the merger of the note in the judgment. To this the obvious reply was and is, that, upon the reversal of the judgment, the merger ceased. It was as if no judgment had been rendered.'' Clearly, when the action was brought, an action upon the note would not lie—but, the obstruction by way of merger being removed, the plaintiff was allowed to set up what he could not have sued upon, and his judgment on this count was sustained.

The difference between merger and estoppel I do not go into. The cases are not few in which, when the matter came on for consideration and determination by the Court, an estoppel by way of judgment existed, and the fact that the judgment might be appealed, as in Doe v. Wright (1839), 10 A. & E. 763, Overton v. Harvey (1850), 9 C.B. 324, Scott v. Pilkington (1862), 2 B. & S. 11, Nouvion v. Freeman (1889), 15 App. Cas. 1, or even had been appealed and the appeal was pending, as in Harris v. Willis (1855), 15 C.B. 710, was held to be immaterial. As Cozens-Hardy, L.J., puts it in Marchioness of Huntly v. Gaskell, [1905] 2 Ch. 656, at p. 667, ''A judgment is . . . not the less an estoppel . . . because it may be reversed on appeal . . .'' But I know of no case in which the estoppel had been removed at the time the matter came up for adjudication, and it was held that the estoppel existing at the beginning of the proceedings still continued as a bar.

I think the motion must be heard on the merits; and on the merits I am bound by the judgment of Mr. Justice Latchford in 7 O.W.N. 309. It is argued that certain parts of the judgment of Mr. Justice Lennox in Re Dougherty and Township of East Flamborough (1914), 6 O.W.N. 487, are opposed to my brother Latchford's view; but these are obiter and must have been considered in the later case in 7 O.W.N. 309.

I think the motion must be allowed with costs (including costs of the postponements).