*Before Mr. Justice Norman and Mr. Justice Phear.*

## COOK AND OTHERS *v.* JADAB CHANDRA NANDI.

1868
Sept. 10.

*Res-adjudicata—Continuing Contract—Estoppel—Damages.*

A, on 1st February 1868, entered into a contract with B to supply him with straw for 12 months: "The supplies to be sent as ordered daily." On the 12th of March, B brought an action in the Small Cause Court against A, "for damages sustained by the plaintiff by reason of A's having failed to supply straw as agreed upon." The Judge decided the questions in issue, namely of the *factum* of the contract and the authority of the person who executed it in A's behalf, in favour of B, and gave him a decree. On the 21st of April, a second suit was brought by B against A on the same contract. The claim was "for damages sustained by the plaintiff by reason of A's having failed to supply straw as agreed, from the 20th February to the 17th April." That suit was dismissed, the Judge holding that the matter was *res-adjudicata* as he considered that the contract was an entire one, and that B had shewn by suing on it for general damages, that he treated it as such, and had elected to rescind it. On the 9th of May, a rule *nisi* was granted for a new trial, and on the 16th May, the rule was made absolute. On the 12th June at the new trial a decree was made in favor of B, for so much of the damages claimed as had been sustained subsequently to the date of the decree of the 25th March. In an action brought by B, on the same contract, for damages sustained between the 17th April and the 16th of June by reason of A having failed to supply straw according to the terms of the same contract, A denied that there had been any such contract; and further pleaded that the matter of the contract, if there had been one, had already been adjudicated upon. On reference from the Small Cause Court, *held*, that the finding of the Judge upon the contract in the action brought on the 12th March was conclusive between the parties, and that A's plea of *res-adjudicata* was not well founded.

THIS was a referenc from the Calcutta Court of Small Causes, for the opinion of the High Court, under section 7 of Act XXVI. of 1864, upon the following questions :

The facts were stated as follows by the first Judge (Mr. Fagan) of the Small Cause Court, in referring the case : "The plaintiffs are now suing for Rs. 987-9-3 for damages sustained by them between the 17th day of April and the 16th day of June 1868, both days inclusive, by reason of the defendant failing to supply straw acording to the terms of the contract entered into by him with the plaintiffs. They put in the contract marked A. which is in the following terms:

"*Calcutta*, 1*st February* 1868.

"I, the undersigned, on behalf of my principal, Jadab Chandra Nandy, of Mitiaburuj, near the Town of Calcutta, do hereby

undertake to supply to Messrs. Cook and Co., of Dharamtollah, for the space of twelve months from the date, all such paddy straw, of a good and serviceable quality, as *per* sample, weighing three seers, left in their office, as may be required for the use of their horses, at the stable in Dharamtollah and elsewhere, during the time specified. The supplies to be sent as ordered daily, and in default of compliance with this condition, Messrs. Cook and Co. shall be at liberty to procure so much, as they may require, from the bazars, and deduct the extra cost from amount of my account against them then unpaid, or should there not be sufficient arrears, I agree to pay them the amount of the difference from succeeding bills.

"The rate to be paid for the straw, shall be three rupees eight annas per kahan of 80 bundles, delivered at either of Cook and Co.'s stables.

(Signature in Bengali.)"

The defendant denied that there had been any such contract, and pleaded, further, that the matter of the contract, if there had been one, had been already adjudicated upon.

"On the 12th March last, the plaintiffs had already sued the defendant for rupees 198 on the same contract. The cause of action was then general, and expressed in the following words, *viz.*, "for damages sustained by the plaintiffs by reason of your failing to supply straw as agreed between you and them." On the 25th March, I decreed that case in plaintiffs' favour. The two questions of the *factum* of the contract and of the authority of the person who executed the contract on his behalf, were directly in issue, and were both decided by me in favor of the plaintiffs. On this ground I considered that the defendant was estopped in the present suit from pleading that there was no such contract between him and the plaintiffs as the plaintiffs relied on.

"On the 21st April last, the plaintiffs instituted a second suit against the same defendant. It was based on the same contract, but the cause of action was special, being limited in time as to the damages claimed. It was in the following terms, *viz.* : "for damages sustained by the plaintiffs by reason of your failing to supply straw, as agreed between you and them from 20th February to 17th April."

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The amount claimed was Rs. 480-9-6. On the 5th May last, I dismissed that suit, holding that it was *res-adjudicata*. I considered that the contract was an entire one, and that the plaintiffs had shewn by suing on it, for general damages, that they treated it themselves as such, and had elected to rescind it. On the 9th May, the second Judge and I concurred in granting a rule *nisi* to shew cause why a new trial should not be had in this second suit. The rule came on for argument before Mr. Thomson and two other Judges, on the 16th May, during my absence from Calcutta, and was made absolute; and on the 12th June, on the new trial, a decree was passed for Rs. 157-12-0, being so much of the damages claimed as had been sustained subsequently to the date of the decree passed by me on the 25th March. In this case, also, the defendant wished to raise again the plea of *non-assumpsit*, but was not allowed to do so, the judgment of the 25th March being considered to operate as an estoppel. In this case now under reference, after the plea of *non-assumpsit* had been disposed of, the plaintiffs replied with respect to the plea of *res-adjudicata* that the defendant was estopped from raising it, inasmuch as that very issue had been raised on the argument of the rule *nisi* on the 16th May, and had been decided against him. Defendant had then relied on the judgment of the 25th March as terminating all questions of damage arising out of non-performance of the contract marked A, and it had then been ruled that the judgment of the 25th March established the validity of the contract, but had no such effect as to determine that the damages awarded were in respect of the whole contract, that question not having been then raised and it being impossible at the time for plaintiffs to prove more damages than had actually at the date of that suit been sustained. As it is certain that this plea was raised, argued, and decided on the 16th May, I considered that plaintiffs are right in contending that the defendant is estopped from raising it again now, althongh I am not sure that I should have concurred in the decision of the 16th May, as I certainly understood, the suit of the 21st March to be for general damages on the entire contract, and the terms of the cause of action seem to point to the same conclusion. Still this question was perhaps not directly raised

if the first suits, and the decisions of the 16th May and 12th June are, at any rate, final judgments of this Court; and I cannot re-open them without assuming to myself the right, which I do not possess, of sitting in appeal from the judgments of my brother Judges."

The following were the questions submitted for the opinion of the Court:

1. Whether the defendant was estopped by the decision of the Court dated March 25th, 1868, from raising in a second suit the plea of *non-assumpsit*?

2. Whether the defendant was estopped by the judgments of the Court of the 16th of May and 12th of June 1868 from raising the plea of *res-adjudicata*, and basing it on the judgment of March 25th, with respect to the question of damages?

Subject to the opinion of the High Court, a decree was given for the plaintiff for the whole sum claimed, with costs.

The *Advocate General* (Mr. *Evans* with him), for the plaintiffs, contended, that defendant was estopped from raising either the plea of *non-assumpsit*, or that of *res-adjudicata*, and cited the cases of *Boileau* v. *Rutlin* (1); *Routledge* v. *Hislop* (2); *Lord Bagot* v. *Williams* (3); and *Mohi Sahu* v. *Forbes* (4). [NORMAN, J., referred to *Martindale* v. *Smith* (5).]

Mr. *Kennedy*, for the defendant, contended that the action was not maintainable. The plaintiff might have sued in the Small Cause Court for the whole damages, treating the contract as renounced; but now having sued only for some of the damages, he must be considered to have made his election of the way he should get his remedy. *Goodman* v. *Pocock* (6); *Hochster* v. *De La Tour* (7); *Richardson* v. *Mellish* (8); Per Pollock, C. B., *in Grimbly* v. *Aykroyd* (9):—The plea of *res-judicata* is open to the defendant—*Kripa Ram* v. *Bhagwan Das* (10)—and is a bar to the action. The defendant is not estopped in any way by

(1) 2 EXCH., 665.
(2) 29 L. J., M. C., 90
(3) 3 B. and C., 235.
(4) 6 W. R., Act X. Rul., 61.
(5) 1 Q. B., 389.
(6) 15 Q. B., 576.
(7) 2 E. and B., 678.
(8) 2 Bing., 229.
(9) 1 EXCH., 479.
(10) 1 B. L. R. (A. C.) 68.

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the record, and it is only by the record he can be estopped. A record cannot be supplemented by evidence.

Mr. *Branson*, on the same side.—The plaintiff might have waited until the end of the twelve months, or he might at once have brought his action treating the contract as rescinded, *Mansuk Das* v. *Rangya Chetti* (1). He chose to treat it as rescinded, and he cannot now treat it as existing, and bring an action for the breach of it.

*The Advocate General*, in reply.—It appears from the record that the contract was denied in the three actions, and the Judge says all the actions are brought on the same contract; which must be taken to be the fact. It has been said that the same question is raised here as in the second action, but that is not so. It need not appear in the record that the action is not the same. *Hitchin* v. *Campbell* (2).

NORMAN, J.—It appears that in a suit on the same written contract, instituted on the 12th of March in this year, for breaches of it, which had then been committed, the defendant put in an answer in these terms: "Denies liability." The Judge says, "the two questions of the *factum* of the contract, and of the authority of the person who executed the contract on his behalf were directly in issue, and were both decided by me in favor of plaintiffs," who had judgment accordingly. The Judge says, "on this ground I consider that the defendant was estopped "in the present suit from pleading that there was no such con- "tract between him and the plaintiffs, as the plaintiffs relied on."

The effect in evidence of a verdict on a former trial on the same point between the same parties is dicussed at great length by Lord Ellenborough in delivering the judgment of the Court of King's Bench in the case of *Outram* v. *Morewood* (3). He concludes by saying, "none of the cases cited on the part of the plaintiffs negative "the conclusiveness of a verdict found on any "precise point once put in issue between the same parties. The

(1) 1 Mad. H. C. R., 162.

(2) 2 W. Blackstone, 779, 827.

(3) 3 East, 346, 366.

cases adverted to on the other side are, in our opinion, as well as upon the reason and convenience of the thing, and the analogy to the rules of law in other cases, decisive that the defendants in this case are estopped by the former verdict and judgment on the same point in the action of trespass." In the *Duchess of Kingston's case* (1), in delivering the opinions of the Judges in the House of Lords, Chief Justice DeGrey says: "From the variety of cases relative to judgments being given in "evidence in civil suits, the deduction seems to follow as gener- "ally true, that the judgment of a Court of concurrent jurisdic- "tion directly upon the point is, as a plea, a bar, or, as evidence, "conclusive between the same parties upon the same matter "directly in question in another Court."

Such being the law, I think that as the same point directly in issue was tried and decided in the former suit, and as a decree upon such finding passed against the defendant, the former decision may be treated as a conclusive finding that the defendant did contract as alleged. I do not desire to be understood as saying that such a finding is necessarily and in all cases absolutely conclusive. But here it is not suggested that the former decision was obtained by fraud, or surprise, or that there was any fraud whatever for re-opening the question once solemnly decided.

As to the second point—The contract is a contract to supply straw for a period of 12 months, the supplies to be sent as ordered daily. It appeaas that on the 12th of March the plaintiffs sued "for damages by reason of the defendants failing to supply straw as agreed." They claimed and recovered Rs. 198.

One of the questions raised by the defendant is whether, after a recovery of damages on a plaint so framed, any second action can be maintained by the plaintiff on the contract; it was gravely argued that the contract was not severable. It seems to me that it would be just as reasonable to contend that if a man lets a house for a year, at a monthly rent, he could not sue month by month for his rent. Day by day, as the defendant fails to supply straw as ordered, new breaches of the contract arise, and in respect of such breaches new causes of action arise from day to

(1) 2 Smith's L. C., Ed. 1867, 979.

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day. It is quite clear that in the suit brought on the 12th of March, the plaintiffs were only entitled to recover damages for the breaches that had occurred down to that day, and the damages were not, and could not have been a satisfaction of subsequent breaches. Whether the plaintiffs could have rescinded the contract or not, there is nothing whatever to lead to the inference that they did so, certainly no such inference can be drawn from the fact that they took the most active steps to enforce the contract, by suing promptly for breaches of it.

Whether the claim now made was adjudicated upon in the suit of the 12th of March ; is a question of fact. If there was a doubt about it arising from any ambiguity in the frame of the former plaint, it was open to the plaintiffs to shew by extrinsic evidence that the causes of action were not the same. That was decided in *Bagot* v. *Williams* (1).

The second point stated was not argued before us. I may observe, however, that the decision, in the former suit, of the Judges of the Small Cause Court, on the motion for the new trial, over-ruling that of the first Judge on a mere point of law, though properly followed by the learned first Judge in this suit, is not an estoppel. The decree appears to be perfectly correct. The defendant must pay the costs of the case sent up.

PHEAR, J.—Generally a plaintiff's cause of action in any suit (excepting certain limited classes of suits) may be considered as divided into two essentially distinct parts, namely ;

1. A right on his side, proprietary, contractual, or resting on duty as against the defendant.

2. Infringement of that right by the defendant.

If the right be put in issue, and a judicial decision be arrived at on that issue, whether affirming or negativing the right, I think the decision is conclusive between the same parties in any future action which may be brought by either of them against the other relative to the same matter of right (see *Outram* v. *Morewood*) (2).

In the case before us all three of the plaintiffs' actions were founded upon the same right, *viz.*, the right created by the alleged

(1) 3 B. and C., 239. (2) 3 East, 346.

contract, the cause of actions differed, if at all, the one from the others, in the acts of infringement which were complained of. The learned first Judge of the Small Cause Court states that the right under the contract was put in issue in the first action, and judicially determined in favor of the plaintiffs. It seems to me, therefore, that the defendant could not in the succeeding action again dispute the plaintiffs' right which had been so determined. I also think from the learned Judge's statement that the contract was a continuing contract not capable of being discharged by one act of the defendant, but requiring for its fulfilment a series of such acts extending over a considerable period of time. Had one act, of the defendant sufficed for due performance on his part, and had the action been brought against him for his omission to do this act, there could have been force in Mr. Kennedy's argument urged to show that no second action would lie. The matter of the contract between the parties would have been brought to an end by reason of the plaintiff having sued the defendant in respect of the whole of that which it lay upon the latter to do. The plaintiff could not enjoy simultaneously a remedy in the shape of damages, and a continuing right of performance in respect of the same thing. But nothing of that kind has, in my opinion, happened here. The plaintiff brought his first suit merely for such default of the defendant, under the contract, as had taken place at the time of instituting the suit. He did not, as he probably might, elect to treat the defendant's default as sufficient ground for rescinding the contract and sue as for non-performance of the whole. He chose rather to keep the defendant to his bargain and to maintain his right to receive from him the benefit of the continuing contract, notwithstanding the breaches thereof, which the latter had already committed. This course, he was, I think, perfectly entitled to take (see *Unwin* v. *Clarke* (1) and cases there cited) even although the defendant had, previously to the institution of the first suit, unmistakeably, exhibited his intention not in any way to perform his part in the contract. This being so, while the right which formed the basis of the cause of action remained the same in all the suits, the

(1) 1 L. R. Q. B., 417.

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infrigement complained of was different in the different suits and consequently the several causes of action differed.

On the whole, therefore, I am of opinion that in the second and third suits, the defendant ought not to be allowed to dispute the contract, and that his plea of *res-adjudicata* is not well founded.

Attorneys for the plaintiff's ; *Messrs Carruthers and Co.*
Attorney for the defendants : Baboo *D. C. Dutt.*

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*Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Markby.*

BARLOW (PLAINTIFF) APPELLANT *v.* COCHRANE (DEFENDANT) RESPONDENT.

1868
*July* 3.

*Sale of Goods—Specific Appropriation—Insolvent Act—Order and Disposition—Equitable Assignment.*

In 1862, the plaintiff's former firm of J. S. B. and B., of Manchester, entered into an agreement with S. and Co., of London, and B. and Co., of Calcutta, to purchase and ship, on the joint account of the three firms, certain goods to B. and Co., each firm taking one-third share of the profit or loss in the transaction ; and by the agreement, it was stipulated as follows :—

"J. S. B. and B. to draw at six months on S. and Co., for cost of goods, including "packing charges ; said bills to be discounted (and domiciled) at Overend, Gurney "and Co's, at 1½ per cent. in excess of Bank minimum rate. B. and Co. to remit "their three months', or six months, drafts as may appear most desirable on S. and "Co., in favor of J. S. B. and B., which Overend, Gurney and. Co. agree to take at, "1½ above Bank minimum rate for three months, and 1½ per cent. for six months, as "provision for said six months' drafts. B. and Co., on sale of goods, to specially "remit proceeds to Overend, Gurney and Co., in first class bills drawn in favor of "Overend, Gurney and Co. Overend, Gurney and Co. agree to give up B. and Co.'s "drafts on S. and Co., on receipt of the said remittances under rebate. In the event "of S. and Co., being brought under cash advances, J. S. B. and B. agree to find "cash to the extent of one-third the amount." In 1863, J. S. B., one of the members of the firm of J. S. B. and B., retired from the firm which was carried on under the name of T. B. and Bro., and the agreement of 1862 was continued by that firm with the two other firms of S. and Co. and B. and Co. Under it certain goods were, in September, October, and November 1866, purchased by the plaintiff, and shipped to B. and Co., on triplicate account, and bills were drawn by the plaintiff on S. and Co. as agreed, and were deposited with A. C. and Co., not with O. G. and Co. On the 2nd of January 1867, in consideration of the plaintiff taking on himself all the risk attaching to the said goods, S. and Co. and B. and Co. transferred all their right, title, and interest in the said goods to the plaintiff. This agreement was signed on behalf of B. and Co. by L. B. in his own name, one of the members of the firm then