JAMES ISBESTER (DEFENDANT).....APPELLANT; 1895

AND *Oct. 22.

RAY, STREET & COMPANY (PLAINTIFFS).....RESPONDENTS. 1896 *Feb. 18.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Partnership—Judgment against firm—Liability of reputed partner—Action on judgment.

Where promissory notes are signed by a firm as makers, a person who holds himself out to the payees as a member of such firm, though he may not be so in fact, is liable as a maker.

In an action upon a promissory note against M. I. & Co., as makers, and J. I. as endorser, judgment was rendered by default against the firm, and a verdict was found in favour of J. I. as it appeared by the evidence that he had endorsed without consideration for the accommodation of the holders, and upon an agreement with them that he should not be held in any manner liable upon the note.

Held, in a subsequent action on the judgment to recover from J. I. as a member of the firm who had made the note, that the verdict in the former suit was conclusive in his favour, the said agreement meaning that he was not to be liable either as maker or endorser.

APPEAL AND CROSS-APPEAL from the decision of the Court of Appeal for Ontario (1), which allowed the defendants' appeal from the judgment in the Queen's Bench Division (2), as to part of the claim, and dismissed the appeal in other respects.

The plaintiffs brought action against defendant and another, claiming that they were partners in the firm of Isbester & Co., and jointly and severally liable for the amount of a judgment recovered against the partnership in the firm name for a dishonoured note, and also for the amount of several other promissory notes signed by

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 22 Ont. App. R. 12. (2) 24 O.R. 497.

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the firm. The defendant James Isbester had been previously sued as endorser of the first note, and the action against him failed on the ground that he had endorsed without consideration for the accommodation of the holder on a special agreement that he was not to be held liable by them. In the present case he pleaded the former judgment as a bar to the action so far as it related to the recovery of the judgment given against the firm, and further denied that he was a partner or liable to plaintiffs as a partner in the firm, and alleged that the plaintiffs, by their conduct in purchasing the bankrupt estate of M. Isbester & Co., and taking part in the sale and distribution of the assets thereof, were estopped from now claiming any liability as against him.

Malcolm Isbester did not defend the action, and the trial judge rendered a judgment against the defendant James Isbester for the amount claimed with interest and costs (1). Upon appeal the judgment in the court below was reduced by the amount claimed under the judgment (2). The appellant appealed from this decision except as to that part which reduced the judgment of the court below, and the respondents, by cross-appeal contended that the judgment of the Court of Appeal for Ontario should be varied by restoring the judgment in the trial court.

McCarthy Q.C. and *Code* for the appellant. The fact of appellant having been sued as endorser of the note on which the judgment was obtained is an admission that he was not a member of the firm as he could not be an endorser for himself. *Reynolds* v. *Doyle* (3).

The respondents have elected to look to the bankrupt estate of M. Isbester & Co. for judgment. See *Kendall* v. *Hamilton* (4); *Scarf* v. *Jardine* (5).

(1) 24 O.R. 497.
(2) 22 Ont. App. R. 12.
(3) 1 M. & G. 753.
(4) 4 App. Cas. 504.
(5) 7 App. Cas. 345.

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Aylesworth Q.C. and *Cameron* for the respondents: The former action did not decide that defendant was not a member of the firm, for that issue was never raised.

Nor does the recovery by defendant therein preclude us from now suing him as a maker. *Wegg Prosser* v. *Evans* (1).

As to the cross-appeal see *Brooke* v. *Haymes* (2); *Ex parte Morgan. In re Simpson* (3).

The judgment of the court was delivered by:

SEDGEWICK J.—This is an action brought by the respondents, Ray, Street & Co., against one M. Isbester and the appellant, James Isbester, both of whom it is contended were members of the firm of M. Isbester & Co., at the time when the causes of action herein respectively arose.

The causes of action are of two classes: First a judgment recovered by the respondent against the firm of M. Isbester & Co. in the High Court of Justice for Ontario, for the sum of $4,962.11 principal, and $24.02 costs, and secondly, six promissory notes, all of them dated in the month of March, 1890, made by M. Isbester & Co., due at the time of action and aggregating $20,000. The defendant Malcolm Isbester did not appear. The defendant James Isbester did, and set up as his main defence that he never was a member of the firm of M. Isbester & Co. and consequently was not liable either upon the judgment against the firm or by reason of the six promissory notes above referred to, signed by the firm. As evidence of this contention he produced a record of a judgment in an action previously brought by the same plaintiffs against him for the purpose of holding him liable upon a note dated 11th November, 1889, for the sum of $4,900, made by M. Isbester

(1) [1894] 2 Q.B. 101; [1895] 1 Q.B. 108.
(2) L.R. 6 Eq. 25.
(3) 2 Ch. D. 72.

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& Co. payable to the order of Adam Isbester & Brother, endorsed by Adam Isbester & Brother to him James Isbester, and endorsed by him to the plaintiffs, which action, having been tried by a jury, resulted in a verdict in his favour. He, the appellant, now contends that this judgment operates as an estoppel inasmuch as it conclusively shows that he, James Isbester, was not a member of the firm of M. Isbester & Company when the notes sued on were made, and, therefore, was not liable in the present action.

At the trial of this action the learned judge found in favour of the plaintiffs for the full amount claimed. Upon appeal it was determined that although the defendant James Isbester was not liable upon the note in respect of which the previous action had been brought, he was liable upon the six notes also sued upon, and that the judgment set up in the defence did not constitute *res adjudicata* so far as they were concerned. From that judgment two appeals have been asserted, one by the respondents upon the ground that the judgment of the trial judge should not have been interfered with, and the other by James Isbester upon the ground that the trial judge should have found in his favour, not only in respect to the judgment sued upon but also in respect to the notes.

I am of opinion that both appeals fail. The main question upon the principal appeal is this: Did the judgment in the first action resulting in a verdict in favour of James Isbester adjudicate upon the question whether he was a member of the firm of M. Isbester & Company? Or, in other words, was the contention that he was a member of that firm or held himself out as a member of that firm at the times when the notes in question were given, determined in his favour, or determined at all? If, as a matter of fact, there was an adjudication in his favour on that issue, then, in my

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view, the matter would be *res adjudicata;* but, as I propose to demonstrate, no such issue was raised or determined and the doctrine of *res adjudicata* cannot possibly apply. As already stated the note sued on in that action was a note dated 11th November, 1889, purporting to be signed by M. Isbester & Company, and to be indorsed by Adam Isbester & Brother, and by the defendant James Isbester. So far as anything appearing of record is concerned, the action was brought against James Isbester, not as a member of the firm of M. Isbester & Company, or Adam Isbester & Brother, but solely as an endorser in his own name of the note. There is no allegation in the statement of claim, nor does it appear to have been brought forward at the trial, that he was or held himself out to be a member of either firm. He was proceeded against in his capacity as an individual endorser and not otherwise. In his defence he admitted the making of the note and its dishonour. He alleged that the two firms sued were composed of M. Isbester and Adam Isbester, but he did not either admit or deny that he was a member of either firm. He, however, claimed that he endorsed the note sued on, not as security for the firms, parties thereto, but for the accommodation of the plaintiffs themselves, with the understanding as between him and the plaintiffs that he should incur no liability in respect of it, and that was the question and the sole question which was submitted to the jury, and upon which they found in his favour.

The learned counsel for the appellant, at the hearing of this appeal, most ingeniously argued that by reason of the rules under the Ontario Judicature Act permitting a firm to be sued by its firm name, and allowing the question as to the parties composing such firm to be determined by subsequent proceedings, an alteration of the previous law had resulted and that it must be

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presumed that there was an adjudication upon the question as to the appellant's membership of the firms referred to. I have not been able to appreciate the force of his argument. It is perfectly clear that a person may be liable upon a promissory note both as maker and as endorser. *Wegg Prosser* v. *Evans* (1). At common law an action may be brought against him as endorser and fail, and a subsequent action may be brought against him as sole maker or as one of several makers and succeed; and I see nothing whatever in the rules to which he has referred which by any possibility can lead to the conclusion that the common law in this respect has been changed. The only substantial issue raised by pleadings in the action, the judgment in which is set up as a defence to this action, was as to whether the appellant was liable to the plaintiffs as endorser. That issue was found in his favour, but there was no finding either express or implied, or any judgment upon the question now raised, as to whether he was a member of the firm who were the makers of the note sued on. It is true the question might have been raised. The plaintiffs might have alleged in their statement of claim that he was a member of the firm of M. Isbester & Company, and liable as such maker as well as an endorser, but so far as I can see, even if the fact had been so, they were not bound to allege it or to prove it, nor was it necessary to their obtaining judgment, assuming that he was liable as an endorser, and I know of no principle of law or practice which absolutely precludes the plaintiffs from suing him as a maker if, having failed in holding him liable as an endorser, they subsequently discovered that he was a member of the firm who were the actual makers.

(1) [1894] 2 Q.B. 101.

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I do not think it necessary in the present case to enter fully into the question of *res adjudicata*. There is no doubt that the judgment of a court of competent jurisdiction upon any point in issue is as a plea a bar, or as evidence conclusive, between the same parties upon the same matter directly in question in another court, but a judgment is only conclusive as to facts which appear to be found as facts by the record, or which must necessarily be presumed to have been proved or admitted as facts; in other words, a judgment is conclusive only upon facts which were material to the issue in controversy in the action upon which it is based. In the present case the record relied upon does not disclose a finding either directly or indirectly that the appellant was or was not a member of the firm of M. Isbester & Company, nor was it material or necessary that there should be a finding upon that point in order to establish his immunity from liability as an endorser of the note sued on, and if that be so, the only question which was to be determined by the trial judge in this action was: Was he or did he hold himself out to the plaintiffs to be a member of the firm of M. Isbester & Company at the time the notes sued on were given? The learned judge did not find that he was, as a matter of fact, a member of that firm, but only that he held himself out to the plaintiffs to be a member, and on that ground judgment was given against him. In this view I think the trial judge was right, and so far as the main appeal is concerned it must be dismissed.

For the reasons stated by Mr. Justice Osler, in his judgment in the Court of Appeal, I am also of opinion that the cross-appeal should be dismissed. There has been no finding to the effect that as a matter of fact he was a partner, but only that he held himself out to the plaintiffs to be a partner.

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In the judgment which is set up as a defence the record shows that, so far as the note sued on was concerned, it was given, so far as James Isbester was concerned, for the accommodation of the plaintiffs, and upon the express understanding that he was in no way (either, in my view, as maker or endorser) to be liable to them upon it, and therefore the judgment is conclusive in respect of his liability on that note.

I think both appeals should be dismissed with costs.

Appeal and cross-appeal dismissed with costs.

Solicitors for the appellant: *Code & Burritt.*

Solicitor for the respondents: *W. K. Cameron.*