AND OTHERS (DEFENDANTS)*

*Bond—Interest post diem—Damages for non-payment on due date—Limitation—Act XV of* 1877 *(Limitation Act), sch. ii, No.* 116*—Charge on hypothecated property—Successive or continuing breaches of contract—Practice—Danger of deciding case upon a document by construction put on another document in another suit.*

A contract to pay interest *post diem* on a mortgage ought not to be implied when the parties to the written contract have not expressed therein any such intention. This is particularly the case where the written contract does in clear terms provide for the payment of interest and compound interest during the term of the mortgage. *Narain Lal* v. *Chajmal Das* (1) followed. *Chhal Nath* v. *Kamta Prasad* (2) and *Haldeo Panday* v. *Gokal Rai* (3) referred to.

* First Appeal, No. 74 of 1888, from a decree of Maulvi Shah Ahmad-ul-lah, Subordinate Judge of Mainpuri, dated the 14th February, 1888.

(1) Decided 7th March, 1889, not yet reported.
(2) I. L. R., 7 All., 333.
(3) I. L. R., 1 All., 603.

Damages given after the due date of a mortgage for non-payment of the principal money upon the due date, are damages for breach of contract, and not interest payable in performance of a contract; and under art. 116, sch. ii, of the Limitation Act (XV of 1877), a suit to recover such damages must be brought within six years from the time when the contract for the breach of which they are claimed was broken. It cannot be said that such damages are, from the date when the contract was broken, and even before they have been ascertained or decreed, a charge upon the property hypothecated, so as to make art. 116 inapplicable. *Price* v. *The Great Western Railway Co.* (1), *Morgan* v. *Jones* (2), *Gordillo* v. *Weguelin* (3), *in re Kerr's Policy* (4), *Lippard* v. *Ricketts* (5), *Cook* v. *Fowler* (6) and *Bishen Dyal* v. *Udit Narain* (7) distinguished.

In such cases there is one breach of the contract, namely, the non-payment on the date agreed upon; and there is no question of continuing or successive breaches. *Mansab Ali* v. *Gulab Chand* (8) referred to.

The danger pointed out of deciding one case relating to a bond by the construction placed in another suit on another and a different bond.

THE facts of this case are sufficiently stated in the judgment of the Court.

The Hon. Pandit *Ajudhia Nath* and Babu *Jogindro Nath Chaudhri*, for the appellant.

Munshi *Ram Prasad* and Babu *Durga Charan Banerji*, for the respondents.

EDGE, C. J., and TYRRELL, J.—This was a suit on a hypothecation bond dated September 24th, 1875. The bond was in the following terms:—"I, Hansraj Singh, son of Bhajan Singh, caste Thakur, occupation zamíndári, resident and zamíndár of Kalhor Bajhana, pargana Karor, tahsíl Mainpuri, do declare as follows:—I have borrowed Rs. 1,000, half of which is Rs. 500, from Bhagwant Singh, son of Dalel Singh, caste Thakur, occupation zamíndári and banking, of Faizpur, pargana Karor, to pay the debt due to Baldeo Singh, Thakur, resident of mauza Bendauli, pargana Mainpuri, and brought the same to my use. I promise to pay the whole amount, including principal and interest, in six years. The interest has been agreed to be paid at Re. 1-2 per cent. per mensem. I shall pay

(1) 16 L. J. Exch., 87.
(2) 22 L. J. Exch., 232.
(3) L. R., 5 Ch. D., 287.
(4) L. R., 8 Eq., 331.
(5) L. R., 14 Eq., 291.
(6) L. R., 7 E. and I., 27.
(7) I. L. R., 8 All., 486.
(8) I. L. R., 10 All., 85.

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interest annually, and if I do not pay interest in any year, the interest would become principal, and interest at Re. 1-8 per cent. per mensem would be charged by the creditor. I have for the creditor's satisfaction, hypothecated a 1⅓ biswa zamíndári share in the aforesaid Kalhor Bajhana. I shall not transfer it in any way so long as the full amount is not paid off. If I do so, it shall be illegal. Whatever money I shall pay on account of interest, I shall get it endorsed on the bond. There would be no necessity for a separate receipt. If I do not pay the full amount, principal and interest, within the prescribed term, the creditor shall be entitled to recover his money from the property hypothecated thereunder, as also from other moveable or immoveable properties belonging to me. I and my heirs shall have no objection to it. I have therefore made these few presents by way of hypothecation bond so that they may serve as evidence and be of use when needed."

Under that bond the principal and interest agreed to be paid by it became payable on September 24th, 1881. This suit was instituted on January 14th, 1888, *i. e.*, more than six years from the due date of the bond. The Subordinate Judge gave the plaintiff a decree, but misunderstood the provision as to compound interest. He disallowed the claim for interest or damages *post diem*. The plaintiff has brought this appeal. It appears to us quite plain that the meaning of this contract is that whenever in any year default was made in the payment of the interest, the interest due for that year should be added to the principal, and that after the first default the interest payable should be at Re. 1-8 per cent. per mensem, and not at the rate of Re. 1-2 per cent. per mensem. In other words, the contract provided that during the contract period there should be rests, and the unpaid interest should be added to the principal, and that in case of default of payment of interest during the contract period, the rate of interest should be increased. No interest was paid during the contract period. The decree below must be varied by adding Rs. 440-12 to the sum decreed in respect of interest unpaid during the currency of the contract, and interest at the increased rate to the 4th January, 1881.

Pandit *Ajudhia Nath*, for the appellant, contended on the other branch of the case, that impliedly the parties contracted that interest should be payable *post diem*, and if we do not so read the deed, then that damages should be allowed in lieu of interest, that in such case the damages are a charge on the estate, and art. 116 of sch. ii of the Limitation Act would not apply, and in any event that his client was entitled to damages for the six years immediately preceding the commencement of this action. In support of his contention that interest was payable after due date, he referred to the case of *Chhab Nath* v. *Kamta Prasad* (1). That case and the case of *Baldeo Panday* v. *Gokal Rai* (2) were considered by us in a judgment which we delivered on March 7th, 1889, in the case of *Narain Lal* v. *Chajmal Das*. We do not think it necessary to repeat what we said in that case as to those authorities. We adhere to the views there expressed on that subject. It is plain that there was here no express agreement that interest should be paid *post diem*. It is not contended that there was any such express agreement, and it is equally plain to us that there is nothing in the contract from which we can or ought to imply that the parties intended that interest *post diem* should be payable. For our part we do not see why a contract to pay interest *post diem* on a mortgage ought to be implied by a Court in India when the parties to the written contract have not expressed any such intention in the contract which they executed. This is particularly the case when we find, as here, that they did provide in very clear terms for the payment of interest and compound interest during the term of the mortgage. It would have been easy by the use of a few apt words inserted in the written contract for the parties to have expressed a covenant that interest should be payable *post diem*, if such they had intended the contract to be. In our opinion there was here no implied contract to pay interest *post diem*. As to the limitation which applies in cases of this kind where damages are sought for the breach of a contract to pay the principal on the due date, we considered that matter at some length in the case of *Mansab Ali* v.

(1) I. L. R., 7 All., 333. (2) I. L. R., 1 All., 603.

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*Gulab Chand* (1), and we would not again consider the question if it had not been for the vigour with which the Hon. Pandit *Ajudhia Nath* contended that in that judgment we were mistaken as to the law. A Full Bench of this Court in *Husain Ali Khan* v. *Hafiz Ali Khan* (2) as we think rightly, applied art. 116 of sch. ii of the Limitation Act (XV of 1877) to a suit on a registered bond for the payment of money. Now if interest as such is not payable after the due date of a mortgage either by express or implied agreement, the mortgagee can only seek compensation for the non-payment of the principal on the due date by claiming damages for the breach of the contract. It may be said that those damages are given in lieu of interest. Call such damages by any name one likes, they are damages for a breach of contract, and not interest payable in performance of a contract, and unless there is something to make art. 116 of sch. ii of the Limitation Act inapplicable, such damages cannot be awarded or given by the Court unless the suit in which they are claimed is brought within six years from the time when the contract, for the breach of which the damages may be awarded, was broken. The contention of the Pandit *Ajudhia Nath* leads one to ask oneself whether there is some magic about damages for the non-performance by a mortgagor of his contract to pay on the due date, which takes the damages which may be awarded for a breach of that contract out of the ordinary category of damages, and out of the purview of art. 116 of schedule ii of the Limitation Act. It is not easy to understand the Pandit's contention. It is that damages for a breach by a mortgagor to pay on the due date are, from the date when the contract is broken or even before they have been ascertained or decreed, a charge upon the property hypothecated, and being such a charge, article 116 does not apply to them. It is not necessary here to consider whether if a Court in a suit on a hypothecated bond did decree damages for such a breach in a case in which such damages could be decreed, the damages so decreed would or would not thereby become a charge on the property hypothecated, or whether if damages so decreed became a charge upon the hypothecated property the charge so created would or would not take

(1) I. L. R., 10 All., 85. (2) I. L. R., 3 All., 600.

priority over a second mortgage subsequent in date to that for the breach of which the damages were decreed, but prior in date to the commencement of the suit in which such damages were claimed, or upon what principle such priority could or could not be decreed, or whether a Court could or could not declare such damages to be a charge upon the hypothecated property. Unless in some way the damages which, during the six years (to take this case) following September 24th, 1881, were unascertained and undecreed, and in respect of which no claim had been made within those six years, could in some way by relation back from a decree passed in a suit commenced after the period of limitation had expired, be held to be a charge upon the land from the date of breach, we fail to see how we, by our decree on the 11th June, 1889, could create a charge on this hypothecated property in respect of damages, the right to sue for which had, by reason of the Indian Limitation Act, determined prior to the commencement of this suit. That is what it appears to us we are asked to do here. The learned Pandit has cited several authorities to us in the course of his argument. He has referred us to Fisher on Mortgages (14th ed.) paragraphs 1484, 1485, 1487, 1488. We see nothing in any of those paragraphs to support his contention. The first case to which he referred us was *Price* v. *The Great Western Railway Co.* (1). All that is to be said about that case is that the learned Barons of the Exchequer were of opinion that the document in question there showed that the parties intended that the interest claimed should be paid. That was the inference they drew from the document. The next case was the case of *Morgan* v. *Jones* (2), and there the Chief Baron, and apparently the other Barons of the Exchequer, considered that the agreement in the document to pay the interest was evidence to go to the jury that interest was to be payable *post diem*. We were then referred to the case of *Gordillo* v. *Weguelin* (3). That case turned apparently more on the facts and dealings between the parties than on anything else. The next case was a case *in re Kerr's Policy* (4) in in which James, V. C., held that the deposit of title deeds to secure

(1) 16 L. J. Exch., 87.
(2) 22 L. J. Exch., 232.
(3) L. R., 5 Ch. D., 287.
(4) L. R., 8 Eq., 331.

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a loan is to be considered as an agreement to execute a mortgage of the property comprised in the deeds with interest; *i. e.*, he inferred from the deposit of the title deeds a contract to execute a mortgage under which the parties would contract to pay interest. Here the parties have not contracted to pay interest, although they have executed a mortgage. The next case was *Lippard* v. *Ricketts* (1). In that case Vice-Chancellor Bacon said, referring to the case in L. R., 8 Eq., p. 331 :—"In the case of *Kerr's Policy*, the Court seems to have proceeded on the theory that a debt secured by an equitable mortgage will, unless something is said or may be implied to the contrary, carry interest; and it seems to follow that when the Court has once decided that there is a charge, the sum charged must bear interest" (p. 294). The Pandit also referred to a case in the House of Lords—*Cook* v. *Fowler* (2). That case we have already commented upon in the case of *Mansab Ali* v. *Gulab Chand* (3). The next case relied upon by the Pandit was *Bishen Dial* v. *Udit Narain* (4). The hypothecation bond in that case was somewhat similar to that in the present, and there Mr. Justice Straight and Mr. Justice Mahmood held that the plaintiff's remedy for the non-payment of the bond on the due date was a suit for damages, and as that part of the case had not been dealt with by the Court below, they remanded issues on the subject of damages. No one appears to have suggested to them that the damages which were being claimed were apparently barred by limitation. On the remand no question was raised as to limitation, and the parties left it to the discretion of the District Judge to say what damages should be allowed. On the return to the remand a decree was passed on that basis in the appeal by the consent of counsel. Consequently on this particular point that case is not an authority against the view which we hold. Many of the cases which have been cited were decided by the Judges on the construction which was put in each case on the particular document in the case. We can only say, as we have more than once pointed out, that there is considerable danger in deciding one case by the construction put in another suit on another

(1) L. R., 14 Eq., 291.
(2) L. R., 7 E. and I., 27.
(3) I. L. R., 10 All., 85.
(4) I. L. R., 8 All., 486.

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and a different bond. This was a danger forcibly pointed out by Sir George Jessel, late Master of the Rolls in England (1). In our judgment to which we have already referred, we have explained as well as we could that in a case like this there is one breach of the contract, namely, the non-payment on the day agreed upon, and that there is no question of continuing or successive breaches. That was a breach once and for all. The decree will be varied by increasing the sum of Rs. 2,156 by Rs. 440-12, giving a total decree for Rs. 2,596-12. The appellant will have proportionate costs, so far as he has succeeded, and will have to pay costs so far as he has failed.

*Decree modified.*

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1889
*January* 18.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Mahmood.*

ASHFAQ AHMAD AND OTHERS (PLAINTIFFS) *v.* WAZIR ALI AND OTHERS (DEFENDANTS).*

*Mortgage—Redemption by co-mortgagor—Suit by other mortgagors against redeeming mortgagor for redemption of their shares—Limitation—Act XV of* 1877 *(Limitation Act), sch. ii, Nos.* 144, 148.

In 1828 one of several co-mortgagors redeemed an usufructuary mortgage executed in 1822 and obtained possession. The other mortgagors brought a suit against the heir of the redeeming mortgagor in 1886, for redemption of their shares in the mortgaged property.

*Held* that the limitation applicable to the suit was that provided by art 148, sch. ii, of the Limitation Act (XX of 1877); that time ran not from the date of the redemption in 1828, but from the time when it would have run against the original mortgagee if he had been a defendant, *i.e.*, the date of the original mortgage of 1822;

*Second Appeal No. 403 of 1887 from a decree of T. Benson, Esq., District Judge of Saháranpur, dated the 4th December, 1886, reversing a decree of Shah Amjad-ullah, Munsif of Deoband, dated the 23rd June, 1886.

(1) The judgments of Sir George Jessel, M.R., above referred to, regarding the danger of construing a document with reference to previous decisions construing other documents, are probably *Aspden* v. *Seddon* (L. R., 10 Ch. A., 394: 44, L. J. Ch., 363), and *Southwell* v. *Bowditch* (L. R., I. C. P. D., 377: 45, L. J. C. P., 630). See also *Robinson* v. *Evans* (43, L. J. Com, Law., 83), *Athill* v. *Athill* (L. R., 16 Ch. D., at p. 223, *per* Jessel, M. R.), and *in re Tanqueray-Willaume and Landan* (L. R., 20 Ch. D., at p. 481, *per* Brett, L. J.). A similar principle has been laid down regarding the danger of deciding questions of fact with reference to previous decisions upon other questions of fact: see *Ecclesiastical Commissioners of England* v. *King* (L. R., 14 Ch. D., at p. 225, *per* Brett, L. J.) and *Queen-Empress* v. *Gobardhan* (I. L. R., 9 All., at pp. 555, 556, *per* Edge, C. J.)