BOVELL v. J.N. GODDARD & SONS LTD.

[COURT OF ERROR - APPEAL FROM THE ASSISTANT COURT OF APPEAL (Field, J.) January 10, 1958]

[1958 - 60] Barb. L.R. 3

Practice and Procedure - Default summons - Two defendants - Only one defendant giving notice of intention to defend - Judgment for plaintiff against that defendant - Appeal - Joint liability of defendants - Judgment in default against one barring judgment against other - Point of law not raised in Assistant Court of Appeal - Petty Debt Act, 1899, section 31.

Facts: The plaintiff J.N. Goddard & Sons Ltd. sued two defendants Walker and Bovell for goods sold and delivered on a joint account. The plaintiff availed itself of the procedure provided by section 31 of the Petty Debt Act 1899 and proceeded by default summons. Walker did not give notice of his intention to defend but Bovell did, and the trial proceeded against Bovell. Judgment for the plaintiff for $234.01 with costs was given. Bovell appealed and it was submitted on his behalf that, judgment having gone against the other defendant Walker, the right of the plaintiff to proceed to recover judgment against Bovell was lost. For the plaintiff - respondent it was contended that, this question of law not having been raised in the Assistant Court of Appeal, it could not be raised on the appeal. [3]

Held: (i) the presumption of law is against a joint and several liability and the burden of showing that liability is joint and several lies on the person who so asserts. From an examination of the authorities and from the fact, as disclosed in the proceedings, nothing could be found to support a finding that the liability of the two defendants was joint and several. The liability was one jointly incurred and no more;

(ii) an appellant to the Court of Error from a decision given in the original jurisdiction of the Assistant Court of Appeal is not precluded from raising a point of law not raised in the Assistant Court of Appeal;

(iii) in a case commenced by a default summons under section 31 of the Petty Debt Act 1899 there is no final judgment against a defendant until judgment is entered into by the judge in accordance with the procedure of the Court, and where there is more than one defendant, until final judgment is so entered up, there is no bar to proceeding to judgment against the other or others;

(iv) the appeal would not be allowed but in order to remove any ambiguities, the judgment to be entered in the records of the Assistant Court of Appeal would be as follows: "judgment for the plaintiff against both defendants jointly for the sum for $234.01."

Cases referred to:

(1) King v. Hoare (1844) 13 M. & W. 494.

(2) Kendall v. Hamilton (1879) 4 App. Cas. 4.

(3) Rice v. Shute 5 Burr. 2611.

(4) Exparte Williams 11 Ves. 3.

(5) In re Hodgson [1885] Ch.D. 177.

(6) Smith v. Baker [1891] A.C. 325.

(7) United Dominions Trust Ltd v. Bycroft [1954] 1 W.L.R. 1351.

(8) Clarkson v. Musgrave (1882) 9 Q.B.D. 386.

(9) Moriarity v. Regent Garage Co. [1921] 2 K.B. 766.

(10) Seymour v. Carlson 5 Q.B.D. 389.

(11) Postmaster Gen. v. Blackpool & Fleetwood Tramsroad Co. [1921] 1 K.B. 114.

(12) Morgan v. Rees 6 Q.B.D. 508.

(13) Rhodes v. Liverpool Commercial Investment Co. (1879) 4 C.P.D. 425.

(14) Parr v. Snell [1923] 1. K.B. 1.

Statutes referred to:

(1) Assistant Court of Appeal Act, 1900.

(2) County Court Act, 1975 (U.K.).

(3) Petty Debt Act, 1899.

(4) Rules of the Supreme Court, O. XIII, XIV, XXII.

Mr. J.E.T. Brancker for the appellant.

Mr. W.H.A. Hanschell for the respondent.

FIELD, J.: In this case the plaintiff sued two defendants for goods sold [4] and delivered on a joint account. The plaintiff availed himself of the procedure provided by section 31 of the Petty Debt Act, 1899 which section is by section 20 of the Assistant Court of Appeal Act, 1900 incorporated into that Act and is then available in respect of actions triable in the Assistant Court of Appeal. Section 31 gives a plaintiff the option to proceed by default summons in an action for a debt or liquidated money demand and if the defendant does not within the prescribed time give notice of his intention to defend the suit, the plaintiff may have judgment entered up against such defendant provided that the affidavit of service required by the section has been filed. The defendant Walker did not give notice of his intention to defend this suit; whereas the defendant Bovell did. The trial of the action therefore proceeded against the defendant Bovell and the judgment of the court was to the following effect: "Judgment for the plaintiff for $234.01 with costs" as shown by the records of the court.

The defendant Bovell has not appealed. Mr. Brancker who appeared both in the court below and in this court has asked the court to reserve the decision of the learned trial judge on two grounds. Firstly, that Bovell was liable for the debt or any part of it on the ground that Bovell was not a party to the arrangement whereby goods were obtained on credit for the business. In support of this he refers to the observation of the learned trial judge where he states in his reasons "on this point, however, her evidence was contradicted not only by the more convincing testimony of the plaintiff's salesman, Johnson, but by her own conduct as revealed by her signature on a number of bills and receipts." Counsel also referred to the evidence of Johnson at p.4 to the effect that "whoever received the goods whether proprietor or someone for the proprietor, signs the bills" and also to the cross examination of the witness Johnson (at p.3) to the effect "it was opened by Seibert Walker alone, but in the names of himself and Bovell." It is obvious that the learned trial judge accepts the evidence of the plaintiff's witness Johnson, the salesman, who negotiated the arrangement between the defendants, and when the Judge states that "on this point etc." he is in effect giving the reasons why he accepts Johnson's evidence. Undoubtedly the fact that defendant Bovell signed her name to the bills when the goods were delivered at the shop would not by itself make her responsible, for as pointed out by Johnson whoever receives the goods be that person proprietor or servant signs the bills. This act of 'signing' coupled with the more significant fact, as pointed out by Mr. Hanschell, of her conduct in accepting the receipts for money paid which were in the joint names of both defendants is strong evidence of her relationship with the other defendant in this business. In addition there is Johnson's testimony that he spoke to Bovell about the arrangement for getting these goods in the names of the two of them and she expressed her satisfaction. There was therefore abundant evidence on which the learned trial judge could find that both defendants were jointly in the business together, and I entirely agree with this finding.

The second point taken by Mr. Brancker is that judgment having gone against the other defendant, viz. Walker, the right of the plaintiff to proceed to recover judgment against Bovell is lost. As authority for this proposition he has referred me to the well known cases of King v. Hoare (1844) 13 M & W 494 and Kendall v. Hamilton (1879) 4 App. Cas 4. Now these cases establish without any doubt that [5] when persons are liable on a joint contract judgment recovery against one puts an end to the right to proceed to recover judgment against the other. It matters not whether the persons jointly liable are sued at one and the same time or at different times. The basis for this rule rests on two principles: (1) one contract, one judgment; (2) joint contractors have the right to be made parties and not have liability to future action hanging over their heads. Rules of the Supreme Court of the U.K. as well as our local Common Pleas Rules give relief to a plaintiff in such cases. Unhappily there is no equivalent rule affecting such matters in actions in the Assistant Court of Appeal. It would therefore seem that the general rule of law as laid down in the two aforesaid cases remains the law applicable to cases tried in the Assistant Court of Appeal (Legal) jurisdiction. This rule however has no application when the persons to be sued are jointly and severally liable.

I will not at this stage for reasons which appear later refer to the cases to which Mr. Hanschell has made reference in support of this proposition. However, before we can decide whether the rule laid down in King v. Hoare and approved in Kendall v. Hamilton is applicable to the facts of this case it is necessary to determine whether the liability of the defendants Bovell and Walker is a joint liability or a joint and several liability. Again, the case of Kendall v. Hamilton is of assistance in the matter for in that case Lord Chancellor Cairns examines the position of partners having regard to expressions found in many cases and textbooks to the effect that a partnership debt is a joint and several liability and particularly to the dicta of Lord Mansfield in Rice v. Shute 5 Burr 2611. At pages 516 and 517 the Lord Chancellor had this to say:

> "there is no doubt that in many cases and textbooks one finds the expression that a partnership debt is in equity joint and several. This, however, is only a compendious expression, which must be interpreted with reference to what were the functions of the Court of Equity as to partnership debts. The only interposition of a Court of Equity with regard to partnership debts, took place in the administration of assets, either of the partnership or of a deceased member of the partnership."

He goes on in his judgment to show how equity approached such matters and refers to the view expressed by Lord Eldon in the case of Ex Parte Williams (11 Ves 3) and concludes his judgment as follows:

> "if, therefore this case is to be looked at as a case in which judgment has been recovered for a partnership debt against two out of three co-partners, it appears to me that, on the principle of King v. Hoare the judgment would be a bar at law to a subsequent action against the third partner. I know of no principle on which a Court of Equity could hold the debt to be several for the purpose of preventing such a result."

I have examined the authorities to which Mr. Hanschell has referred me on the question of joint and several liability but I am of the view that they are not applicable to the facts of this case. The presumption of law is against a joint [6] and several liability and the burden of showing that the liability is joint and several lies on the person who so asserts. From an examination of the authorities and from the facts as disclosed in these proceedings I find nothing to support a finding that the liability of the two defendants can be said to be joint and several. In other words the liability is one jointly incurred and no more. If further support were needed one only has to refer to the case of In Re Hodgson [1885] Ch. D. 177. The head note starts off by saying "the creditors of a partnership firm although not strictly a joint and several creditor etc..." I do not however consider it necessary to go in the report of that case.

Having however reached this conclusion that there was a joint contract and not a joint and several contract, unfortunately I do not consider that the finding necessarily disposes of the case by the application of the rule laid down in King v. Hoare. I do not however consider it necessary to go into the report of that case, and before I proceed to examine that aspect of the case, it is proper that I should deal with the point raised by Mr. Hanschell, viz. that the question of law now raised by Mr. Brancker as to proceedings against the second defendant, was not raised in the Assistant Court of Appeal and therefore cannot be raised in this court.

I have examined if not all, certainly all of the available authorities on this point including the local case of Bishop v. Smith decided by this Court. I should say at once that I do not regard the case of Bishop v. Smith as any authority for this proposition. All that case does say on this point is that our Petty Debt Courts exists for much the same reason as the English County Courts, viz. to serve litigants of small means and for quick justice. The learned trial judge who decided that case had this only to say:

"The court (meaning the A.C.A.) exercises the same jurisdiction as the English County Courts. It is the policy of the County Courts Act, as it is that of our own Petty Debt Act, to enable suitors to get cheap and easy redress for wrongs and to recover their debts by a cheap and speedy process."

The point now raised was not raised in that case and the remarks earlier quoted are in any case obiter as they were not necessary to the point which the court was called upon to decide.

In support of the principle the English authority most frequently quoted is Smith v. Baker [1891] A.C. 325, which is a decision of the House of Lords. The most recent case seems to be United Dominions Trust Ltd. v. Bycroft [1954] 1 W.L.R. 1351. All the relevant authorities lay it down that a point of law not taken in the County Court cannot be taken in the Appeal Court. It is also put in a different way, viz. it is a condition precedent that a point of law should be taken in the County Court, if an appeal is to lie from that court. The use of the expression "condition precedent" should be carefully borne in mind when we come to examine the reasons for the decision.

I am aware that the point of law need not be taken by counsel but it is sufficient if it is noticed by the judge in his decision or judgment.

Before however I accept the cases on this point as deciding that a point of law taken in the local Assistant Court of Appeal in its original legal jurisdiction cannot [7] be raised in the Court of Error, I must examine the relevant provisions of the relevant Acts, both local and English. In view of the impending disappearance of the Court of Error and the Assistant Court of Appeal, I do not propose to examine in detail all the provisions of the Assistant Court of Appeal Act and those of the Petty Debt Court Act which are incorporated in the Assistant Court of Appeal, but only those dealing with appeals.

Section 6 of the County Court Act, 1875 provides:

"In any cause, suit or proceeding, other than a proceeding in bankruptcy, tried or heard in any county court, and in which any person aggrieved by the ruling, order, direction or decision of the judge on a point of law to appeal against such ruling, order, direction, or decision, by motion to the court to which such appeal lies, instead of by special case."

The further provisions of the section deal with taking a note of the evidence by the judge at the request of either party. Section 68 of the Assistant Court of Appeal Act, 1900 is on the following terms:

"If any party in any action or matter within the original legal jurisdiction of the Assistant Court of Appeal is dissatisfied with the decision of the said court, such party may appeal therefrom to the Court of Error."

It will therefore be seen that under the County Court Acts there is a limited right of appeal whereas under the Assistant Court of Appeal Act there is a wide general right of appeal both on fact and law. Hence it becomes necessary to consider the ratio decidendi for the decisions in the cases which apply to the English County Courts to ascertain whether they can or should apply with equal merit to appeals from the Assistant Court of Appeal.

From the authorities it appears that the basis for the principle decided by the cases of Smith v. Baker approving Clarkson v. Musgrave (1882) 9 Q.B.D. 386, and Moriarity v. Regent Garage Co. [1921] 2 K.B. 766 and United Dominions Trust v. Bycroft [1954] 1 W.L.R. 1351 and that line of cases is:

(1) that the County Court Act gives only a limited right of appeal on a point of law (see judgment of Field, J in Clarkson v. Musgrave, and the judgment of Sterndale M.R. in Moriarity v. Regent Garage Co.);

(2) the unjustness of allowing one party having failed in the contention put up in the lower court, to rely on a different point in the appeal court, which might have been answered, if taken. (See judgment of Lord Halsbury in Smith v. Baker at p. 333).

I concede that the latter reason has some attractiveness about it not only for litigants but for courts of appeal. I do not however consider that this of itself, having regard to the local enactments, should decide this question. Let me therefore examine the reasons advanced by Field, J. in Clarkson v. Musgrave [8] and by Sterndale M.R. in Moriarity v. Regent Garage Co.

Field, J. had this to say on this question of raising a point of law on appeal from County Courts:

"That point was not raised at the trial and the question depends upon whether section 6 of the County Court Act, 1875, requires that it should have been raised as a condition precedent to the defendant's right to raise it here. It is important that the code under which appeals from county courts are bought should be well settled. Before the passing of the County Court Act, 1875, the only mode of appealing was by a case stated by the judge and the appeal did not lie upon any question of fact. It was thought necessary to give suitors a right of appeal not depending entirely upon the judge's discretion and the legislation therefore gave the remedy by Section 6 of the County Court Act, 1875. But the appeal given by

that section is limited as the appeal was before, to questions of law, and it must be brought by a person aggrieved by the "ruling, order, direction or decision of the judge.... I am clearly of the opinion that every question of law upon which it is desired to appeal must be raised at the trial. Unless it is there is no "ruling, order, direction or decision of the Judge" within section 6 upon which to appeal."

Field, J. then goes to refer in his judgment to the cases of Seymour v. Coulson 5 Q.B.D. 389 and Morgan v. Rees 6 Q.B.D. 508 and state that they do not affect the principle in Rhodes v. Commercial Investment Company (1879) 4 C.P.D. 425 which is authority for the proposition on raising a question of law on appeal not raised in the court below.

I will refer in a minute to the case of Seymour v. Coulson. I have not been able to find the report of Morgan v. Rees. First, however, let us see what is said in Moriarity v. Regents Garage Ltd. In that case Lord Sterndale, M.R. in his judgment at pp. 75/776 had this to say:

"We had occasion to say (and I think Atkins, L.J., who said it more emphatically than any of us) in Postmaster General v. Blackpool & Fleetwood Tramsroad Co. not very long ago, that it is most important to preserve the rule that a point not taken in the county court shall not be taken on appeal."

The other judges who took part in that decision also refer to the limited right of appeal that an unsuccessful suitor in the county court is possessed of.

Now Seymour v. Coulson decided that it was not a condition precedent to the right of appeal from a county court that the judge had not been requested to take a note of the evidence of the point of law raised. He states:

"Section 6 gives a new form of procedure upon appeal, instead of that which had previously existed and had been found inconvenient. It gives no new right of appeal as to this subject matter, no right of appeal as to facts. [9] It only enacts that the procedure need not be by special case; the section is not in the form of a proviso or of a condition precedent. The enactment is in favour of the party under favourable circumstance ....."

The important points made by Brett were -

(a) a new form of procedure was provided;

(b) no new right of appeal granted;

(c) no right of appeal on facts;

(d) no proviso or condition precedent attached;

(e) the enactment is in favour of the appellant;

(f) the enactment is for the benefit of the appellant.

The judgment of Cotton and Thesiger, L.JJ. are also worthy of examination. At. p. 365 Cotton L.J. reiterated what Brett L.J. had said in the following way:

"By the County Court Act 1876, section 6, a new right of appeal was not given. The statute assumes that the right of appeal already existed: it merely created a particular mode of appeal on questions of law. Does the section make the request to the judge to take a note of a condition precedent to the right of appeal? In my opinion it does not .... the right of appeal is not restricted; it is enough if the point of law appears to have been raised at the trial before the judge of the county court; and it is sufficiently raised, if the judge necessarily decided it in order to arrive at a conclusion."

Now it seems to me that there is a vast difference between what section 6 of the County Courts Act, 1875 purported to do and what section 68 of the Assistant Court of Appeal Act, 1900 purported to do. As has been observed section 6 is procedural and gives no new right of appeal and further it is restricted to a point of law. Section 68 on the other hand is in general terms, does not restrict the appeal to a point of law. It has always been interpreted - I think correctly so, as giving a right of appeal on fact as well as on a point of law. The language of this section is not capable of a construction to the effect that any condition precedent is expressed or implied before a litigant can appeal, nor is there any proviso which limits the general right conferred. The words of Brett L.J. seem in point when he states "the enactment is in favour of the party who appeals and for his benefit." Unless there were provisions in the Act from which I could clearly hold that the intention was to restrict an appellant in the way suggested it would be contrary to principle to adopt such a course. Further, I do not interpret section 68 as procedural. Its language and effect seem capable of one construction only and that is, that it provides for a right of appeal from a decision of the Court of Appeal in its original legal jurisdiction simpliciter. The ratio decidendi and the principles decided by the case of Smith and Baker and that line of cases do not in my view apply to our local appeals from the Assistant Court of Appeal (original legal jurisdiction) to the Court of Error. It would therefore be clearly wrong to limit the hearing of an appeal in the Court of Error from the original jurisdiction of the Assistant Court of Appeal [10] so as to submit the appeal to a point of law raised at the trial. For these reasons I am therefore of the view that an appellant is not precluded from raising in the Court of Error a point of law not raised in the Assistant Court of Appeal (original legal jurisdiction).

It seems to me that the principle so firmly established by King v. Hoare and approved by the House of Lords in Kendall v. Hamilton although of general application (save as otherwise provided by Rules of the Supreme Court, see Orders XIII, XIV, XXII which were designed to alleviate the hardship created by the decision in King v. Hoare) needs further examination in the light of Section 31 and the practice of the Assistant Court of Appeal when more than one person sued on default summons. Now at p. 308 of Chitty on Contracts (Twenty-first edition) the learned author at para 509 has this to say (he is dealing with the rule established by King v. Hoare):

"So also is judgment against one co-contractor obtained in a suit to which all the others were parties, except in the case of a liquidated claim

when judgment was signed in default of appearance or of delivery of a pleading ... or in the case of unliquidated claim when judgment was interlocutory only."

In support of this the case of Parr v. Snell [1923] 1 K.B. 1 is given as the authority. The head note to that case reads as follows:

"in an action against three joint contractors for damages for breach of an agreement, the plaintiff obtained an interlocutory judgment for damages to be assessed, against two of the defendants in default of defence. He then procured an assessment of damages and signed final judgment for the assessed amount against the two defendants who were in default", and it was held that under the rule established in King v. Hoare and Kendall v. Harrison and Brinsmead v. Harrison, the plaintiff was precluded from proceeding with the action against the third defendant. There was no statute or rule of law which took the case out of the law as laid down in those authorities." The facts of this case are set out in the report and I will not repeat them here. The learned trial judge found a joint and several contract and gave judgment for the plaintiff. On appeal this was reversed. The Court of Appeal holding that this was not a joint and several contract and that (as earlier stated) the rule in King v. Hoare applied. When we examine these judgment of the court one finds various allusions to claims for liquidated or unliquidated sums. For instance, Lord Sterndale at p. 6 stated:

"In my opinion that claim upon which he proceeded and on which he got these judgments was not a claim for a liquidated sum; it was a claim for unliquidated damages. Before he proceeded against the present appellant and got this judgment for damages against him he had obtained an assessment of the damages due under the interlocutory judgment against [11] the Snells for £516. 12. 6. ... and then the plaintiff having got the damages assessed signed final judgment against the Snells for the amount assessed; and the question is whether that is a bar to his proceeding against the appellant."

Similarly Scrutton L.J. at p. 9 has this to say:

"The technical rule of law which we have to apply is this: that when there are joint contractors if judgment is signed against one, the other is discharged."

The expressions used are "signed final judgment" and "judgment is signed". The position regarding the applicability or otherwise of the rule is clearly set out at p. 10 by Scrutton L.J. The basis upon which this rule has been formulated seems to rest on two things. First, that joint contractors are liable on one and the same contract and so there is only one cause of action. Hence if judgment is obtained against one of such contractors, then there cannot be a second judgment in respect of the same cause of action; or as it is otherwise put, that the contract is merged in the judgment (Scrutton, L.J. ibid); or alternatively, each joint contractor has a right to have his co-contractors joined as partners so as to have them all before the Court at one and the same time and thus not have a possible action hanging over the heads of some of the joint contractors if not sued to judgment at one and the same time. We are all agreed that there are no rules of the Assistant Court of Appeal equivalent to Orders XIII, XIV and XXVII of R.S.C. or Order 13 rules 3 and 4 of the Common Pleas Rules. Hence the principle established by the case of King v. Hoare is applicable to matters in the Assistant Court of Appeal unless provision can be found which would take it out of that rule. A litigant has the right to avail himself of Section 31 of Petty Debt Court Act, 1899 but in so doing he may jeopardise his position if one of the defendants in a case where there is more than one defendant does not defend and judgment is entered up against him. Before however the true legal position can be stated one must examine the practice of the Assistant Court of Appeal on default summons.

The practice is as follows. In a case where one defendant only is sued by means of default summons for a liquidated amount then the return of the copy of the plaint with affidavit of service duly sworn to by the officer serving the summons, the clerk writes on the back "judgment for the plaintiff for $x and costs" or similar words which in turn is signed by the Judge. In effect that is the "entering up" judgment by the judge. That is a straightforward case. Now when there is more than one defendant sued on such a summons and one or more fails to give notice of intention to defend, although one affidavit of service as required by section 31 is filed, no similar writing is made on the back of the plaint by the clerk or the judge. The plaintiff in order to have the matter adjudicated so far as concerns the liability of the other defendant or defendants, pays a hearing fee. The case is set down and duly heard; if the plaintiff is successful the judge writes on the plaint "judgment for the plaintiff for $x with costs" or words or similar import. That procedure was adopted in the present case. A search of the records of the Court will show that the [12] affidavit of service as required by section 31 was recorded on December 28, 1955 to the effect that both defendant were personally served on 24. No further action was taken under section 31.

The plaintiff paid a bearing fee and the case was set down for trial on February 1, 1956. It would have been within the powers of the judge to enter up judgment after the expiration of six days from and inclusive of December 24, 1955. This was not done. As far as the records go judgment was given for the plaintiff on February 5, 1957. Can it therefore be said that there was, on the date of final adjudication when Bovell's liability was determined, in existence a judgment against her co-defendant Walker? Mr. Brancker has contended that the use of the word "shall" is imperative or mandatory and therefore after six days judgment automatically goes against a defendant who has defaulted in giving notice of intention to defend. I do not construe the section in that way. The use of the word "shall" at most connotes that there is no discretion in the judge to do any other act than enter up judgment. But it does not compel him to do so at any given time. He cannot do so earlier than after the expiration of six days, but he may do so later. That is the practice as indicated earlier when more than one person is sued on a default summons. I see nothing irregular in the practice. I would observe that if a plaintiff in such a case instead of paying a hearing fee so as to have the liability of another defendant determined were simply to ask for a judgment to be entered up against the one defendant who did not defend, then it would be in order for the judge to enter up judgment against that defendant and if the plaintiff subsequently sought to proceed against the other defendant then he could, in my view, be successfully met by the rule in King v. Hoare. My attention was directed to the expression used by the learned trial judge in his reasons where he says "judgment therefore went against the other defendant" and later "judgment had gone against one of them." Mr. Brancker submits that those statements by the learned trial judge can mean but one thing only and that the final judgment had been entered against one defendant. It is to be noted that the language used by the learned trial judge is - "judgment went against", and "judgment had gone against" whereas the relevant provisions of the Act speaks of "enter up judgment." Now these statements by the learned trial judge are not statements of fact, but merely a compendious way of expressing the legal consequences which follow or must follow on the procedures of a default summons. Being an expression of the effect of statutory provision, this court is itself entitled to look at that provision and place its own interpretation upon it. I have earlier set out the practice and indicated that there was nothing ultra vires in the practice and I do not think that the expressions used by the learned judge in that context were intended to indicate anything more than what is the ultimate legal

position of a defendant who does not defend in a default summons.

Mr. Brancker has not taken the point in this court that the amendment permitted in the Assistant Court of Appeal was improperly allowed. Having decided that the liability was joint and not joint and several, it is obvious that the amendment was of no avail. By alleging a joint and several liability in a claim does not mean that in law it is such. Then can only be determined after evidence and it forms no part of the judgment of the Assistant Court of Appeal against the two defendants.[13]

My conclusion, therefore, in answer to the question which I posed earlier, is that in a case commenced by a default summons under section 31, until judgment is entered up by the judge in accordance with the procedure of that court, there is no final judgment against a defendant and where there is more than one defendant it is no bar to proceeding against the other or others.

The appeal will therefore not be allowed but in order to remove any ambiguities, the judgment to be entered in the Assistant Court of Appeal records will be as follows "judgment for the plaintiff against both defendants jointly for the sum of $234.01."

Appellant to pay cost of appeal. [14]