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*Nov. 3, 4.
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*Mar. 30

JACK SINGER AND ABRAHAM BELZBERG (DEFENDANTS) ..... APPELLANTS;

AND

THE J. H. ASHDOWN HARDWARE COMPANY LIMITED (PLAINTIFF) RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Judgments—Merger—Sale of goods—Prior action against three partners—Joint liability—Default judgment against one—Discontinuance as to other two—New action against the two and another—Order setting default judgment aside—Whether merger—Rule 113 of the Supreme Court of Alberta.

The respondent had brought an action against the appellants and one Barker, former members of a partnership and whose liability was joint, for the price of goods sold and delivered. Judgment in default of defence was obtained against Barker and the action against the appellants discontinued.

*PRESENT: Kerwin, Taschereau, Estey, Locke and Cartwright JJ.

(1) [1935] 1 K.B. 354. (2) [1942] A.C. 601.

1953

SINGER AND BELZBERG v. J. H. ASHDOWN HARDWARE CO. LTD.

The respondent then commenced this action for the same debt against the appellants and another. After the joinder of issue but before the action had come to trial, the judgment in the first action against Barker was, upon his application, set aside. The appellants pleaded, inter alia, the recovery of the judgment against Barker and that the indebtedness had been merged in that judgment. The action was maintained by the trial judge and by the Appellate Division of the Supreme Court of Alberta.

Held (Locke J. dissenting), that the appeal should be dismissed and the action maintained.

Per Kerwin, Taschereau and Estey JJ.: Where a judgment has been set aside properly and without consent, as was done in the present case, there is an exception to the general rule that a judgment against one of several persons who are jointly liable on a contract effects a merger of the original cause of action.

Per Kerwin, Taschereau, Estey and Cartwright JJ.: As long as the judgment was set aside before the adjudication, it matters not that it was done after the issue of the writ in the second action.

Per Cartwright J.: The rule in *King* v. *Hoare* (1844) 13 M. & W. 494, does not apply when the judgment against one of several co-contractors who are jointly liable on the same contract has been, as in the present case, validly set aside. Having been set aside, the judgment against Barker ceased to operate as a bar to the action against the other co-contractors; it ceased to exist and therefore to have any effect thereafter, except possibly as a justification for an act done in reliance upon it during its existence. *Semble,* that the same result would obtain even where the order setting such judgment aside had been made on consent and no grounds had existed for setting it aside against the opposition of the plaintiff.

Per Locke J. (dissenting): The rule at common law that a cause of action against several joint debtors is merged if judgment is taken against one of them whose liability is admitted has been altered in Alberta only to the extent provided by Rule 113 of the Supreme Court and upon the discontinuance of the action after judgment had been signed against Barker the cause of action was extinguished: *King* v. *Hoare* (1844) 13 M. & W. 494; *Kendall* v. *Hamilton* [1879] 4 A.C. 504; *Odell* v. *Cormack* (1887) 19 Q.B.D. 223; *Hammond* v. *Schofield* [1891] 1 Q.B. 453; *Price* v. *Moulton* (1851) 10 C.B. 561; *Cross* v. *Matthews* (1904) 91 L.T.R. 500, followed. *Re Harper and Township of East Flamborough* (1914) 32 O.L.R. 490 and *Partington* v. *Hawthorne* (1888) 52 J.P. 807, distinguished. While upon the evidence it should have been found that the judgment against Barker was set aside by consent, whether or not this was the case was not decisive, since Barker's liability for the debt for which judgment had been signed was expressly admitted and the cause of action having merged, could not be revived.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), affirming the judgment of the trial judge.

(1) [1951] 3 W.W.R. (N.S.) 145.

1953

SINGER AND BELZBERG v. J. H. ASHDOWN HARDWARE CO. LTD.

C. F. H. Carson Q.C. and *A. L. Barron Q.C.* for the appellants.

H. W. Riley Q.C. and *D. R. Fisher* for the respondent.

The judgment of Kerwin, Taschereau and Estey JJ. was delivered by

KERWIN J.:—The appellants Jack Singer and Abraham Belzberg are, together with William Kluner, the defendants in an action brought by the respondent to recover the price of goods alleged to have been sold and delivered by it to a partnership known as Atlas Plumbing and Heating which is said to consist of the defendants and one John Barker. So far as appears Kluner was never served with the writ of summons. The judgment at the trial in favour of the respondent against the appellants was affirmed by the Appellate Division of the Supreme Court of Alberta (1). In the Courts below it was alleged that the respondent had failed to prove that the goods had actually been sold and delivered but such contention was abandoned before us. I agree with the Appellate Division that the unsigned memorandum, Exhibit 2, was not a release or an estoppel. The only remaining question therefore is whether the respondent's claim was defeated under the circumstances now narrated.

On November 28, 1949, an earlier action had been commenced by the respondent against Barker and the appellants for the same sum of money and based on the same cause of action. On December 16, 1949, default judgment was entered against Barker only. On January 26, 1950, that action was discontinued as against the appellants and, on the same day, the present action was commenced. On February 23, 1950, judgment by default was entered against the appellants but on March 6, 1950, this was set aside. By their statement of defence, dated March 8, 1950, the appellants pleaded the default judgment against Barker in the former action and alleged that any indebtedness of the appellants was merged in that judgment. The joinder of issue and reply denied that there was any merger. Upon the application of Barker the default judgment against him in the previous action was set aside by an order of Mr. Justice Egbert on March 21, 1950. The trial of the present action did not take place until April, 1951.

(1) [1951] 3 W.W.R. (N.S.) 145.

Even if it could be said that, in the absence of an allegation by the respondent that the previous judgment had been set aside, the trial judge should not have permitted to be produced the Court records, including the order of Egbert J., nevertheless he did so, and the Court of Appeal affirmed his ruling. The solicitors for the appellants were not taken by surprise as they had known for some time that the order had been made and, therefore, if the respondent had applied to set up in its pleadings the order of Egbert J. in order to show that the allegation of the appellants that there was an existing prior judgment against Barker was not correct, leave would undoubtedly have been given.

It is not the law, as was argued on behalf of the appellants that a judgment against one of several persons who are jointly liable on a contract effects a merger of the original cause of action which remains in force under all circumstances that may arise in the future. In Halsbury, 2nd ed. Vol. 13, 416, after referring to the principle that where there is but one cause of action the damages must be assessed once for all, it is stated:—

> 471. On this principle a judgment recovered (though unsatisfied) against some one of a number of persons who are jointly (not jointly and severally) liable on the same contract or are liable for the same tort with others, is, until set aside (*d*), a bar to an action.

The words "until set aside" are significant and in general the rule is subject to that condition. In principle I would think that must be so and it has been held that if such a judgment is properly set aside, it is as if it had never existed,—*Goodrich* v. *Bodurtha* (1) referred to by Riddell J. in *Re Harper and Township of East Flamborough* (2), and *Partington* v. *Hawthorne* (3) cited in note (*d*) in Halsbury. We are not here concerned with the qualification contained in the note:—

> but a consent judgment regularly obtained, and not objectionable on the merits, cannot be set aside by consent of parties, so as to prejudice a third person in whose favour it is a bar (*Hammond* v. *Schofield* (1891) 1 Q.B. 453; 21 Digest 219; *Cross & Co.* v. *Matthews and Wallace* (1904) 91 L.T. 500; 21 Digest 223,575).

because I agree with the Appellate Division, that it must be taken that the trial judge had decided that the order of

(1) (1856) 72 Mass. (6 Gray) 323. (2) (1914) 32 O.L.R. 490.
(3) (1888) 52 J.P. 807.

1953

SINGER AND BELZBERG v. J. H. ASHDOWN HARDWARE CO. LTD.

Kerwin J.

Egbert J. had not been granted with the consent of the respondent, and that on the evidence this was a proper conclusion.

The judgment in *Hammond* v. *Schofield* (1) proceeded upon the fact that there a consent had been given by the plaintiff to set aside a default judgment but some expressions in the reasons of Wills J. were relied upon by the present appellants. At page 455, referring to the effect of the signing of a default judgment, he says:—

> If a judgment be improperly obtained, so that it never ought to have been signed, there can be no doubt when set aside it ought to be treated as never having existed. I am inclined to think (though it is not necessary to decide the question), that if it be regularly obtained, but through a slip on the part of the defendant, so that on an affidavit of merits it might be set aside, and it ultimately turns out that the defendant never was liable, it may equally be regarded as a judgment which never ought to have been signed, and would in such a case be properly treated as a nullity. If, being regularly obtained, though through a slip on the part of the defendant, and set aside upon an affidavit of merits, it ultimately turns out that the original defendant was liable, I do not think it could be treated, so far as the rights of other persons are concerned, as a nullity. Still less, when there is no pretence for saying that there is any ground for setting it aside upon the merits as between the plaintiff and the defendant, and when as between them it could only be set aside by consent.

Although not so expressed, the third sentence is in my opinion *obiter* but whether that be so or not, I am, with respect, unable to agree with it. In the first sentence, although stating it was unnecessary so to decide, Wills J. thought that if a judgment had been improperly obtained, if it is set aside, it ought to be treated as never having existed. However, if the effect of a merger be absolute, the original cause of action could never be resuscitated. In *Parr* v. *Snell* (2), Scrutton L.J. referred to what he has said in *Moore* v. *Flanagan* (3), where he adopted as correct what Vaughan Williams J. had stated in *Hammond* v. *Schofield*, at p. 457:—

> The basis of this defence (i.e. based on *Rice* v. *Shute* and *Kendall* v. *Hamilton*) is not the election or unconscious election, if there can be such a thing, of the plaintiff, but the right of the co-contractor when sued in a second action on the same contract to insist, though not a party to the first action, on the rule that there shall not be more than one judgment on one entire contract.

(1) [1891] 1 Q.B. 453.
(2) [1923] 1 K.B. 1.
(3) [1920] 1 K.B. 919 at 925.

If a judgment be set aside properly and without consent, as I hold to have occurred in the present case, there is an exception to the general rule which although binding by precedent was founded upon a fiction and should be restricted and not enlarged. The judgment having been set aside, there is not more than one judgment on one entire contract.

It was objected that the order of Egbert J. was made after the issue of the writ in the present action and that therefore the respondent had no cause of action at the date of the writ. Whether the default judgment against Barker be put forward as estoppel or merger cannot, I think, make any difference. The decision of the Appellate Division of Ontario in *Cornish* v. *Boles* (1), was cited on behalf of the appellants and it may be added that in that case there is a reference to *Northern Electric and Manufacturing Co. Limited* v. *Cordova Mines Limited* (2). Mr. Justice Riddell, who took part in both these decisions, subsequently decided the *Harper* case referred to above. I agree with the decision in *Harper* and in the *Massachusetts* case and conclude that the objection cannot be sustained.

The appeal should be dismissed with costs.

LOCKE J. (dissenting):—On November 29, 1949, the respondent commenced an action in which the appellants and one Barker described in the Statement of Claim as "carrying on business under the firm name of Atlas Plumbing and Heating", and these three persons individually were named as defendants. The claim made was for the purchase price of goods sold and delivered to the alleged partnership. Barker was served with the Statement of Claim and on December 16, 1949, in default of defence, judgment was entered against him for the sum of $10,898.95, the amount claimed, and costs. Whether the appellants were served with the Statement of Claim in the action does not appear. On January 6, 1950, the respondent discontinued the said action as against the present appellants and on that date commenced the present action against the appellants and one William Kluner, the Statement of Claim alleging that during the years 1948 and 1949 the defendants had been partners with Barker in the business known as

(1) (1914) 31 O.L.R. 505. (2) (1914) 31 O.L.R. 221.

1953

SINGER AND BELZBERG v. J. H. ASHDOWN HARDWARE CO. LTD.

Locke J.

Atlas Plumbing and Heating, and claiming the same amount as in the first action for goods sold and delivered to such partnership. In the second action the defendants were served with the Statement of Claim and on March 8, 1950, filed a Statement of Defence in which it was alleged, inter alia, that the respondent had recovered judgment in the amount claimed against Barker in the first action, that, if there was a debt, the liability of the partners was joint and not joint and several and that the appellants had accordingly been released from any liability. On March 21, 1950, upon the application of Barker, Egbert J. made an order setting aside the judgment in the first action and gave Barker leave to defend.

The main question to be determined upon this appeal is as to whether the cause of action which the respondent asserted against the appellants and Barker in the first action was extinguished by the action of the respondent in signing a final judgment against Barker for the amount of its claim and thereafter discontinuing the action as against the other defendants.

Except to the extent that the matter is affected by Rule 113 of the Supreme Court of Alberta, it is the law that, where action is brought against one or more persons liable jointly for a liquidated amount upon a contract and final judgment is entered against one of them, the cause of action merges in the judgment and the liability of the others is extinguished. The rule in *King* v. *Hoare* (1), that a judgment even without satisfaction recovered against one of two joint debtors is a bar to an action against another, was expressly approved by the House of Lords in *Kendall* v. *Hamilton* (2).

Rule 113, while not in identical terms, appears to have been taken from the rule which is now Rule 3 of Order 27 of the Rules of the Supreme Court 1883. In so far as it touches the present matter, the Alberta Rule reads:—

> When a Statement of Claim includes a claim for a debt or liquidated demand with or without interest . . . and any defendant, fails to deliver a Statement of Defence . . . the plaintiff may as against such defendant enter final judgment for any sum in respect of which no defence is delivered . . . and may proceed with the action against any other defendants and in respect of any other claims.

(1) (1844) 13 M. & W. 494. (2) (1879) 4 App. Cas. 504.

In the present matter the respondent might thus after signing judgment against Barker have proceeded in that action with its claim against the appellants but, for reasons which are not explained, elected to discontinue the action as against them and to start afresh, adding a third person as defendant. It is to be noted that when these proceedings were commenced the judgment against Barker in the first action had not been set aside and, as an additional argument to that upon the main point, the appellants contend that in any event the existence of this judgment was a bar to the proceedings as of the date they were instituted.

In *King* v. *Hoare,* Baron Parke, after saying that the question of substance to be decided was whether a judgment recovered against one of two joint contractors is a bar in an action against another, said (p. 504):—

> If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, "transit in rem judicatam,"—the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action, and prevents its being the subject of another suit, and the cause of action, being single, cannot afterwards be divided into two.

And later (p. 505):—

> We do not think that the case of a joint contract can, in this respect, be distinguished from a joint tort. There is but one cause of action in each case.

In *Kendall* v. *Hamilton* (1), the action was against one of three members of a partnership. A previous action had been brought and judgment recovered against two members of the firm and nothing was realized under the judgment. At the time the first action had been brought the plaintiff was unaware that the defendant in the second action had been a partner of the firm. The judgment was held to be a bar to the claim. Earl Cairns L.C. said in part (p. 515):—

> In the present case I think that when the appellants sued Wilson & McLay, and obtained judgment against them, they adopted a course which was clearly within their power, and to which Wilson & McLay could have made no opposition, and that, having taken this course, they

(1) (1879) 4 App. Cas. 504.

1953

SINGER AND BELZBERG v. J. H. ASHDOWN HARDWARE CO. LTD.

Locke J.

exhausted their right of action, not necessarily by reason of any election between two courses open to them, which would imply that, in order to an election, the fact of both courses being open was known, but because the right of action which they pursued could not, after judgment obtained, co-exist with a right of action on the same facts against another person.

These remarks were made on the footing that Wilson and McLay, against whom judgment had been recovered, were the agents, and that Wilson, McLay and Hamilton, the partnership, was the undisclosed principal. The Lord Chancellor then proceeded to discuss the matter on the basis that Wilson, McLay and Hamilton were in the position of co-contractors and, considering *King* v. *Hoare* to have been correctly decided, was of the opinion that the recovery of the judgment against two of the three was fatal to the claim. Lord Selborne (p. 539) said that the judgment had the effect of extinguishing the legal liability of Hamilton as a partner on the debt previously due from the partnership of which he was a member. Lord Blackburn, who agreed with the other Law Lords that *King* v. *Hoare* had been rightly decided and that it did not depend on any such principle as that by suing some he had elected to take them as his debtors to the exclusion of those whom he had not joined in the action, said that the plaintiffs had a right of recourse against Hamilton for which they had never bargained and that they had destroyed that remedy by taking a judgment against persons who turned out to be insolvent.

In *Odell* v. *Cormack* (1), where a former member of a partnership was sued upon a bill of exchange accepted in her name without authority by one Carter who had been employed to realize the assets of the firm of which the defendant had been a member, judgment had been recovered in another action against Carter. Hawkins J., after finding that the action failed, since the defendant's acceptance had been given without her authority, said that this view rendered it unnecessary to discuss the effect of the judgment obtained. He then said that he was very strongly disposed to think that if a joint liability could have been established against Cormack and Carter, the fact that that action was abandoned against Cormack and judgment afterwards signed against Carter alone would have afforded her a good defence to the action on the authority of *King*

(1) (1887) 19 Q.B.D. 223.

v. *Hoare* and *Kendall* v. *Hamilton*, and that he did not think the effect of that judgment, so far as Cormack was interested, could have been altered to his prejudice by the plaintiff obtaining, with Carter's consent, a Master's order to set it aside.

In *Hammond* v. *Schofield* (1), the plaintiffs, a firm of printers, sued the defendant for the cost of printing for him a certain newspaper of which they supposed him to be the sole proprietor and the defendant consented to final judgment being signed against him. After judgment had been signed, the plaintiffs received information that at the time the work was done one T. was a partner of the defendant and joint proprietor with him of the newspaper. Accordingly, with the consent of the defendant, they applied for an order that the judgment should be set aside and the writ amended by adding T. as a defendant in the action. It was held that the consent of the defendant to the setting aside of the judgment could not enable the plaintiff to evade the rule that judgment recovered against one of two joint contractors is a bar to an action against the other, and that there was consequently no jurisdiction to make the order. The facts differ from those in the present case in an important particular since T. was not a party to the action at the time the judgment was signed against the defendant, and so the joint debt had merged in the judgment obtained before it was set aside. Wills J., speaking of the effect of the judgment, said (p. 455):—

> The effect of the judgment was undoubtedly to destroy the right of action against a co-contractor with the defendant—*King* v. *Hoare*—even though the plaintiff did not know when he signed judgment that he had a remedy against him.

and again (p. 456):—

> I cannot see upon what principle the consent of the plaintiff and defendant can be allowed to create a new right, or (which is the same thing), to resuscitate an extinguished right in favour of the plaintiff against a third person, or to create on the part of a third person a new liability.

In this matter no reasons for judgment were delivered by the learned trial judge. In delivering the judgment of the Appellate Division (2), Clinton J. Ford J.A. considered that since the judgment obtained against Barker had been set aside (though after this action had been commenced) it was not a bar to the action. He was further of the

(1) [1891] 1 Q.B. 453. (2) [1951] 3 W.W.R. (N.S.) 145.

1953

SINGER AND BELZBERG v. J. H. ASHDOWN HARDWARE CO. LTD.

Locke J.

opinion that it should be presumed that the trial judge found that it was not set aside by the consent, either express or tacit, of the plaintiff and that a statement made in Vol. 13 of Halsbury, p. 416, was authority for the view that if the judgment were set aside otherwise than by consent any objection to the merger of the cause of action was overcome.

If the question were as to whether or not the judgment had been set aside with the tacit, if not the express, consent of the solicitor for the respondent, I would have difficulty in coming to the conclusion that by his conduct before Egbert J. he had not tacitly consented to the judgment being set aside. At the trial the respondent put in as part of its case the order setting aside the judgment which had been signed against Barker, but tendered no evidence as to how it had been obtained. The order setting aside the judgment and the court file in the matter disclose that there was no affidavit made by Barker explaining the reason why he had not defended the action or denying his liability to the plaintiff in the action, or explaining the delay of something more than three months in making the application to set the judgment aside. The appellants, however, at the trial called the solicitor who had appeared for Barker on the application who said that he had discussed with the solicitor for the respondent "the project of opening up the judgment" in advance of the making of the application and that, when the latter appeared before Mr. Justice Egbert and the judge had asked him what position he took towards the application, he had said that "he was neither opposing nor consenting to the order" or words to that effect. The solicitor acting for Barker said that he had mentioned to the judge that, in his opinion, there might be some question of contribution as between Barker and Belzberg and Singer but that he made no suggestion that his client did not owe the money. On being cross-examined he said that it was not a consent order and, in answer to a question: "There is no doubt that it was granted on the merits?", said that that was correct and that in making the application he was considering the welfare of Barker and that he had had no arrangements with the respondent or its solicitor. He, however, repeated that his client did not dispute liability on his part for the amount of the judgment.

I have difficulty in understanding how any question of contribution as between these partners could have arisen since as the evidence showed Barker, Belzberg and Singer had on April 1, 1949, almost a year prior to the date of the application to Egbert J., entered into an agreement dissolving the partnership in which Barker convenanted, inter alia, to indemnify Belzberg, Singer and Kluner against all debts and liabilities of the partnership and all claims and demands in respect thereof. Furthermore, even had there been no outstanding covenant at the time, the signing of the judgment against Barker would not have affected any claim to contribution he might conceivably have had against his former partners. The solicitor for Barker expressed the view that this judgment was not set aside with the consent of the solicitor for the respondent, but this does not appear to me to be the proper conclusion from these facts. I think it is quite clear that the solicitor for the respondent who had charge of the proceedings in these two actions considered that it was in his client's interests that the judgment against Barker should be set aside and, while he did not expressly consent, it appears to me that by his conduct he tacitly consented to the making of such an order. That it had been regularly obtained and that the debt was due and owing is conceded and it cannot be seriously suggested that if the solicitor for the respondent had said that he opposed the application the Chamber Judge would not have refused it.

The passage from 13 Halsbury, p. 416, relied upon in the judgment of the Appellate Division, reads:—

> On this principle, a judgment recovered (though unsatisfied) against some one of a number of persons who are jointly (not jointly and severally) liable on the same contract, or are liable for the same tort, with others is, until set aside, a bar to an action.

This statement follows Article 470 in which the effect of the rule in *King* v. *Hoare* and other cases touching the same matter is discussed and which concludes with the sentence:

> The principle is that where there is but one cause of action, the damages must be assessed once for all.

I think this statement in Halsbury, if it is to be construed as meaning that, apart from the rule of Court, it is only until a judgment recovered against one of several joint

1953

SINGER AND BELZBERG v. J. H. ASHDOWN HARDWARE CO. LTD.

Locke J.

debtors is set aside that it is a bar to an action against the others, is inaccurate. I am unable, with respect, to agree in the conclusion of Mr. Justice Clinton J. Ford that the judgment against Barker was not set aside by consent but, if I were, I do not think that that fact and the further fact that the judgment itself was signed in default of defence and was not a consent judgment are decisive of the matter.

This subject is discussed by Wills J. in *Hammond* v. *Schofield* at p. 455 where, speaking of the effect of the signing of a judgment in such cases, he said in part:—

> If a judgment be improperly obtained, so that it never ought to have been signed, there can be no doubt when set aside it ought to be treated as never having existed. I am inclined to think (though it is not necessary to decide the question), that if it be regularly obtained, but through a slip on the part of the defendant, so that on an affidavit of merits it might be set aside, and it ultimately turns out that the defendant never was liable, it may equally be regarded as a judgment which never ought to have been signed, and would in such a case be properly treated as a nullity. If, being regularly obtained, though through a slip on the part of the defendant, and set aside upon an affidavit of merits, it ultimately turns out that the original defendant was liable, I do not think it could be treated, so far as the rights of other persons are concerned, as a nullity. Still less, when there is no pretence for saying that there is any ground for setting it aside upon the merits as between the plaintiff and the defendant, and when as between them it could only be set aside by consent. I cannot see upon what principle the consent of the plaintiff and defendant can be allowed to create a new right, or (which is the same thing), to resuscitate an extinguished right in favour of the plaintiff against a third person, or to create on the part of a third person a new liability.

In the present case there is no pretence for saying that there was any ground for setting aside the judgment against Barker upon the merits.

An opinion apparently inconsistent with that of Wills J. was expressed by Riddell J. in *Re Harper and Township of East Flamborough* (1), upon an application by a ratepayer of the Township for an order quashing a by-law passed by the Municipal Council. Prior to the time when the proceedings were launched, the by-law had been approved by the Ontario Railway and Municipal Board and by a section of the Municipal Act it was provided that, after such approval, the validity of the by-law "shall not thereafter be open to question in any court." After the motion had been launched the Board set aside its certificate

(1) (1914) 32 O.L.R. 490.

of approval. It was objected that the by-law could not be quashed since at the time the motion was launched it was not "open to question in any court." Riddell J. held that the objection failed and construed the section of the statute as meaning that the Court could not question the validity of the by-law which had been approved by the Court, if such approval was in existence when the Court was called upon to decide the point. He then said in part (p. 492):—

> Were this a case of estoppel, difficult questions might arise: but, even then, there is respectable authority for the proposition that an action begun which can be met by a plea of estoppel, will lie if the estoppel be removed before the matter comes to adjudication.

In support of this statement Riddell J. referred to *Goodrich* v. *Bodurtha* (1), a decision of Thomas J. of the Supreme Judicial Court of that State. In that case the plaintiff brought his action upon a judgment recovered in the Court of Common Pleas upon a joint and several promissory note. While the action was pending, the judgment upon which it was based was reversed on the ground of want of jurisdiction in the Court. After the reversal the plaintiff obtained leave to amend his declaration in order to claim upon the original note and the defendant pleaded that the right of action had merged in the judgment. As to this claim, Thomas J. said (p. 324):—

> To this amended declaration the defendant answered the merger of the note in the judgment. To this the obvious reply was and is that, upon the reversal of the judgment, the merger ceased. It was as if no judgment had been rendered.

With respect, the learned judge might have said with greater force that since the judgment had been awarded by a court which was without jurisdiction it was itself a nullity and could not either effect a merger or have any other legal consequence. What was meant by the expression "the merger ceased" I do not understand. The statement, that upon the reversal of the judgment it was as if no judgment had been rendered, was directed to the judgment he was then considering and was not, I think, intended as having universal application. If it was, it was *obiter* and, I think, inaccurate.

(1) (1856) 72 Mass. (6 Gray) 323.

1953

SINGER AND BELZBERG v. J. H. ASHDOWN HARDWARE CO. LTD.

Locke J.

Riddell J., while noting that the judgment had been set aside by reason of lack of jurisdiction in the *Goderich* case, appears to have relied upon it as authority for the statement that when "the obstruction by way of merger" was removed and the judgment set aside there was no estoppel. It is to be noted that no question of merger affected the decision in *Harper's* case. There was no such question to be determined as the effect of the signing of a judgment upon further proceedings upon a cause of action, in respect of which it was awarded, and anything said by Mr. Justice Riddell on the subject of merger was simply *obiter*.

Some support for the view that the signing of the judgment did not extinguish the cause of action and that it might be pursued, if the judgment is set aside, might appear to be found in the case of *Partington* v. *Hawthorne* (1). In that case the action was brought for goods sold and delivered by the plaintiff to the defendant at the Princess's Theatre. The order for the goods had been given by a person named Kelly, who the plaintiff afterwards discovered to be the agent of Hawthorne. The plaintiff brought an action against Kelly and recovered judgment in default of defence and thereafter sued Hawthorne. At the time the latter action was commenced, the judgment against Kelly was still in effect. Hawthorne applied to the Master and obtained unconditional leave to defend. On the plaintiff appealing from this order, Sir James Hannen, in Chambers, varied it by giving the defendant leave to defend only on paying the sum in dispute into Court. Hawthorne appealed from the latter order to a court consisting of Pollock B. and Manisty J. Two days before the appeal came on for hearing, the judgment against Kelly was set aside on an order of the Divisional Court, presumably on Kelly's application though the report does not say so. On the appeal, counsel for Hawthorne contended that since Partington had taken judgment against Kelly he could not proceed against Hawthorne for the same subject matter since the question was res judicata and that, having chosen to proceed first against the agent, he could not now proceed against the principal, referring in support of this contention, inter alia, to *Kendall* v. *Hamilton*. It was further contended that Hawthorne should at least have unconditional

(1) (1888) 52 J.P. 807.

leave to defend. Baron Pollock said that the action against Kelly, in which the judgment had been obtained, was "obviously a mistaken proceeding" and should have been directed against Hawthorne. He said further:—

> That judgment, however, has been set aside. It is not now existing and there is nothing to show that the second action is frivolous or vexatious.

Manisty J. said in part:—

> The judgment therein obtained has gone and is as if it never had been. The matter is now just as if Miss Hawthorne had been sued originally; besides, she does not deny receipt of the goods.

It is unfortunate that the statement of facts in the report is so meagre. The case is not reported elsewhere, however. I think the decision does not touch the present question. Kelly, ordering the goods in the name and on behalf of Princess's Theatre, in which name apparently Hawthorne carried on business, was not liable to Partington for the purchase price. The judgment against him was set aside presumably on this ground. Taking the judgment against him did not merge the only cause of action that existed, which was as against Hawthorne for goods sold and delivered.

I have been unable to find that the decision in *Partington's* case has been considered in any case in England. It was, however, explained and distinguished in a judgment of the Appellate Division of Ontario in *Brennen* v. *Thompson* (1), the judgment of the Court being written by Riddell J. In that case, the plaintiff sued three defendants T., L. and C. in the County Court for the price of goods sold and delivered. All three were sued as if liable in the same way. T. did not appear and judgment was entered against him upon default; the defendants L. and C. however, appeared and the plaintiff then delivered a statement of claim which, in substance, stated that T. had bought the goods as agent of L. and C., that the plaintiff had recovered judgment against T. and asked that if it should appear that L. and C. were liable as principals, the judgment taken by default should be set aside. On a motion by L. and C. to strike out the statement of claim and dismiss the action against them, the County Court Judge made an order setting aside the judgment which had been signed

(1) (1915) 33 O.L.R. 465.

1953

SINGER AND BELZBERG v. J. H. ASHDOWN HARDWARE CO. LTD.

Locke J.

against T. and allowing the plaintiff to amend the statement of claim as it might be advised. L. and C. appealed and their appeal was heard by a Court consisting of Falconbridge, C.J.K.B., Riddell, Latchford and Kelly JJ. The judgment of the Court was that the case presented by the statement of claim was that the two defendants were undisclosed principals of the defendant against whom judgment had been signed by default and that that judgment was a bar to the prosecution of an action against the principals, the cause of action having passed into a judgment which could not be set aside without their consent.

Counsel for the respondent on the appeal had relied upon the decision in *Partington* v. *Hawthorne,* apparently to support a contention that the judgment against T. having been set aside it was, as had been said by Manisty J., "as if it never had been." Dealing with this contention, Riddell J. pointed out that in *Partington's* case Kelly, representing himself as acting for the Princess's Theatre, had ordered goods for the theater from the plaintiff and that they were sold, delivered to and debited against the Princess's Theatre. Further, they were sold on the credit of the theatre and Hawthorne did not deny receipt of them. As to the judgment which had been recovered against Kelly, he was of the opinion that it had been obtained necessarily on the hypothesis that Kelly had not the authority to act for Hawthorne. If, indeed, this was the ground upon which Partington proceeded against Kelly, the latter's liability would be in damages for breach of warranty of authority. Whether the action proceeded on this basis or on the ground that Kelly had contracted personally, though also on behalf of his principal, cannot be determined from the report. The statement in the judgment of Baron Pollock that the action against Kelly was obviously a mistaken proceeding can only mean that Kelly was not personally liable on either ground. Riddell J. pointed out that the cause of action against Hawthorne had accordingly not merged and, referring to his judgment in *Re Harper and Township of East Flamborough,* he said that once the judgment against Kelly was out of the way the action against Hawthorne could proceed. Mr. Justice Riddell's opinion as to the effect in law of the merger of a cause of action is made apparent by a further passage in his judgment dealing

with a supposititious case where A. goes to C. and buys goods ostensibly for himself and on his own credit. C. thereafter discovering that B. is the real purchaser and A. only an agent for his undisclosed principal may sue A. and will succeed if he proves the sale only, or may sue B. when he will succeed if he proves agency. He then said (p. 471):

> In either case the action is the same, for "goods bargained and sold, and sold and delivered;" there is only one cause of action, the one contract: a contract to which C. is one party and either B. or A. (at C.'s option) the other. If he takes judgment against either, the contract transit in rem judicatam and is merged, gone. He cannot thereafter say that the contract is in existence. Nor can he, having taken a judgment against one, revive against the other the dead contract; it stays dead.

While expressing these views as to the consequences of the merger of a cause of action, the judgment of the Court in *Brennen's* case does not appear to have been based on this ground. Upon the evidence the Court were of the opinion that the agent and the principals were all personally liable, that there was but one cause of action and that signing the judgment against the agent was conclusive evidence of an election not to proceed against the others.

In the passage from the judgment of Riddell J. in *Harper's* case, above quoted, that learned judge said that if it was a case of estoppel there was respectable authority for the proposition that an action begun, which can be met by a plea of estoppel, will lie if the estoppel be removed before the matter comes to adjudication. However, as pointed out in the passage from Vol. 13 of Halsbury which has been relied upon in the present matter, the question in a case such as this is not that the plaintiff is estopped by having taken judgment against one of several joint debtors, but rather that the cause of action has been extinguished. While the judgment of the Appellate Division in *Brennen's* case, delivered by Riddell J. where all three defendants were liable, proceeded upon the ground that the plaintiffs had by taking judgment against the agent elected not to proceed against the others, the Court must have arrived at the same result, though on different grounds, had the liability of the three defendants been joint. If Riddell J. was of the opinion, when he delivered judgment in *Harper's* case, that where judgment had been taken against one of several who were alternatively liable or against one of several joint debtors, setting aside the judgment would

1953

SINGER AND BELZBERG v. J. H. ASHDOWN HARDWARE CO. LTD.

Locke J.

revive the cause of action against the others, it would appear that he had changed his mind by the following year when he delivered the judgment of the Court in *Brennen's* case.

Partington v. *Hawthorne* is the authority referred to in Note D to the passage from 13 Halsbury, above mentioned, for the statement that a judgment recovered against one of a number of persons jointly liable is *until set aside* a bar to an action. In that case, the defendant against whom the judgment had been signed had not been liable for the debt, the only cause of action being that against Hawthorne. The remarks of Baron Pollock and Manisty J. as to the effect of setting aside that judgment were presumably directed and accordingly must be limited in their application to the situation with which they were dealing. No question as to the effect of a merger of the cause of action could arise, either in that case or, as I have already pointed out, in the case of *Harper* or that of *Goodrich*. *Partington's* case was not one where there was joint liability and it does not support the proposition that where, as in the present case, judgment has been signed against one of several joint debtors, the setting aside of the judgment revives the cause of action as against third persons.

There is a statement in the 13th edition of Odgers on Pleadings, p. 207, where, dealing with the subject of estoppel by record, that is by judgment of a court of record, it is said that so long as a judgment stands *no one who was a party to it* can reopen that litigation, the matter having become *res judicata*. But this does not touch the question here. The appellants were not parties to the judgment which was signed. Estoppel is not a cause of action, rather is it a rule of evidence. In the case of estoppels arising from a judgment of a court of record, it is as between the parties and their privies that the record is conclusive so as to estop the parties from again litigating a fact once tried and found (Everest and Strode on Estoppel, 3rd Ed. p. 52). Odgers' statement, as is apparent from its terms, relates, and indeed could only relate, to the situation as between the parties to the judgment.

In *The Bellcairn* (1), the question was as to the effect of a judgment entered between the owners of two vessels upon a subsequent dispute between them arising out of the same incident. The remarks of Lord Esher M.R., to which our attention has been drawn, amounted only to this, that if the first judgment was still in existence the matter as between the parties was *res judicata*. The case does not appear to me to bear upon the issue in the present matter.

The respondent's contention is, as I understand it, that where judgment has been signed against one of several defendants whose liability to the plaintiff is joint and the proceedings are thereafter abandoned against the others, the original cause of action which has been merged in the judgment may be revived and the legal consequences of having taken the judgment avoided by the simple expedient of obtaining an order of the court setting it aside, even though this be done without the knowledge or consent of the parties defendant who have been released of liability. If the mere setting aside of the judgment in this manner were effective to revive rights which have been lost as against those who were formerly joint debtors, I can see no sound reason why the same rule should not apply to rights which have been lost by election. By way of illustration, in *Morel* v. *Westmorland* (2), a claim was advanced against a husband and wife for necessaries supplied on the orders of the latter. The plaintiff, under the provisions of Order 14 of the Rules of the Supreme Court, obtained leave to sign judgment against the wife and proposed to proceed with the action against the husband. Holding that the liability of the husband and wife was alternative and not joint, and there being no rule permitting the plaintiff to proceed against the husband in these circumstances, the Court of Appeal decided that signing judgment against the wife was a conclusive election on the part of the plaintiff to hold her liable, to the exclusion of the liability of the husband (Collins M.R. p. 77). The judgment was upheld in the House of Lords, the Law Lords being unanimously of the opinion that the doctrine of election as stated in *Scarf* v. *Jardine* (3), applied. The legal consequence of

(1) (1885) 10 P.D. 161. (2) [1903] 1 K.B. 64; [1904] A.C. 11.
(3) (1882) 7 App. Cas. 345.

1953

SINGER AND BELZBERG v. J. H. ASHDOWN HARDWARE CO. LTD.

Locke J.

the election was the release of the husband. If the respondent's contention in the present case be sound, then, notwithstanding such release, by obtaining an order setting aside the judgment entered against the wife, the liability of the husband would be revived. If there is any authority for any such proposition in English law, we have not been referred to it and I have been unable to discover any such.

There is but one cause of action against persons jointly liable in contract. Merger is effected by mere operation of law, independently of any intention of the parties that the inferior remedy should be discharged (*Price* v. *Moulton* (1)). As pointed out by Baron Parke in *King* v. *Hoare,* the judgment of a court of record changes the nature of the cause of action which is the subject matter of the suit and prevents it being the subject of another suit. In *Kendall* v. *Hamilton,* Cairns L.C., speaking of the effect of the judgment taken against Wilson and McLay, said that the plaintiffs by doing so had exhausted their right of action. Lord Selborne and Lord Blackburn, as above stated, were in agreement that its effect was that the legal liability of the respondent was extinguished. In *Hammond* v. *Schofield* (p. 545), Wills J. said that the effect of the judgment was undoubtedly to destroy the right of action against a co-contractor with the defendant. The opinion expressed by Hawkins J. in *Odell's* case and that of Wills J. at p. 455 of the report of *Hammond* v. *Schofield* were no doubt *obiter.* The accuracy of the statement of the law by Wills J., however, appears to me to receive strong support from the judgment of Lord Alverstone C.J. in *Cross v. Matthews* (2), in which Kennedy J. concurred. Wills J. was the third member of the court hearing this appeal and his concurrence in the judgment of the Chief Justice shows that he remained of the same opinion as that which he had expressed thirteen years earlier. Other than general statements as to the effect of the setting aside of judgments in cases where the liability was neither joint nor alternative, I am unaware of any authority which suggests the contrary, other than the judgment in the present case. If the cause of action is extinguished by the taking of judgment against one of two joint debtors and the proceedings are regularly conducted and the debt justly due

(1) (1851) 10 C.B. 561.

(2) (1904) 91 L.T.R. 500.

at the time the judgment is signed, I am quite unable to understand how the setting aside of the judgment, either by the consent of the parties to that judgment or otherwise, resuscitates the obligations of those who, by operation of law, were discharged when the judgment was signed.

The English counterpart of Rule 113 of the Supreme Court of Alberta first appeared in the Rules of the Supreme Court 1883, which came into operation in that year. I am unable to find that the exact point to be determined here has been decided in any reported English case. The rule in *King* v. *Hoare* was firmly embedded in the common law of England when the rule of court was first adopted. The principle of statutory construction to be applied appears to me to be accurately stated in Maxwell on the Interpretation of Statutes, 9th Ed. p. 85, where the learned author, in dealing with the presumption against implicit alteration of the law, has said:—

> One of these presumptions is that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed. It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness, and to give any such effect to general words, simply because they have a meaning that would lead thereto when used in either their widest, their usual, or their natural sense, would be to give them a meaning other than that which was actually intended. General words and phrases, therefore, however wide and comprehensive they may be in their literal sense, must, usually, be construed as being limited to the actual objects of the Act.

The rule was first enacted in England four years after the judgment of the House of Lords in *Kendall* v. *Hamilton* and it appears to me that its purpose is clear on the face of it. That purpose was to permit the plaintiff, in any action for a debt or liquidated demand where the act of signing judgment against one of several defendants might extinguish the right of action against others, to sign judgment against one or more and pursue the claim in that action against the other or others, a course which was not legally possible prior to the adoption of the rule of court. I think only to that extent was the common law rule changed.

1953

SINGER AND BELZBERG v. J. H. ASHDOWN HARDWARE CO. LTD.

Locke J.

I think support for this view is to be found in the judgment of Lord Sterndale M.R. in *Parr* v. *Snell* (1). In that action, which was against three joint contractors for damages for breach of an agreement, the plaintiff obtained an interlocutory judgment for damages to be assessed against two of the defendants in default of defence. He then procured an assessment of damages and signed final judgment for the assessed amount against the two defendants who were in default and attempted to proceed against the remaining defendant. Rule 5 of Order 27 of the Rules of the Supreme Court 1883 permitted a plaintiff in such an action, which was for pecuniary damages only, to enter an interlocutory judgment against a defendant in default but did not permit the signing of a final judgment, as was permitted by Rule 3 in the cases to which the latter rule applied. In holding that the plaintiff could not proceed further with the action, the Master of the Rolls said in part (p. 6):—

> Apart from any rules of Court or any statutory provisions to the contrary, it is quite clear that a judgment against one joint contractor or tortfeasor is a bar to proceeding against the others. It is not necessary to read the cases upon that point. It is clearly established in *Kendall* v. *Hamilton; King* v. *Hoare;* and *Brinsmead* v. *Harrison* with regard to both joint contractors and joint tortfeasors. Therefore, apart from any special provision by statute or rule, it seems to me quite clear that this judgment is a bar to proceeding against the other defendant. There are a certain number of rules contained in Order XXVII which have been framed to mitigate the hardship occasioned by the application of the doctrine in *Kendall* v. *Hamilton; King* v. *Hoard;* and *Brinsmead* v. *Harrison,* and unless the plaintiff can bring himself within one of these rules, the general doctrine must apply.

The rule, as originally enacted and as continued in Rule 113 of the Supreme Court of Alberta, does not say that the right of action does not merge upon signing judgment in respect of such a claim against one or more of the others; rather does it simply permit the action to be pursued after signing such a judgment. The true situation, therefore, in the present matter, when the judgment was signed against Barker, was, in my opinion, that the merger of the cause of action was conditional and not absolute, being subject to the right of the respondent to carry the proceedings to judgment against the present appellants in the action. That right the respondent appears to me to have abandoned

(1) [1923] 1 K.B. 1 at 10.

when the action was discontinued against the appellants and it could not be enforced in a separate action. To hold otherwise would be to construe the rule as transforming a liability which was admittedly joint into one that was joint and several.

I would allow this appeal with costs throughout.

CARTWRIGHT J.:—The facts out of which this appeal arises are stated in the reasons of my brother Kerwin. Several defences were raised at the trial but I find it necessary to deal with only one of them, as, in my opinion, the others were rightly rejected in the courts below.

The defence to which I refer is that based on the default judgment signed against one Barker who had been a partner of the appellants. The facts so far as relevant to this defence are as follows. The appellants and Barker were indebted to the respondent for the price of goods sold and delivered. Their liability was joint, not joint and several. The respondent therefore had but one cause of action against Barker, Singer and Belzberg. On 28 November, 1949, the respondent commenced an action against Barker, Singer and Belzberg, based on the cause of action aforesaid, claiming $10,898.95. On 16 December 1949 judgment in default of defence was signed and entered for this amount against Barker. On 26 January 1950 the respondent filed a notice wholly discontinuing the action against Singer and Belzberg and on the same day commenced the action in which this appeal is brought. In the Statement of Claim in the present action the same amount is claimed as that for which judgment had been signed against Barker. On 8 March 1950 the appellants delivered their Statement of Defence pleading *inter alia* the recovery of the judgment against Barker and that the indebtedness was joint and was merged in such judgment. On 14 March 1950, the respondent delivered a reply which, insofar as it relates to the defence mentioned, reads as follows:—

> In reply to paragraph Nine (9) of the said Defendants' Statement of Defence the Plaintiff denies that the said debt was a joint debt, and not a joint and several debt. He further denies that the indebtedness was merged in the judgment recovered by the plaintiff against John Barker, and he further denies that the defendants were released from liability for such indebtedness.

1953

SINGER AND BELZBERG v. J. H. ASHDOWN HARDWARE CO. LTD.

Cartwright J.

No further pleadings were delivered.

On 21 March 1950 Egbert J. sitting in Court made an order in the earlier action setting aside the judgment against Barker. This order recites that it was made upon the application of Barker and upon hearing counsel for him and for the respondent. It will be necessary to refer later to the evidence as to the circumstances in which this order was made. It appears that in August 1950 the solicitors for the respondent served upon the solicitors for the appellants a notice that at the trial of the action they would ask leave to amend their reply by pleading the order of Egbert J. which order was set out verbatim in the notice. The solicitors for the appellants thereupon wrote to the solicitors for the respondent stating that they would have no objection to leave being granted if this were applied for promptly but that they would object to its being granted at the trial. Their reason for taking this position was stated to be that they would require production and discovery in regard to the making of the order of Egbert J. The solicitors for the respondent did nothing further. At the opening of the trial counsel for the appellants referred to the notice of motion and asked the position of counsel for the respondent in regard to it. The latter said: "When the trial is over you will perhaps know my position on that amendment. I doubt if it will become necessary." During the trial when counsel for the respondent sought to introduce the order of Egbert J. in evidence counsel for the appellants objected on the ground that it was not pleaded. The learned trial judge overruled the objection and permitted the order to be introduced. Following this counsel for the appellants called as a witness, Mr. McLaws, who had acted as counsel for Barker on the application to Egbert J. and examined him as to the circumstances under which the order of that learned judge was made. Towards the end of the trial counsel for the appellants again referred to the motion to amend and asked whether it had been abandoned and counsel for the respondent said to the Court:—"I never made any application my Lord."

In my view the position taken by counsel for the appellants was correct. I think that it was necessary for the respondent to plead the order of Egbert J. and that when it appeared that counsel had deliberately decided not to

ask for the amendment to his pleadings he ought not to have been allowed to give evidence of the order. I think, however, that if the learned trial judge had so ruled counsel for the respondent would then have asked for leave to amend and that it would have been granted. I am unable to say that the appellants were prejudiced by what was, in my respectful opinion, an erroneous ruling and as such ruling appears to me to have been in regard to a matter of procedure I do not think that we should interfere with the judgments below on this ground.

From the above recital of facts it appears that when the present action was commenced in the Supreme Court of Alberta, and indeed when issue was joined, there was in existence a judgment of that Court against Barker for the same cause of action. Had the last mentioned judgment continued in existence I think it clear that, under the rule stated in *King* v. *Hoare* (1) and approved by the House of Lords in *Kendall* v. *Hamilton* (2), such judgment would (although unsatisfied) have been a bar to the plaintiff's claim against the appellants.

It is argued for the respondent that the rule does not apply in the case at bar for two reasons. The first is that the rule is abrogated, in the circumstances of this case, by the provisions of rule 113 of the Alberta Rules of Court, quoted in the reasons of my brother Locke. As to this, if the judgment against Barker had not been set aside I would have been of opinion that rule 113 did not assist the respondent. The effect of that rule is to modify the rule in *King* v. *Hoare* (*supra*) only to the extent of permitting a plaintiff who has sued, in one action, two or more persons who are jointly liable to proceed to judgment in that action against the other defendants notwithstanding that he has signed judgment against one or more of them in default of defence. I do not think that rule 113 assists a plaintiff who has taken judgment against one joint contractor and then seeks in a different action to obtain judgment against the co-contractors who were jointly liable with him. The reasons of Byrne J. in *McLeod* v. *Power* (3) and those of the Court of Appeal in *Parr* v. *Snell* (4) indicate that a rule of this nature is to be strictly construed.

(1) (1844) 13 M. & W. 494.
(2) (1879) 4 App. Cas. 504.
(3) [1898] 2 ch. 295.
(4) [1923] 1 K.B. 1.

1953

SINGER AND BELZBERG v. J. H. ASHDOWN HARDWARE CO. LTD.

Cartwright J.

The second and main reason urged by the respondent is that the setting aside of the judgment against Barker prevents the application of the rule in *King* v. *Hoare*. As to this if the matter were devoid of authority I would have thought that upon the judgment against one of several co-contractors being set aside it would cease to operate as a bar to an action against the others, that upon being set aside it ceases to exist and therefore to have any effect thereafter, although it would in some circumstances provide a justification for an act done in reliance upon it between the time of its being given and being set aside, as for example in the case of *Williams* v. *Smith* (1). This view of the matter finds some support in the way in which the rule is stated, and particularly in the words which I have italicized, in the following passages: Halsbury 2nd Edition, Vol. 13, page 416:—

> On this principle, a judgment recovered (though unsatisfied) against some one of a number of persons who are jointly (not jointly and severally) liable on the same contract, or are liable for the same tort, with others is, *until set aside,* a bar to an action against the others (although the plaintiff may not have been aware of their liability), not on any ground of estoppel, but because there was but one cause of action, and that has merged in the judgment—*transit in rem judicatam;* and because in the case of contract the others are deprived by the act of the plaintiff of the right to have their liability determined in the same judgment with their co-contractors.

Odgers on Pleading, 3rd Edition, page 207:—

> Estoppel by record, e.g., by a judgment of a Court of Record. The matter becomes *res judicata. So long as that judgment stands,* no one who was a party to it can re-open that litigation.

Reference may also be made to the words of Lord Mansfield in *Moses* v. *Macferlan* (2):

> It is most clear, "that the merits of a judgment can never be overhaled by an original suit, either at law or in equity." *Till the judgment is set aside, or reversed,* it is conclusive, as to the subject matter of it, to all intents and purposes.

It is, however, argued for the appellants that it has been held in cases which we ought to follow that once a judgment has been entered against one of several co-contractors the right of action against the others is irrevocably lost and that the setting aside of such judgment (except, perhaps in cases where it was irregularly entered or for some other reason ought never to have been pronounced) is immaterial. The cases relied on in support of this proposition are

(1) (1863) 14 C.B.N.S. 596. (2) (1760) 2 Burr. 1005 at 1009.

Hammond v. *Schofield* (1), *Odell* v. *Cormack* (2), *The Bellcairn* (3), *Cross and Co.* v. *Matthews and Wallace* (4), *M. Brennen and Sons* v. *Thompson* (5); and it is necessary to examine each of them.

Hammond v. *Schofield* is distinguishable on the facts. In that case the plaintiffs, a firm of printers, sued the defendant for the cost of printing a newspaper of which they supposed him to be the sole proprietor. There being no defence the defendant consented to final judgment being signed against him. After judgment had been so signed the plaintiffs received information that at the time the work was done one Thomas was a partner of the defendant and jointly liable with him. With the consent of the defendant they obtained an order in the Birmingham District Registry ordering that the default judgment be set aside and that the writ be amended by adding Thomas as a defendant in the action. That order was confirmed on appeal by Pollock, B. Thomas appealed to the Divisional Court consisting of Wills and Vaughan Williams, JJ. and the appeal was allowed. From the above summary of the facts it is clear that in the final result the default judgment was not set aside as the order setting it aside was reversed by the Divisional Court. In the case at bar, on the other hand, the default judgment against Barker had been set aside by the order of Egbert J. and no appeal has been taken from that order. It would appear that under rule 446 of the Alberta Rules of Court, the appellants, upon the order of Egbert J. coming to their notice, might have moved to rescind it but they did not do this. Egbert J. clearly had jurisdiction to make it under the provisions of rule 127 of the Alberta Rules of Court. If it is contended that an order made by a judge of the Supreme Court of Alberta, who clearly had jurisdiction to make it, setting aside a default judgment entered in that Court ought not to have been made the proper course would seem to be to attack such order directly either by way of appeal or by motion to rescind. The Court cannot, in another action, simply ignore it or treat it as being ineffective. It appears to me that anything said in the judgments in *Hammond* v.

(1) [1891] 1 Q.B. 453.
(2) (1887) 19 Q.B.D. 223.
(3) (1885) 10 P.D. 161.
(4) (1904) 91 L.T.R. 500.
(5) (1915) 33 O.L.R. 465.

1953

SINGER AND BELZBERG v. J. H. ASHDOWN HARDWARE CO. LTD.

Cartwright J.

Schofield as to what would be the effect on the liability of persons jointly liable with one against whom judgment had been taken of that judgment having been validly set aside is *obiter*. Wills J. relied on *Odell* v. *Cormack* (*supra*) and *The Bellcairn* (*supra*).

In *Odell* v. *Cormack* at page 228 Hawkins J. expresses an opinion similar to that expressed by Wills J. but states that such opinion is unnecessary to the decision of the case and it is clearly *obiter*.

The Bellcairn was not a case involving joint liability. The facts are accurately summarized in the head-note which reads as follows:

> In an action for damages by collision between the owners of the A. and the B., the Court, by consent of the parties, made a decree dismissing the action. Subsequently another action was brought by the owners of the cargo on the A. against the B. in respect of the same collision, and the Court found both vessels to blame. The owners of the B. then commenced an action against the owners of cargo on the A. for the purpose of limiting their liability in respect of all claims arising out of this collision, and paid the amount of their statutory liability into court. Subsequently, again by consent of the owners of the A. and the B., the assistant registrar rescinded the decree by consent in the first action, and the owners of the A. then brought in a claim in the limitation action against the fund in court. The registrar held such claim to be inadmissible. On motion to confirm the report:—
>
> Held, that the report should be confirmed, as the owners of the A. and B. could not by consent rescind the decree of the Court, and that the decree by consent was a bar to a claim against the fund in court, as it estopped the owners of the A. from bringing any further action against the B.

It would seem clear that so long as the judgment in the action first mentioned in the head-note was in existence it would estop the owners of the A. from bringing any further action against the B. and the case, therefore, appears, at a first reading, to raise directly the question of the effect of the consent order setting aside that judgment. When, however, the reasons of the Court of Appeal are examined it appears that the Court dealt with the matter as if the judgment had not been set aside at all. Lord Esher M.R. said at pages 165 and 166:—

> It is clear that if the judgment of the 7th of November, 1884, be valid and standing, the owner of the *Britannia* can have no claim against the *Bellcairn*. *The sole question therefore is whether this judgment has been set aside*. I agree with Butt, J., that when at a trial the Court gives a judgment by the consent of the parties it is a binding judgment of the Court and cannot be set aside by a subsequent agreement between the solicitors, or the parties, even though it be placed in the form of an

order by consent on a summons and taken to a registrar or master, and by him made as a matter of course. It is only the Court, with full knowledge of the facts on which it is called on to act, which can set aside the first judgment, and I doubt whether, unless some fraud in regard to such judgment is shewn, even the Court would have jurisdiction to set aside its first judgment. It is clear then that the second consent order was absolutely void, and would have been of no validity in an action between the *Britannia* and the *Bellcairn,* in which the judgment of the 7th of November was relied on as a bar.

Cotton, L.J. says, in part, at page 166:—

I am of the same opinion. The judgment of the 7th of November was a bar to any action by the owners of the *Britannia* against the *Bellcairn,* and if such judgment could have been set aside at all, it could only have been done by the Court with all the facts before it.

These passages would seem to indicate that in the view of Lord Esher and of Cotton L.J. the consent order was made without jurisdiction and was absolutely void. The words used by Lord Esher, which I have italicized, are open to the interpretation that if the first judgment had been validly set aside the bar to the later action would have been removed. I have already indicated my view that in the case at bar it cannot be said that the order of Egbert J. was void or was made without jurisdiction.

Cross and Co. v. *Matthews and Wallace* (*supra*) is a decision of the Divisional Court delivered by Lord Alverstone C.J. with the concurrence of Wills and Kennedy JJ. The head-note reads as follows:—

Two defendants, M. and W., having been sued in the High Court for goods sold and delivered, judgment was entered against M., and the action as against W. was remitted for trial to the County Court. At the trial it was found that the debt was contracted by W. alone, and that M. had merely acted as his agent.

Judgment was postponed, and the judgment against M. was set aside. The learned County Court Judge then entered judgment against W.

Held, that the judgment against W. was wrong, as the plaintiffs had conclusively elected to enforce their remedy against M.

It will be observed that Matthews and Wallace were alternatively and not jointly liable. The concluding sentence of Lord Alverstone's judgment is as follows:

I am of opinion that the County Court judge ought to have given judgment for the defendant on the ground that the plaintiffs had conclusively elected to enforce their remedy against Matthews. The appeal must, therefore, be allowed.

It would appear that the signing of judgment against Matthews was treated as conclusive evidence of an election to look to him for payment instead of to Wallace and that

1953

SINGER AND BELZBERG v. J. H. ASHDOWN HARDWARE CO. LTD.

Cartwright J.

this was the real *ratio decidendi* of the case, but there is no doubt that Lord Alverstone used language approving of the observations of Wills J. in *Hammond* v. *Schofield.*

M. Brennen and Sons v. *Thompson* (*supra*) was a case of principal and agent. The plaintiffs sued T., the agent, and L. and C., the undisclosed principals, in one action in the County Court. They signed judgment by default against T. but then moved in the same action asking to set aside the judgment against T. The County Court Judge made an order setting aside the default judgment and giving the plaintiffs leave to amend the statement of claim. From this order L. and C. appealed. As in *Cross and Co.* v. *Matthews and Wallace,* this was a case not of joint but of alternative liability and, as in *Hammond* v. *Schofield,* the appeal was from the order setting aside the default judgment. The Court was not called upon to consider what would have been the result had the default judgment been validly set aside by an order from which no appeal was taken.

In my view, in none of the five cases mentioned was it determined as part of the *ratio decidendi* that where a judgment is recovered against some one of a number of persons who are jointly liable on the same contract but is set aside by a valid order such judgment nonetheless continues to constitute a bar to an action against the others. It is my present view that even where the order setting such judgment aside was made on consent and no grounds existed for setting it aside against the opposition of the plaintiff, the effect of the judgment as a bar to a subsequent action is destroyed by the order setting it aside and, to use the words of Manisty J. in *Partington* v. *Hawthorne* (1), it "has gone, and is as if it never had been made." Once it has been decided that the order of Egbert J. was made with jurisdiction its merits cannot be inquired into in this action and, so long as it remains unreversed, to borrow the words of Lord Mansfield, in *Moses* v. *Macferlan,* quoted above, "It is conclusive as to the subject matter of it to all intents and purposes."

I find nothing in the judgment of Parke B. in *King* v. *Hoare* (or in those of the Law Lords in *Kendall* v. *Hamilton* where it is discussed and approved) to support the view

(1) (1888) 52 J.P. 807.

that had the judgment against Smith been set aside it would still have availed as a plea in bar to the subsequent action against Hoare. It will be observed that the plea there under consideration stated:

> . . . that the contract in the declaration was made by the plaintiff with the defendant and one N. T. Smith jointly, and not with the defendant alone; and that, in 1843, the plaintiff recovered a judgment against Smith for the same debt, with costs, "as appears by the record remaining in the Court of Queen's Bench, *which judgment still remains in full force and unreversed,*" concluding with the common verification.

I am at a loss to understand how any matter can be held to be *res judicata* by virtue of a judgment which once existed but has since been validly set aside.

I am unable to accept the view expressed by Wills J. in *Hammond* v. *Schofield* in the following passage:—

> I cannot see upon what principle the consent of the plaintiff and defendant can be allowed to create a new right, or (which is the same thing), to resuscitate an extinguished right in favour of the plaintiff against a third person, or to create on the part of a third person a new liability.

The consent of the plaintiff and the defendants there referred to did not, I respectfully think, purport to create a new right in the plaintiff but only to remove an obstacle in the way of the enforcement of a right theretofore existing.

If, contrary to the view that I have expressed, it is material to decide whether the order of Egbert J. must necessarily have been made with the consent of the respondent I think that such question should be answered in the negative for the following reasons. It appears to me that Barker had at least an arguable legal right to have the default judgment against him set aside. At common law, before the *Judicature Act,* Barker, being jointly liable to the plaintiff with his co-contractors was entitled to be sued in the same action with them and if he had been sued alone he would have had the right to plead in abatement. The *Judicature Act* abolished pleas in abatement but it did not change the rights of the parties, and, since the *Judicature Act,* if a party jointly liable with others is sued alone his remedy appears to be to move the Court to stay the action unless and until the plaintiff adds his co-contractors as defendants. No such remedy was open to Barker in the action brought against him because his co-contractors

1953

SINGER AND BELZBERG v. J. H. ASHDOWN HARDWARE CO. LTD.

Cartwright J.

Singer and Belzberg were made defendants in that action. Having no defence on the merits against the plaintiff's claim Barker could not be criticized for failing to file a defence and he could not object to judgment being signed against him by default although it was not signed at the same time against his co-defendants because such a course was expressly permitted by rule 113. He had therefore no right to complain until the plaintiff discontinued the action as against the other two defendants. When this happened I think that Barker had a right to object that the procedure which the plaintiff had adopted of suing the three co-contractors, signing judgment against him and then discontinuing as against the other two had the effect of depriving Barker of his right to have his liability and that of his co-contractors determined in one action. This right is referred to in *Kendall* v. *Hamilton* and it is made clear that it was not taken away by the *Judicature Act*. See for example the statement of Lord Blackburn at page 544:—

> . . . I cannot agree in what seems to be the opinion of the noble and learned Lord on my left (Lord Penzance) that the Judicature Act has taken away the right of the joint contractor to have the other joint contractors joined as Defendants, or made it a mere matter of discretion in the Court to permit it. With great deference I think that the right remains, though the mode of enforcing it is changed.

What course then was open to Barker to enforce this right? It was, I think, to move the Court for whatever relief was appropriate to require the liabilities of the three defendants to be determined in one action and it would seem that the first step in obtaining such relief would be to ask to have the judgment against him set aside. It may well be that it was on this ground that Egbert J. set the judgment aside. Some support is found for this view in the following evidence of Mr. McLaws, as to what was said by counsel on the application before Egbert J.:—

> A. . . . I mentioned to the judge that it was my opinion, acting for my client Barker, that there may be some question of contribution of Messrs. Belzberg and Singer with my client with respect to this debt and other facts which I knew about at that time.
>
> Q. And you say it was on account of the matter of contribution that . . .
>
> A. Or joint liability, if you wish to put it that way.

I do not think that it is an answer to this to say that it appears from the contract of 1 April 1949 filed as Exhibit 3 that as between Barker, Singer and Belzberg, Barker was

liable to pay the whole of their joint indebtedness to the plaintiff. The existence of such an agreement would not destroy Barker's right to insist that the liability of himself and of his co-contractors to the plaintiff should be determined in one action instead of being settled piece-meal.

It remains to consider the argument of the appellants that at the date of the commencement of this action the plaintiff had no cause of action. I think this argument must be rejected. The default judgment against Barker was available to the defendants as a plea in bar but I think it was rightly held in *Partington* v. *Hawthorne* and in *Harper* v. *Township of East Flamborough,* cited by my brother Kerwin, that it is sufficient to enable the plaintiff to succeed that such a bar was removed before the trial, even although it existed at the commencement of the action.

For the above reasons I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the Appellants: *Barron & Barron.*

Solicitors for the Respondent: *Fisher, McDonald & Fisher.*