[4 Mad. 296.]

APPELLATE CIVIL—FULL BENCH.

The 4th November, 1879.

PRESENT:

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, MR. JUSTICE INNES, MR. JUSTICE KERNAN, MR. JUSTICE MUTTUSAMI AYYAR, AND MR. JUSTICE FORBES.

Muttu Chetti.....(Plaintiff) *and* Muttan Chetti and another.....(Defendants).*

Promise to pay money and grain—Promissory note—Res judicata.

A document which contains a promise to pay money and a certain quantity of grain is not a promissory note for the purpose of the General Stamp Act, 1869, Section 28.†

The defendants and two others jointly executed a document (A), whereby they promised, on the 27th April 1874, to pay to the plaintiff Rs. 25 at the end of April 1875, and also to give to the plaintiff, in April 1875, a certain quantity of grain by way of interest:

Held (KERNAN, J., *dissenting*) that the suit was not barred by the dismissal of a suit in 1877 in which the plaintiff sued the defendants for a proportionate amount due by them under the document (A), alleging a verbal promise by the defendants, in November 1876, to pay such proportionate amount.

[297] THIS was a case stated under Section 617 of the Code of Civil Procedure by the District Munsif of Sivaganga.

The Plaintiff brought a suit in 1878 upon a document (Exhibit A) dated 1874, which contained a promise by the defendants and two others to pay Rs. 25 and a certain quantity of grain.

The first defendant pleaded that Exhibit A being a promissory note and unstamped was not admissible in evidence, and, further, that the plaintiff's claim was *res judicata*, inasmuch as he had sued the defendants in 1877 upon an alleged oral promise to pay their quota of the debt secured by Exhibit A. This suit had been dismissed on the ground that the promise had not been proved. The District Munsif was of opinion that Exhibit A was a promissory note, and that the plea of *res judicata* was an answer to the suit; but at the request of the plaintiff referred the following questions to the High Court:—

(1) "Whether the plaintiff's claim is *res judicata*.

(2) "Whether A is a promissory note, or bond, or what."

The parties did not appear.

The Court (TURNER, C.J., INNES, KERNAN, MUTTUSAMI AYYAR, and FORBES, JJ.) delivered the following **Judgments:**—

Forbes, J.—In the above letter the District Munsif of Sivaganga asks for a ruling upon two questions which have arisen in a case before him. These are—(1) Whether the claim was *res judicata*, and (2) whether the document sued on was a promissory note, or a bond, or what.

* Referred Case No. 6 of 1878 stated by S. Kristnasami Ayyar, District Munsif of Sivaganga, in Small Cause Suit No. 214 of 1878.

†[Sec. 28:—Except as provided in sections eight and twenty-six, no stamp shall be affixed to, or impressed on, any bill of exchange, or promissory note, or any instrument chargeable hereunder with the duty of one anna, subsequent to the execution thereof, nor shall the provisions of sections twenty and twenty-four apply to any such instrument.]

After stamping when inadmissible.

Upon the facts stated, I think we should find the first question in the negative. The cause of action in the prior suit appears to have been a verbal promise made by the defendants to pay the quota due upon a loan previously made to them and others. This promise was stated to have been made some months after the advance of the money, and the plaintiffs were not precluded by their failure in that suit from falling back upon the original cause of action, in regard to which there had been no adjudication.

As regards the second question, I observe that the document is styled a "Kaikanakku" or "note of account," which sets out an agreement to pay. It is, I think, distinguishable from a promissory note properly so called.

Kernan, J.—I regret that I do not take the same view as Mr. Justice FORBES.

[298] The same sum of money (the one consideration) was sought in the dismissed suit and is now sought in this. There the action was on a verbal promise supported by the same consideration; here the action is on the same consideration, but the agreement to pay is evidenced by a writing which was in existence and in the possession of plaintiff when the former action was brought. Plaintiff in the former case stated that the sum then sought was the same, for which he was entitled on a document which he could not rely on as it was not stamped. This suit is a claim for the same matter (*see* Section 13, Civil Procedure Code) supported by, or evidenced by, a different means. That is all. See *Denobundhoo Chowdhry* v. *Kristomonee Dossee* (I. L. R. 2 Cal. 152). The same matter appears to me to have been substsantially open as in the former suit (Section 13 and Explanation 2). Apart from this, though not a question in the case, Section 43 would apply.

I am inclined to think that the document (A) is not a promissory note.

Turner, C.J.—The cause of action in the previous suit was the alleged promise to pay an antecedent debt; that suit was dismissed because the so-called promise was held to be a mere acknowledgment of an antecedent liability under an agreement in writing which the plaintiff had not put in suit.

The present suit is brought on the promise or contract contained in the agreement itself; the cause of action is not in my judgment the same.

Secondly, the document does not contain a promise to pay money *only*, but money and paddy. It is not then a promissory note in English, nor, as I understand it, in Indian law.

Innes, J.—To enure as a promissory note, the instrument must contain a promise to pay money only. This seems to be the English rule without exception. There is one case quoted by *Byles* at page 92 in the edition of 1874, *Dixon* v. *Nuttall* (6 C. & P., 320), in which the language used was "I promise to pay £16 at sight by giving up clothes and papers." But the meaning was held to be that the promise was to pay £16, the clothes and papers being the consideration received for the note by the maker, and that, consequently, it was not a promise to give up clothes and papers, but a **[299]** promise to pay £16. In Hare and Wallace's Leading Cases, edition of 1871, volume 1, pages 395-6, the rule recognized in America is stated in exactly the same way. I think the document in question is not a promissory note, as it does not conform to this rule.

There are two grounds on which, as I understand, Mr. Justice KERNAN considers that the *former* is a bar to the *present* suit—

(*a*) That there is substantially the same matter in issue in both.

If not, (*b*) then the claim in the present suit *ought* to have been made a ground of attack in the former suit, and thus falls within the restrictions contained in Section 13 of the Civil Procedure Code, Explanation 2, upon a repetition of matters of claim which might have been and ought to have been brought forward and adjudicated upon in former litigation between the same parties.

I agree with the Chief Justice and Mr. Justice FORBES that the matter in issue, in the present suit, is substantially different from that in issue in the former.

It appears from the statement of the case that, on the 27th April 1874, the two defendants in the present suit and two others made and executed a promissory note in favour of plaintiff for a certain sum, and that they afterwards, as the plaintiff in the first suit alleged, entered into oral agreement to pay each his several portion of the debt, substituting this for the original obligation in writing and doing so without fresh consideration—a course which, by English law, might always be taken before breach of the first agreement, and which, by the Contract Law of India, may bring into existence an enforceable new agreement, whether before or after breach.

There arose out of this new agreement, if made, a new cause of action and one distinct from that of the former obligation. The two cannot possibly be confounded, because the right to sue arose on the former obligation in the month of Panguni 1875, whereas the right to sue on the new agreement could not arise until after the date of it in 1876, and (to apply a very usual test) the evidence which would suffice to support the claim on the promissory note would not suffice to support the claim on the agreement subsequently entered into. The present suit is not, therefore, affected **[300]** by Section 43 of the Civil Procedure Code, either as that section originally stood, or as it now stands as amended.

Then, as to Explanation 2 of Section 13, I do not think that it can be said within the meaning of the explanation that the claim in the present suit upon the original agreement '*ought*' to have been made a ground of attack in the former suit. In determining what ought to be or ought to have been a ground of attack in a suit, matters must not be included which are not within the scope of it, *i.e.*, which are not embraced within the same cause of action.

In the case now before us, can it be said that the claim in the present suit was within the scope of that in the former suit? They were destructive of each other. It was a prerequisite of the former suit that the obligation of the promissory note, on which the present suit is brought, had been superseded by a new agreement. It was impossible, therefore, to make that a ground of attack. I agree, therefore, with the Chief Justice and Mr. Justice FORBES as to the answers that should be given in this case.

Muttusami Ayyar, J.—Two questions are referred for our opinion, *viz.*, whether the document sued on is a promissory note, and whether the claim is *res judicata*.

On the 27th April 1874, the first and second defendants, together with two others, executed the document (A) in plaintiff's favour, on plain paper, in consideration of a loan of Rs 25. This document provided for the repayment of Rs. 25 at the end of the month of Punguni next, March-April 1875, and for the delivery of two kalams of paddy, by way of interest as alleged by both parties, in the same month. Subsequently plaintiff brought Suit 533 of 1877 against the defendants alleging that, in November 1876, they made an oral agreement promising to pay their proportionate shares only. This suit was, however,

dismissed on the ground that no subsequent agreement was proved as alleged, and that it had been set up for fear that the action might fail if it were based on an unstamped promissory note. Thereupon the plaintiff has brought this suit. As to the first question, I do not think that the document (A) is a promissory note, for it provides for the delivery of paddy in addition to the payment of a specific sum of money. Nor do I think that it creates two distinct obligations, as the promises to pay the principal and interest form together the contents of one **[301]** and the same obligation. In *Follett* v. *Moore*, (4 Ex., 410.) Baron Parke said, "To constitute a promissory note, the promise must be to pay a sum certain and nothing else." (*See* also Byles on Bills of Exchange, 12th edition, p. 93.) I am not also sure that the oral agreement was without consideration, since the defendants' release from liability to pay the whole debt, though with remedy over against joint debtors, may be regarded as a consideration sufficient to sustain an action on the new agreement. As for the second question, it seems to me that the claim is not *res judicata*. Section 13 in the Code of Civil Procedure appears to embody three rules of law—1st, that no man shall be vexed twice for one and the same cause; 2ndly, the rule stated by *Vinnius*;* and 3rdly, the rule about the constructive extension of matters of fact, directly and substantially in issue, in the former suit. I do not clearly see how they have application in this case. In order that the first two rules may apply, there must have been an adjudication on the document (A) in the former suit as a matter directly then in issue, and it was referred to only as furnishing a probable motive for setting up an oral agreement which did not, in fact, exist. Reading the Explanation together with the rule enacted in Section 13, it relates, I think, to matters of fact or forms of relief referable to the cause of action in the former suit. Even supposing that it refers to all available grounds of action entitling the plaintiff to the relief then sued for, still I do not see how it can be applied to this case, in which the document (A) was alleged to have been superseded by the oral agreement. The two transactions could not co-exist and they could not simultaneously be made grounds of attack. If there was no novation, I do not see how the original transaction ceased to be operative. This case appears to be similar to a case in which a party sues on a promissory note which turns out to be a waste paper and is then permitted to fall back on the original cause of action. I am thefore of opinion that both questions must be answered in the negative.

NOTES.

['RES JUDICATA'—

A plaintiff, though bound to bring before the Court all grounds of attack available to him with reference to the title which is made the ground of action, is not bound to put forward in one suit all his titles to the subject sued for, is not bound when several independent grounds of action are available to him; to unite them all in one suit :—*See* also 7 Mad. 264; 14 Mad. 1; 5 Bom. 589; 14 Bom. 31.]

Quæ ita agenti obstat si eadem quæstio inter eosdem revocetur, id est, si omnia sint eadem, idem corpus, eadem quantitas, idem jus, eadem causa petendi, eadem conditio personarum.