The learned Judge then proceeded to consider the other objection, which is not material to this report.

MARKBY, J.—I concur.

Appeal dismissed.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Markby.

HEMENDRO COOMAR MULLICK, SON OF ROOPLALL MULLICK (PLAINTIFF) *v.* RAJENDROLALL MOONSHEE AND ANOTHER (DEFENDANTS).

1878 *Jany.* 28 *and Feby.* 11.

Joint Contractors, Suit against—Res Judicata—Contract Act (IX of 1872) s. 43.

A suit in which a decree has been obtained against one of several joint makers of a promissory note, is a bar to a subsequent suit against the others. The effect of s. 43 of the Contract Act is not to create a joint and several liability in such a case. That section merely prohibits the defendant in such a suit pleading in abatement, and thus places the liability arising from the breach of a joint contract and the liability arising from a tort on the same footing.

The rule laid down in the case of *King* v. *Hoare* (1), and *Brinsmead* v. *Harrison* (2), is one of principle, not merely of procedure.

APPEAL from a decision of Kennedy, J., dated the 20th of August 1877. The suit was brought to recover the sum of Rs. 1,000, with interest at 12 per cent. per annum, due on a promissory note payable on demand, made in Calcutta by one Gourhurry Shaw, in his name and in the names of his partners, the defendants, on the 28th of November 1873. The plaintiff, on the 2nd September 1874, brought a suit against the two present defendants and Gourhurry Shaw on the promissory note, and in that suit the defendants did not appear. The suit was heard as an undefended suit, and the plaintiff obtained a decree against the defendant Gourhurry alone for the whole amount of the note, the decree ordering that the suit should be withdrawn as against the two present defendants with liberty

(1) 13 M. & W., 494, 505.
(2) L. R., 7 C. P., 547.

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to the plaintiff to bring a fresh suit against them for the same matter. No satisfaction of the decree having been obtained, the present suit was brought to recover the amount against the two defendants as to whom the suit had been withdrawn.

At the hearing the preliminary question was suggested by the Court that the suit was not maintainable, and after argument the suit was disposed of on this point.

KENNEDY, J.—In this case I am asked to hold that the 43rd section of the Contract Act converts into a joint and several promise every joint contract, because it makes in the absence of special agreement every joint contract enforcible against any one of two or more joint promisors. I cannot hold that. The Statute makes no further alteration than it professes to do: it leaves the law without the slightest change, except that it abolishes the plea in abatement for non-joinder of defendants in the very cases in which it was available in the later state of the law. Before the Contract Act the promisee could compel one of the promisors to perform a joint and several promise, unless he was met by the plea in abatement; and when he was compelled to make them all parties, yet so soon as judgment was recovered, he could enforce it against any one of them: and we must remember that the question of pleading really had little, if anything, to do with the objection. The language of Parke, B., in *King* v. *Hoare* (1) puts the reason in a very clear light. He says:—"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. The party injured may sue all the joint tortfeasors or contractors, or he may sue one, subject to the right of pleading in abatement in the one case and not in the other; but for the purpose of this decision they stand on the same footing, whether the action is brought against one or two, it is for the same cause of action. The distinction between the case of a joint and several contract is very clear. It is argued that each party to a joint contract is severally liable, and so he is in one sense; that if sued seve-

(1) 13 M. & W., 494, 505.

rally, and he does not plead in abatement, he is liable to pay the entire debt: but he is not severally liable in the same sense as he is on a joint and several bond, which instrument, though on one piece of parchment or paper, in effect comprises the joint bond of all and the several bonds of each of the obligors, and gives different remedies to the obligee." And he proceeds at p. 506, after a reference to the effect of a plea in abatement:—"These considerations lead us quite satisfactorily to our own minds to the conclusion that where judgment has been obtained for a debt as well as a tort, the right given by ther ecord merges the inferior remedy by action for the same debt or tort against another party."

This decision was referred to and upheld in *Brinsmead* v. *Harrison* (1), affirming the judgment of the Common Pleas (2). Indeed, that being the case of a tort, is somewhat stronger, as in that case a plea in abatement for non-joinder of a defendant could never have been maintained.

How does the question now stand affected by the Contract Act? I confess myself to be wholly unable to see that, except so far as the question of pleading, it has made any difference in the liabilities of the parties. There was a decision of *Ram Nath Roy Chowdry* v. *Chunder Seekur Mohapattur* (3), which might seem favorable to the plaintiff's contention. It is not very clearly reported, but it would seem that the bond there was executed only by one party, the person first sued, and the subsequent suit only based on a supposed equitable liability of the defendant. However that may be, the decision was afterwards considered in a case before Sir R. Couch and Ainslie, J. —*Nuthoo Lall Chowdry* v. *Shoukee Lall* (4)—in which the Court dissented from the case of *Ramrutton Roy* (3), which was a decision of the majority (E. Jackson and Trevor, JJ., against Steer, J.), and it was there laid down in express terms (see p. 204) that if there be a joint contract, not a joint and several but a joint contract, and the party sues upon it and gets judgment, he cannot bring a fresh suit against the parties

(1) L. R., 7 C. P., 547.
(2) *Ib.*, 6 C. P., 584.
(3) 4 W. R., 50.
(4) 10 B. L. R., 200.

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who were jointly liable but were not included in the former suit. This is a direct decision of the Appellate Court, and the language of the Statute by no means contemplates successive suits. This very case shows the necessity of such a rule. A speculative attorney might bring three suits instead of one, and I am bound to put the construction in the language of the Statute, which prevents such an abuse as this—an abuse in the possibility of which Kelly, C. B., much relies in *Brinsmead* v. *Harrison* (1). The plaintiff may select one. He may sue all, but he cannot do both, he must make his selection and abide by it.

In this case, to use the words of Lord Justice Turner in *Ex parte Higgins* (2), the plaintiff has made his deliberate election to pursue his remedy "against one debtor, and that having failed, he is now attempting to have recourse to the others;" and I must, therefore, dismiss this suit against the now defendants with costs on scale 2. The order withdrawing the suit against these defendants with liberty to sue again made as it were behind the backs of these defendants cannot in any way prejudice them.

From this decision the plaintiff appealed. The appellant having died pending the appeal, his son was substituted as a party appellant in the suit.

The ground of appeal was "that the Court was in error in holding that the suit could not be maintained by reason of the judgment recovered in the former suit, the said judgment remaining and being unsatisfied, and leave having been by the said judgment reserved to the plaintiff to bring a fresh suit against the present defendants."

Mr. *Hill* (Mr. *Bonnerjee* with him) for the appellant contended that the suit was not barred. The effect of s. 43 of the Contract Act was to make each one of several joint contractors severally liable; to make every joint contract in fact a joint and several one. Since that Act the case of *King* v. *Hoare* (3) as to a suit against one of two joint debtors being a bar to a suit

(1) L. R., 7 C. P., 547. (2) 3 De Gex. & J., 38.
(3) 13 M. & W., 494, 505.

against the others, would not be law here. Nor would it in England since the passing of the Judicature Act; see the Schedule Order 19. The contract if joint and several is a contract that the creditor may sue the debtors jointly and severally, but each debtor has a right to refuse to be sued alone by pleading in abatement; see *per* Alderson, B., in *King* v. *Hoare* (1), at p. 498. By Statute 3 & 4 Will. IV, c. 42, the plea in abatement was abolished as to a co-contractor out of the jurisdiction; and in *Henry* v. *Goldney* (2) the effect of such abolition was said to be "to make contracts joint and several which at first were joint only," see *per* Pollock, C. B., at p. 499; and that is precisely what I contend is the effect of s. 43 of the Contract Act. Subject to the plea in abatement, "a joint bond is the bond of both obligees, and each of them is bound in the whole"—*Richards* v. *Heather* (3), *Whelpdale's Case* (4). And where any part of the demand on a joint and several bond remains unsatisfied, you can sue the other of two co-contractors, though judgment has been obtained against one—*Lechmere* v. *Fletcher* (5). [GARTH, C. J.—In the case of tortfeasors you can only sue once.] A case of tort is different, there is only one cause of action; in case of contract there are many, see s. 43 of the Contract Act, s. 43, illus. (a). [MARKBY, J., referred to *Nuthoo Lall Chowdry* v. *Shoukee Lall* (6). How do you get rid of that case?] That case draws a distinction between joint contract and joint and several contract, and it was, moreover, decided before the Contract Act. [MARKBY, J.—Did the Contract Act do more than bring the law in the Presidency towns into the same state as in the mofussil? I never heard of a plea in abatement in the mofussil, though the judgment in that case seems to assume there was.] Several causes of action are created by the contract which nothing done by the plaintiff can defeat. It is submitted that the effect of the plea in abatement by s. 43 is the same as it was held to be in England in the abolition of that plea as to a co-debtor out of the jurisdiction. As to that see *Joll* v. *Curzon* (7). [GARTH, C. J.—The abolition of the plea

(1) 13 M. & W., 494, 505.
(2) 15 M. & W., 494.
(3) 1 B. & Ald., 33.
(4) 3 Coke's Rep., Part V, 119.
(5) 1 C. & M., 623.
(6) 10 B. L. R., 200.
(7) 4 Com. B., 249.

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in abatement by s. 43 of the Contract Act seems to me to leave the case of a contract in the same position as the case of a tort; and as to torts, the question has been decided by the case of *Brinsmead* v. *Harrison* (1).] In cases of tort the injury sustained by the person complaining is the whole cause of action; the cause of action is whole and undivided. In cases of contract, the cause of action is a breach by *A.* when we sue him; a breach by *B.* when we sue *B.*, and so on, there are several causes of action. There is no *res adjudicata* here to prevent this suit from being maintained. The only *res adjudicata* is under s. 2, Act VIII of 1859. But here the cause of action and the parties are not the same as in the former suit. In the former suit it was decided that Gourhurry Shaw had broken the contract: that is not the question here. Here also there is no merger: no extinguishing of the inferior remedy by the superior as put by Parke, B., in *King* v. *Hoare* (2).

Mr. *T. A. Apcar* and Mr. *Beeby* for the respondents were not called on.

The following judgments were delivered:—

GARTH, C. J.—This suit was brought against the defendants to recover the amount of a promissory note, which was alleged to have been made by them jointly with one Gourhurry Shaw. It appeared from the plaint, that a former suit had been brought by the plaintiff against Gourhurry Shaw and the defendants; but as the note was signed by Gourhurry alone, professing to act for himself and the defendants, and as the plaintiff did not prove at the trial that Gourhurry had authority to act for the defendants in making the note, the plaintiff obtained a decree against Gourhurry alone, leave being reserved to the plaintiff by the learned Judge to bring another suit upon the note against the present defendants.

No satisfaction of the debt having been obtained against Gourhurry under the former decree, the plaintiff brought the present suit; but the defendants' object in the first instance, that

(1) L. R., 7 C. P., 547. (2) 13 M. & W., 494, 505.

as the liability upon the note was a joint one, the judgment obtained against Gourhurry is a bar to this suit, and that the rule laid down in the case of *King* v. *Hoare* (1) is applicable here. The defendants also raise the question, whether the plaintiff had authority to pledge their credit; but if they are right in the question of law, it is not necessary for us to enter upon the question of fact.

The learned Judge in the Court below has decided the point of law in the defendants' favour, and I entirely agree with him.

The rule which was laid down by the Court of Exchequer in the case of *King* v. *Hoare* (1), and subsequently by the Exchequer Chamber in the case of *Brinsmead* v. *Harrison* (2) is not a rule of procedure only, but of principle,—*viz.*, that a judgment obtained against one or more of several joint contractors or joint wrong-doers operated as a bar to a second suit against any of the others. There is but one cause of action for the injured party in the case of either a joint contract or a joint tort; and that cause of action is exhausted and satisfied by a judgment being obtained by the plaintiff against all or any of the joint contractors or joint wrong-doers whom he chooses to sue. If a plaintiff, under such circumstances, were allowed to sue each of his co-debtors or wrong-doers severally in different suits, he would be practically changing a joint into a several liability.

This rule is so fully explained by Baron Parke, in *King* v. *Hoare* (1), and by Chief Baron Kelly in *Brinsmead* v. *Harrison* (2), that I do not think it necessary to enlarge further upon it.

It is a rule which in my opinion is founded on strict justice and public convenience; and it has been acted upon in this Court in the case of *Nuthoo Lall Chowdry* v. *Shoukee Lall* (3).

It was much pressed upon us in the argument by Mr. Hill, that the effect of s. 43 of the Indian Contract Act is to enable a promisee to sue one or more of his joint promisors severally in two or more suits; or, in other words, to change a joint liability into a several one at the option of the promisee; but this, I conceive, is not the object or effect of the section. It merely

(1) 13 M. & W., 494, 505. (2) L. R., 7 C. P., 547.

(3) 10 B. L. R., 200.

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allows the promisee to sue one or more of several promisors in one suit; and so practically prohibits a defendant in such a suit from objecting that his co-contractors ought to have been sued with him.

It is true that the rule upon which I am acting may possibly lead to some hardship in cases when one or more of several co-contractors is out of the jurisdiction, and the plaintiff, if he waits for his return, would be barred by the Statute of Limitation. But this is an injustice which the legislature, if they so pleased, could easily remedy, and which has been, in fact, remedied in England by the Statute of 19 and 20 Vict., c. 97.

I consider, therefore, that the appeal should be dismissed with costs on scale No. 2.

MARKBY, J.—This suit was brought against the defendants to recover the amount due upon a promissory note. It was stated in the plaint that the note was made by one Gourhurry Shaw, who carried on business in partnership with the defendants; that a suit had been previously brought against Gourhurry Shaw and the present defendants; and that on that occasion the plaintiff had obtained a decree against Gourhurry alone. By this decree the former suit as against the present defendants was ordered to be withdrawn at the request of the plaintiff with liberty to the latter to bring a fresh suit against them for the same matter.

It was admitted by the defendants that they carried on business as ordinary traders in partnership with Gourhurry Shaw, and they did not deny the making of the note by Gourhurry; but they denied that Gourhurry had any authority to bind his partners by the note, which they alleged to have been in fact made for the purchase of another business in which Gourhurry was concerned.

No evidence was given in the case, but it is admitted that nothing has been recovered by the plaintiff upon the decree against Gourhurry. The learned Judge below dismissed the suit upon the ground that the plaintiff having elected to take a decree in the former suit against one of the joint-makers of the note only, could not bring another suit against the other joint-makers.

The note was not produced, so that we do not know the exact form of it. The question, however, as I understand it, which is

submitted for our consideration, is this: if several persons carrying on an ordinary trading partnership make a joint promissory note, and one partner be sued upon it and a decree obtained, is any subsequent suit upon the same note against the remaining partners barred, even although nothing has been recovered upon the former decrees? If this question be answered in the affirmative, the appeal is to be dismissed.

I also understand it to have been conceded on the argument that this is a question which is to be determined by the English Law of Contract, except so far as the same may have been modified by the Indian Contract Act. I think it impossible to deny that, under the English law, this suit would have been barred, and notwithstanding the great authority of Mr. Justice Willes, who seems to think otherwise, I should say, not as a mere rule of procedure, but upon principle of the Law of Contract. If this were a mere matter of procedure, the English law would not necessarily bind us. But I understand Parke, B.'s judgment in *King* v. *Hoare* (1), which is the leading authority, to rest upon this, that, under a joint contract to pay a sum certain, there is but one single obligation which may indeed be enforced severally, but can be enforced once only.

Other principles are stated in the judgment, but they are either based upon rules of pleading not applicable to the case now under consideration, or they apply only to cases where the suit is brought to recover damages and not for a sum certain.

Of course, in all questions of this kind, the liability must depend ultimately upon the intention of the parties; but I consider that it is now finally settled by the law of England that, apart from a Statute which I shall notice presently, and which is not applicable here, a joint promissory note creates an obligation which can be sued on once only.

If this be, as it seems to me to be, the true mode of stating the law, all difficulty about the further question which has been argued disappears. Mr. Hill contended that s. 43 of the Contract Act did away with the rule that the second suit was barred in such a case as this. But that section does no more than place the liability arising from the breach of a joint contract

(1) 13 M. & W., 494, 505.

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and the liability arising from a tort upon the same footing,—that is to say, that each wrong-doer is liable to be separately sued in respect of the whole liability. But it does not touch that which has been determined to be the nature of the obligation created by the breach of contract,—namely, that it is one which can be sued on once only.

I have searched into this matter with some care in order to see if the rule laid down in *King* v. *Hoare* (1) was really binding upon us, because if it was not, I think it would require some consideration how far it is desirable that in such a case as this a note made by an ordinary trading partnership, the second suit should be barred. The rule laid down by Parke, B., in *King* v. *Hoare* (1) is very likely correct in theory. It is at any rate identical, or nearly identical, with the strict rule of the ancient Roman law. But it must be borne in mind that this rule was abolished in the Roman law 1300 years ago; and has been since repudiated in America and everywhere in Europe, except in England. Even in England, until the decision of *King* v. *Hoare* (1) it was very doubtful whether the rule prevailed or not in joint contract; whilst since that time one learned Judge (Sir James Knight Bruce) has spoken of the rule in strong terms of disapprobation (27 L. J., Bank., 29). Lord Mansfield also expressed the opinion in *Rice* v. *Shute* (2) that all contracts with partners were joint and several; and the rule in *King* v. *Hoare* (1) has been since modified by Statute in England. The 19 and 20 Vict., c. 97, s. 11, directs that the period of limitation as to joint-debtors shall run notwithstanding that some are beyond seas; but expressly provides that the creditor shall not be barred as against those out of the jurisdiction by judgment recovered against those who remain within it. If the rule laid down in *King* v. *Hoare* (1) be combined with the law of limitation here, which is very strict, it is by no means clear that a creditor might not very often be left to the choice between a remedy against an insolvent debtor and having his debt barred.

I do not deny that there are important considerations of con-

(1) 13 M. & W., 494, 505. (2) 1 Sm. L. C., 6th ed., 513.

venience the other way. These considerations have been pointed out and insisted on by several learned Judges of great experience in England, and just now by the Chief Justice. I only say that if I were at liberty to enter upon the general question of convenience, I should hesitate much before applying to this country without any qualification the rule laid down in *King* v. *Hoare* (1). As it is, however, I am bound to follow that decision, and to hold that this being a case governed by the English law, the learned Judge was right in dismissing the suit.

Appeal dismissed.

Attorneys for the appellant: Messrs. *Remfry* and *Rogers*.

Attorney for the respondent: Baboo *B. M. Doss*.

APPELLATE CIVIL.

Before Mr. Justice L. S. Jackson and Mr. Justice Kennedy.

DOSS MONEY DOSSEE (DEFENDANT) *v.* JONMENJOY MULLICK (PLAINTIFF).*

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Res Judicata—Simple Mortgage Bond—Mortgagee's Lien—Money Decree—Mortgagor's Right, Title, and Interest sold—Registration Act—Summary Procedure under—Act XX of 1866, *s.* 53—*Act VIII of* 1859, *s.* 2.

A having a simple mortgage bond, which was specially registered, obtained a summary decree under the provisions of the Registration Act, and attached the lands under mortgage to him. Prior to *A's* decree these lands had been attached by other creditors and subsequent to *A's* decree they were sold to *B*. After such sale, *A*, under his attachment, sold the right, title, and interest of the mortgagor which he himself purchased. *A* now sued the mortgagor and *B* to enforce his mortgage lien against the mortgaged properties.

Held that, according to the decision of *Syud Eman Momtaz-ood-deen Mahomed* v. *Rajcoomar Dass* (2), the suit should be dismissed.

* Special Appeal, No. 60 of 1877, against the decree of L. R. Tottenham, Esq., Judge of Zillah Midnapore, dated the 30th August 1876 reversing the decree of Baboo Jadoonath Roy, Subordinate Judge of that district, dated the 21st June 1875.

(1) 13 M. & W., 464, 505. (2) 14 B. L. R., 408.