PRIVY COUNCIL. 1922.

YORKSHIRE INSURANCE CO. LTD. v. CRAINE.

the public interest the jurisdiction conferred upon it. Every word of Lord *Watson's* judgment is, in their Lordships' view, applicable to this case, and they think that on this question of estoppel by conduct, namely, the taking of the possession of the plaintiff's premises, the appeal, on the proper construction of condition 12, fails; and they will humbly advise His Majesty accordingly.

Having regard to the appellants' undertaking given when special leave to appeal was granted, they must pay the respondent's costs of the appeal as between solicitor and client.

[HIGH COURT OF AUSTRALIA.]

BUCKNELL . . . . . APPELLANT;
DEFENDANT,

AND

O'DONNELL . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1922.

SYDNEY, *Sept.* 14, 15.

KNOX C.J., GAVAN DUFFY AND STARKE JJ.

Contract—Sale of goods—Agreement by another to pay the price—Judgment obtained against purchaser—Action against other for price—Estoppel.

Held, that, where A agreed to sell certain goods to B for a certain price and to deliver them on a certain day, and C afterwards agreed with A that, if A supplied and delivered those goods to B for that price on that day, C would pay to A the price for those goods, an unsatisfied judgment obtained by A against B for the price is not a bar to a subsequent action by A against C for the same price.

Isaacs & Sons v. *Salbstein*, (1916) 2 K.B., 139, followed.

Decision of the Supreme Court of New South Wales: *O'Donnell* v. *Bucknell*, (1922) 22 S.R. (N.S.W.), 339, affirmed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by Michael O'Donnell against Norman Charles Bucknell to recover the sum of £8,528 4s. 3d. By the first count of the declaration it was alleged that the plaintiff sued the defendant "for that in consideration that the plaintiff would supply and deliver certain merino ewes with certain lambs at foot to one Edmund Wentworth Daniel and one Keith Edman Bucknell for a sum of money to be agreed upon between the plaintiff and the said Edmund Wentworth Daniel and Keith Edman Bucknell bearing interest at a rate to be agreed upon between the plaintiff and the said Edmund Wentworth Daniel and Keith Edman Bucknell, the defendant promised the plaintiff to pay to the plaintiff the said sum and interest thereon calculated at the rate aforesaid, and the plaintiff did supply and deliver the said ewes and lambs to the said Edmund Wentworth Daniel and Keith Edman Bucknell and did agree with the said Edmund Wentworth Daniel and Keith Edman Bucknell upon the said sum of money therefor and the said rate of interest, and all things happened and all conditions were fulfilled and all times elapsed necessary to entitle the plaintiff to the performance by the defendant of his said promise and to sue for the breaches thereof hereinafter alleged, and the said sum of money and interest calculated at the rate aforesaid became due and payable by the defendant to the plaintiff yet the defendant did not nor would pay any part of the said sum of money or the said interest to the plaintiff, and the same remains wholly due and payable by the defendant to the plaintiff and unpaid."

The action was heard before *Ferguson* J. and a jury. From the evidence for the plaintiff it appeared as follows:—Prior to 13th October 1920 the plaintiff had agreed to sell to Edmund Wentworth Daniel and Keith Edman Bucknell (a nephew of the defendant), of Alice Downs, Moree, 3,600 merino ewes of a certain age, with between 300 and 400 lambs at foot, for the price of 45s. per head, lambs at foot being given in, payment to be by a promissory note with a currency of six months and indorsed by the defendant, and delivery to be given on or before 9th October 1920. The agreement also included a provision for arbitration in the event of any dispute between the parties. On 13th October 1920 the plaintiff's brother,

H. C. OF A. 1922.

BUCKNELL v. O'DONNELL.

Francis Stephen O'Donnell, who was then acting as the plaintiff's agent, saw the defendant, when a conversation, which was substantially as follows, took place between him and the defendant:— O'Donnell: "I have come up to see you about those ewes." The defendant: "Oh yes, those ewes for Alice Downs." O'Donnell: "Yes. I have come up particularly to see you in reference to them and find out if you are behind the boys, having had no word from you direct before I came up to see you with reference to them." The defendant: "I think the boys have bought the ewes too dear; in fact I have written to Daniel and told him that I think they have bought them too dear." O'Donnell: "I am sure they are not too dear, they are worth the money; I have had an application for them at £2 2s. for cash payment. It is necessary for me to know how I stand before I will give delivery of those ewes." The defendant: "Oh Frank, you know me, a contract is a contract. I told them to buy the ewes, and you deliver them and I will pay you." O'Donnell: "Well, that is satisfactory, I will go down to Moree and deliver the ewes to-morrow." On 14th October the plaintiff delivered the ewes to Edmund Wentworth Daniel and Keith Edman Bucknell. The defendant did not indorse any promissory note as provided in the agreement. A dispute arose as to the ages of some of the ewes; and, the parties failing to agree, the plaintiff brought an action against Edmund Wentworth Daniel and Keith Edman Bucknell for the price agreed to be paid. In that action the parties consented to the matter being referred to arbitration, and, the arbitrator having made an award in favour of the plaintiff, judgment was entered for the plaintiff for £8,075 5s. and interest at 6½ per cent. per annum from 14th October 1920 to the date of the award. That judgment remained wholly unsatisfied at the time the present action was brought.

At the close of the plaintiff's case in the present action, counsel for the defendant moved for a nonsuit on the ground that upon the evidence the plaintiff's rights of action against the defendant and against Edmund Wentworth Daniel and Keith Edman Bucknell were alternative and that, having elected to pursue his remedy against Edmund Wentworth Daniel and Keith Edman Bucknell to judgment, his action against the defendant was barred. *Ferguson* J. dismissed

the application for a nonsuit, holding that where there are two separate and distinct contracts, even although they are in respect of the same subject matter, the fact that the plaintiff sues the person who is liable under one contract does not prevent the plaintiff from afterwards suing the person who has made himself responsible under the other contract. Evidence was then called for the defendant. In his summing-up to the jury *Ferguson* J. told them that if the plaintiff had satisfied them that the defendant promised to pay for the sheep, then the plaintiff was entitled to a verdict for the amount agreed to be paid for the sheep, namely, £8,075 5s., and six months' interest amounting to £262 8s. 10d., a total sum of £8,337 13s. 10d. The jury found a verdict for the plaintiff for £8,337 13s. 10d.

The defendant moved before the Full Court by way of appeal to set aside the verdict and to enter a verdict for the defendant or to grant a new trial. At the hearing of the appeal the plaintiff consented to the verdict being reduced by the sum of £262 8s. 10d., and an order was made reducing the verdict accordingly and otherwise dismissing the appeal with costs: *O'Donnell* v. *Bucknell* (1).

From that decision the defendant now appealed to the High Court.

Alec Thomson K.C. and *Curtis*, for the appellant. The liability alleged in the first count of the declaration and proved by the conversation to have been incurred by the appellant was alternative to the liability of Daniel and the younger Bucknell, and, as the respondent has elected to enforce the latter liability, his action against the appellant is barred. The respondent's liability arose from his bare promise to pay the price of the sheep, and under the circumstances there could not exist independently the two liabilities in respect of the same subject matter unless the relation of principal and surety existed, in which case the *Statute of Frauds* would be an answer. The position of the appellant is the same as that of a principal against whom it is sought to enforce liability on a contract in respect of which judgment has already been obtained against his agent. The facts in *Isaacs & Sons* v. *Salbstein* (2) are distinguishable; for there the earlier judgment was recovered against

(1) (1922) 22 S.R. (N.S.W.), 339. (2) (1916) 2 K.B., 139.

H. C. OF A. 1922. BUCKNELL v. O'DONNELL.

a fictitious person. [Counsel also referred to *Birkmyr* v. *Darnell* (1); *Chitty on Contracts*, 16th ed., p. 560; *Morel Bros. & Co.* v. *Earl of Westmoreland* (2); *Scarf* v. *Jardine* (3); *Verschures Creameries Ltd.* v. *Hull and Netherlands Steamship Co.* (4).]

Holman K.C. and *Cassidy*, for the respondent, were not called on.

The judgment of the COURT, which was delivered by KNOX C.J., was as follows:—The first count of the declaration in this action alleges that in consideration that the plaintiff would supply and deliver certain ewes and lambs to Edmund Wentworth Daniel and Keith Edman Bucknell for a sum of money to be agreed upon, bearing interest at a rate to be agreed upon, between the plaintiff and Daniel and Keith Edman Bucknell, the defendant promised the plaintiff to pay to the plaintiff the said sum and interest thereon calculated at the rate aforesaid, and the plaintiff did supply and deliver the said ewes and lambs to Daniel and Keith Edman Bucknell and did agree with them upon the sum of money and the rate of interest, and all things happened and all conditions were fulfilled and all times elapsed necessary to entitle the plaintiff to the performance by the defendant of the said promise and to sue for the breaches thereof thereinafter alleged, and the said sum of money and interest thereon became due and payable by the defendant to the plaintiff, yet the defendant did not nor would pay any part of the said sum or the said interest to the plaintiff and the same remained due and payable by the defendant to the plaintiff. To this count the defendant pleaded *non assumpsit* and denial of breaches. At the close of the plaintiff's case counsel for the defendant applied for a nonsuit on the ground that the first count alleged an alternative right in the plaintiff against either Daniel and Keith Edman Bucknell or the defendant, that the evidence supported this allegation, and that, as the plaintiff had elected to sue Daniel and Keith Edman Bucknell and had recovered judgment against them, he was not at liberty to sue the defendant. The learned trial Judge refused to nonsuit. He was of opinion

(1) (1704) 1 Salk., 27; 1 Sm. L.C., 12th ed., p. 335.
(2) (1903) 1 K.B., 64; (1904) A.C., 11.
(3) (1882) 7 App. Cas., 345.
(4) (1921) 2 K.B., 608.

that the count alleged an independent promise by the defendant to pay for the sheep if they were delivered to Daniel and Keith Edman Bucknell, that there was evidence for the plaintiff which, if believed, would justify the jury in finding the issue in that count in his favour, and that in that view the judgment recovered by the plaintiff against Daniel and Keith Edman Bucknell did not debar the plaintiff from recovering in this action. The jury having found a verdict for the plaintiff on the first count, the defendant applied to the Supreme Court in Full Court for an order to enter a nonsuit or a verdict for him on that count, and now appeals to this Court against the dismissal of that application.

In our opinion the decision of *Ferguson* J. on the application for a nonsuit was correct; and this appeal consequently fails. We think the law applicable to this case is correctly stated by *Lush* J. in *Isaacs & Sons* v. *Salbstein* (1) :—" There is, however, no foundation whatever for the contention that because A recovers a judgment against B, who in truth never was a party to the contract at all, he cannot afterwards recover judgment on that contract against C, who was the real contracting party. Where judgment is recovered on a simple contract, that contract no doubt merges in the contract of higher degree which is evidenced by the judgment and which is a contract of record. But there is no ground for saying that a contract between A and B, although it is a contract of record, merges a contract between A and Z. They are two different contracts and therefore give rise to two different causes of action."

For these reasons we are of opinion that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Villeneuve-Smith & Dawes.*

Solicitors for the respondent, *Sly & Russell.*

B. L.

(1) (1916) 2 K.B., at p. 143.