CROOS *v.* GOONEWARDENE HAMINE.

D. C., Kalutara, 2,168.

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Cause of action—Contract of mortgage and its breach—Parol agreement outside the mortgage agreement—Civil Procedure Code, s. 5—" Obligation "—Failure to pay.

C lent money to G upon a mortgage bond. A part of the loan having been liquidated, C and G entered into a parol agreement that a further sum should be advanced to G and the total " secured " by the same bond. G, having received the additional sum and being in default of payment, was sued by C on the mortgage bond, but being advised that the action could not be maintained on the bond, he moved to withdraw the suit. G objected and plaintiff's action was dismissed, as he was not ready on the trial day.

Plaintiff then raised the present action alleging payment to G upon a parol agreement. G pleaded *res judicata*.

Held, that, though the cause of action was in the previous suit the breach of the contract of mortgage and in the present suit the breach of the parol agreement, yet both actions referred to the failure to pay one and the same debt, and it was the duty of the plaintiff, when he sued the defendant in the former suit for the money as due upon the mortgage, to have claimed it as due also upon the parol agreement declared upon in the present suit.

WENDT, J.—The word " obligation," occurring in the definition of ' cause of action " given in section 5 of the Civil Procedure Code, is to be understood not in the narrower sense in which a parol promise to pay a promissory note and a mortgage given for the same debt may be described as three different obligations (arising from the parol promise, promissory note, and mortgage), but in the wider sense of a liability to pay the one sum of money stipulated.

IN this action, instituted on 20th February, 1900, plaintiff alleged that he lent to the defendants Rs. 1,037.65 on the agreement that they should pay off the loan by deliveries of arrack; that he received from them arrack of the value of Rs. 237.84, and made further loans of money on the same understanding; and that on the 6th September, 1897, there was due to the plaintiff Rs. 944.24, which the defendants had failed to liquidate by delivery of arrack or by cash. He prayed that the defendants be decreed to pay to the plaintiff Rs. 944.24 with interest thereon, &c.

The defendants denied the agreement as alleged, and pleaded " that on the 5th July, 1898, plaintiff brought against the defendants " the action No. 1,915 in the District Court of Kalutara to recover " from them the sum of Rs. 1,875, wherein was included the sum of " Rs. 1,037.65 now sued for, and the said action was by decree of " this Court dismissed with costs, and the said decree still remained " of full force and effect, and the defendants say that the plaintiff is " thereby estopped from again suing the defendants for the said sum."

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On the trial day plaintiff admitted that the previous action (D. C., 1,915) was based on a mortgage bond, whereby the present defendants mortgaged to plaintiff certain property to secure payment of Rs. 1,500, which he had paid to them on 15th February, 1896, against supplies of arrack; that on 11th February, 1897, he found a balance of Rs. 453.35 due on that bond; that the defendants then asked him for a further loan of Rs. 1,037.65, so as to bring the debt up to Rs. 1,500; that it was then agreed that the bond should secure this amount; that on this understanding he paid the defendants the sum of Rs. 1,037.65; that after suit No. 1,915 was filed, he was advised by his counsel that the evidence in proof of the consideration of the mortgage bond, as appearing in the bond itself, would be at variance with the evidence intended to be led as to the aforesaid sums of Rs. 453.35 and Rs. 1,037.65 making up the considerations, and therefore he should withdraw the suit No. 1,915 and institute a fresh suit; that on defendants objecting to the withdrawal of the suit, the case was fixed for trial; and that as plaintiff was not ready, the action was dismissed with costs.

The District Judge found that the claim in the present case was for the same or part of the same subject-matter as in D. C., 1,915. He upheld the plea of *res judicata* and dismissed the action.

Plaintiff appealed.

The appeal was argued on the 7th and 14th February, 1902.

Van Langenberg, for plaintiff, appellant.

Bawa, for defendants, respondent.

Cur. adv. vult.

24th February, 1902. WENDT, J.—

The question in this case is whether the plaintiff is barred from recovering the amount of his claim by reason of the judgment in his former action No. 1,915. The plaintiff seeks to recover the balance sum of Rs. 944.24 said to be paid under the following circumstances. On the 11th February, 1897, plaintiff advanced to the defendants, who are distillers of arrack, the sum of Rs. 1,037.65, which defendants promised to liquidate by delivery of arrack to that value. Five small sums were subsequently advanced on the same terms up to 6th September, 1897, bringing the total up to Rs. 1,182.08; and defendants having made three deliveries of arrack, amounting to Rs. 237.84 in value, they remained plaintiff's debtors in the sum now claimed, Rs. 944.24. The defendants in answer denied all the material averments in the plaint, and pleaded that the sum now claimed had been included in the plaintiff's claim of Rs. 1,875 in action No. 1,915, and that the dismissal of that action is a bar to the present action.

It appears that in February, 1896, the plaintiff advanced to the defendant a sum of Rs. 1,500 secured by a mortgage, which was to be satisfied by deliveries of arrack. The deliveries of arrack up to the 11th February, 1897, reduced the debt to Rs. 453.35, but the defendants wished to have fresh advances up to Rs. 1,500, and the plaintiff then paid them Rs. 1,037.65, and it was agreed that the mortgage should be considered to be again in force for the full sum of Rs. 1,500 secured by it. On that footing the plaintiff brought his action No. 1,915 to recover the full principal sum of Rs. 1,500 secured by this mortgage, and a further sum of Rs. 375 as interest at the rate stipulated in the bond. The defendants pleaded complete satisfaction of the bond by deliveries of arrack. The plaintiff was advised that the parol agreement to revive the bond was invalid, and he thereupon moved to withdraw from the action with leave to institute a fresh action. This was refused, and plaintiff not being ready to go to trial, his action was dismissed with costs. When examined at the present trial, the plaintiff deposed that he was not now claiming the balance of Rs. 453.35, to which the original mortgage debt had been reduced, but he admitted that the sum of Rs. 944.24 which he was now seeking to recover was part of the sum sued for in action No. 1,915.

Upon these facts the District Judge held that the dismissal of that action was a bar to the maintenance of the present action, which he accordingly dismissed. It has been argued for the plaintiff that this decision was wrong, because the causes of action under the two cases were different; that the cause of action in No. 1,915 was the contract of mortgage and its breach, while in the present suit the cause of action was founded upon an agreement outside the mortgage altogether. Now "cause of action" is defined under section 5 of the Civil Procedure Code as "the wrong for the prevention or redress of which an action may be brought," and as including "the denial to a right, the refusal to fulfil an obligation, the neglect to perform a duty, and the infliction of an affirmative injury." I think that the word "obligation" in this definition is to be understood not in the narrower sense in which a parol promise to pay a promissory note and a mortgage, although given for the same debt, may be described as three different "obligations," but in the more generally understood sense of a liability to pay that sum of money. Reading the definition in this case, the cause of action was the same in both actions, namely, the failure to pay one and the same debt. That being so, the plaintiff, when he claimed as due upon the mortgage the sum which he now seeks to recover,

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ought to have claimed it also as due by the parol agreement now declared upon. Not having done so, his right under the last mentioned agreement was a " right to money ..... which could be claimed, set up, or put in issue between the parties " to the former action, and which, whether it was actually so claimed, set up, or put in issue or not, has become, on the passing of the final decree, a *res adjudicata*, which cannot therefore be made the subject of the present action for the same cause between the same parties.

The appeal will therefore be dismissed.

BONSER, C.J.—I agree.