T. A. LIVESLEY AND OTHER (DEFENDANTS) ..... } APPELLANTS;

AND

E. CLEMENS HORST COMPANY (PLAINTIFF) ..... } RESPONDENT.

1924
*Oct. 16, 17.
*Nov. 11.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contract—Conflict of laws—Foreign contract—Damages for breach—Assessment of damages—Application of foreign law—Sale of Goods Act, R.S.B.C. (1911), c. 203, s. 64.

The right to damages for breach of a contract made in a foreign country and to be executed there is governed by the *lex loci contractus* and not by the *lex fori*.

Judgment of the Court of Appeal (34 B.C. Rep. 19) affirmed.

APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge (2) and maintaining the respondent's action.

The action was brought by the respondent against the appellants for damages for breach of contract to purchase hops. The main point in issue is that of the measure of damages. The contract was made in California and was to be performed there. If the damages are to be measured by the laws of California, then the measure of damages is that which had been proven by the legal gentleman called to give evidence of that law and is that applied by the trial judge. But it was argued on behalf of the appellant that the action having been brought in British Columbia, the measure of damages should be ascertained by the law of British Columbia and that the rule to be applied is that contained in s. 64 of the "Sale of Goods Act," c. 203, R.S.B.C. 1911. The questions at issue are: if the right to damages for breach of a contract is a substantive right, the *lex loci contractus* must be applied; if it is a question of procedure, the *lex fori* must be followed.

Lafleur K.C. and *Carson* for the appellants.

E. P. Davis K.C. and *R. L. Reid K.C.* for the respondent.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

(1) 34 B.C. Rep. 19; [1924] 2 W.W.R. 443.

(2) [1923] 2 W.W.R. 987.

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The judgment of the court was delivered by

DUFF J.—This is in part an attempt to set aside findings of fact pronounced by the trial judge and concurred in without dissent by the Court of Appeal. There were two actions, which were tried together, for the enforcement against the appellants of contracts for the purchase of hops from the respondents. Hops tendered by the respondents in execution of their respective contracts were in large part rejected as not answering in point of quality the descriptions of the contracts.

Whether the quality of the hops tendered conformed to the contract standard or did not was the question of fact with the determination of which the trial judge was charged, and his view necessarily turned in large measure upon the weight to be attached to the oral testimony of the witnesses examined at the trial. The learned trial judge explicitly declared that in deciding against the appellants he was, at least in part, influenced by the favourable impression he had received as regards the candour of the witnesses called by the respondent and the general weight of their testimony, while commenting, as he no doubt esteemed it his duty to do, rather unfavourably upon some of the testimony adduced by the appellants.

In these circumstances, the appellants must fail unless they can make it appear that the judgments below are characterized by some aberration from principle or affected by some error at once radical and demonstrable in the appreciation of the evidence adduced or in the method by which the consideration of it has been approached. It is sufficient to say in a word that no such error has been established.

The only question requiring discussion is the question raised by the appellant's contention that, as to the measure of damages, the rights of the plaintiff are governed by the law of British Columbia, and not by the law of California. There is not and, in view of the evidence there could not be, any serious controversy, either as to the law of California or as to its application to the facts. The expert witnesses are in agreement upon the point that, by virtue of the rules laid down in the California code, the plaintiffs acquired, under each of the contracts we are concerned

with, a lien upon the subject matter of the sale as soon as it was identified, for a sum equivalent to the purchase price; that, accessory to this lien, there is given by the same provisions a power of sale by auction on default of payment; and that, if a sum equal to the amount of the purchase money is not realized from the sale, the vendor also becomes entitled to require from the purchaser payment of the difference between the amount so realized and the sum due to the vendor under the contract of sale. The vendor is entitled to bid at the sale. And again there could be no dispute, in view of what occurred at the trial, that each of the sales by the plaintiff was a sale valid in California; or that under the law and in the courts of that state the plaintiff if entitled to recover at all would be entitled to the amounts which have been awarded by the judgments appealed from.

But damages are not exigible, the appellants argue, under the terms of the contract itself, but under a new obligation, which, with its accessory right of action, springs from the breach of contract; and this right, being strictly remedial in its nature, must on principle, it is said, be derived from and ruled by the *lex fori* and not the proper law of the contract.

There is singularly little express authority in English law upon the broad question whether in an action on a foreign contract—that is, a contract made abroad, and to be executed abroad—the right to unliquidated damages for breach of it is a right determined and measured by English law or by the appropriate foreign law; although, as we shall presently see, judicial *dicta*, the opinions of text-writers and the analogy of decided cases, all appear to point to a conclusion in a sense opposed to the contention of the appellants.

In principle, it is difficult to discover a solid ground for refusing to classify the right to damages for breach of contract with other rights arising under the proper law of the contract, and recognizable and enforceable as such.

Where rights are acquired under the laws of foreign states (said Turner L.J., in *Hooper* v. *Gumm*) (1), the law of this country recognizes and gives effect to those rights, unless it is contrary to the law and policy of this country to do so.

(1) [1866] 2 Ch. App. 282 at p. 289.

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The exception embraces a very wide field, and among other things excludes procedure, because the policy of the English law recognizes no vested rights in procedure, and a party invoking the jurisdiction of the courts must take procedure as he finds it. The concept of procedure, too, is, in this connection, a comprehensive one, including process and evidence, methods of execution, rules of limitation affecting the remedy and the course of the court with regard to the kind of relief that can be granted to a suitor. But it does not, of course, extend to substantive rights; and here questions as to substantive rights include all questions as to the "nature and extent of the obligation" under the foreign contract. *Fergusson* v. *Fyffe* (1) per Cottenham L.C.

It is most important to observe that it is not the foreign agreement to which effect is given by English law but, as the language of the accurate judge, whose judgment is quoted, suggests, it is the civil or legal right generated by the contract. The right of action, as Willes J., said in *Phillips* v. *Eyre* (2), is a "creature" of the law by which the contract is governed. Applying the principle to the circumstances of the case before us, the lien given to the vendor, and the accessory right of sale, are obviously substantive rights given by the law of California to the vendor as such; in his capacity, that is to say, as seller under a contract of sale. And the right to recover the difference between the contract price and the moneys realized on the sale would seem to be not less so. The provisions of the code could, no doubt, be varied or entirely eliminated by express stipulation; and it seems plain enough, therefore, that indirectly, at all events, they take effect by consent of the parties. But, however that may be, the vendor's rights under these provisions accrue to him by reason of the contract, and may without impropriety be described as rights implied by law as terms of the contract. *Attorney General of Victoria* v. *Ettershank* (3). On principle, since it is the right created by the contract, and not the agreement itself

(1) [1840] 8 Cl. & F. 121 at p. 140.
(2) [1870] L.R. 6 Q.B. 1 at p. 28.
(3) [1875] L.R. 6 P.C. 354 at p. 372.

which is enforced, there would appear to be no pertinent distinction between rights arising under terms thus implied by law and rights arising by force of the general law from express stipulations *inter partes* formally embodied in the record of the agreement.

Our attention has not been called to any Canadian decision or English decision inconsistent with this conclusion, and, so far as can be ascertained, there appears to be no such authority. The relevant decisions are nearly all concerned with bills of exchange and, as regards these, the effect of the decisions prior to the Bills of Exchange Act appears to be that, by the law of England, interest by way of damages will be given according to the law of the place where the party charged has contracted to pay the bill; that is to say, according to the proper law of his contract. *Cooper* v. *Earl of Waldegrave* (1); *Allen* v. *Kemble* (2); *Gibbs* v. *Fremont* (3); *In re Commercial Bank of South Australia* (4); *The Queen* v. *Grand Trunk Ry. Co.* (5); *Fergusson* v. *Fyffe* (6).

As a rule the place of payment under each of the contracts embodied in the bill will be the place where the contracting party has become a party to the bill; and this accounts for the fact that the rule is sometimes stated as if the governing law, as regards interest, were the *lex loci contractus;* as, for example, in *Gibbs* v. *Fremont* (3) at page 484 and *In re Commercial Bank of South Australia* (4) at pages 525-6.

In the United States divergent views have been held, and the decisions are not in agreement upon the question whether, in such cases, it is the law of the place where the contract is made or of the place where the money is to be paid which determines the liability and the measure of it in respect of interest. But in one state only, Massachusetts, is the rule followed that the *lex fori* governs. The overwhelming preponderance of authority in the United States in both the federal and the state courts is against

(1) [1840] 2 Beav. 282.
(2) [1848] 6 Moore P.C. 314.
(3) 22 L.J. Ex. 302.
(4) [1887] 36 Ch. D. 522.
(5) [1890] 2 Can. Ex. R. 132.
(6) 8 Cl. & F. 121.

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that view: *Gilpins* v. *Consequa* (1); *Mills* v. *Dow* (2); *Dyke* v. *Erie Ry. Co.* (3); *Philadelphia Loan Co.* v. *Towner* (4).

The same rule prevails in actions upon foreign judgments. The principle upon which such judgments are enforced by the English courts, as stated by Blackburn J. delivering the judgments of the Court of Queen's Bench in *Godard* v. *Gray* (5); and in *Schibsby* v. *Westenholz* (6),—following the judgments of Parke B., in *Russell* v. *Smyth* (7), and *Williams* v. *Jones* (8)—is that the judgment of a court of competent jurisdiction gives rise to a legal obligation to pay the judgment debt; and in an action upon such a judgment in an English court interest, if by the law of the judgment itself it carries interest, is treated as an integral part of the judgment debt, and the rate is accordingly calculated in conformity with the requirements of that law, whatever that rate may be. If no interest is given by the foreign law, none can be recovered in an action on the judgment in an English court unless, of course, interest, being specified in the judgment, is, by the terms of the judgment itself, part of the judgment debt. *Arnott* v. *Redfern* (9); *Douglas* v. *Forrest* (10); *Hawksford* v. *Giffard* (11). In the case last mentioned, the Judicial Committee of the Privy Council held that, in an action in Jersey upon a judgment recovered in the Queen's Bench Division in England, the plaintiff was entitled to recover interest at the English statutory rate of four per cent upon the judgment debt from the date of the judgment and not at the Jersey rate of five per cent.

That contractual stipulations as to the measure of damages embodied in the agreement itself are governed as to validity and effect by the proper law of the contract, seems to follow as a corollary from the principle that the cause of action rests upon the rights given by that law; and this is the sense of the decision of the Privy Council in *Peninsular & Oriental Steam Navigation Co.* v. *Shand* (12). The

(1) Peters Cir. Ct. 225.
(2) [1890] 133 U.S.R. 423.
(3) [1871] 45 N.Y. 113.
(4) 13 Conn. 249, 257.
(5) [1870] L.R. 6 Q.B. 139.
(6) [1870] L.R. 6 Q.B. 155.
(7) [1842] 9 M. & W. 809 at p. 819.
(8) [1845] 13 M. & W. 628 at p. 633.
(9) [1826] 3 Bing. 353.
(10) [1828] 4 Bing. 686.
(11) [1866] 12 App. Cas. 122.
(12) [1865] 3 Moore P.C.N.S. 272.

conclusion to which these decisions and dicta point has been formally adopted in the opinions of text-writers of repute; Story, sec. 307; Wharton, secs. 427 and 513; Westlake, sec. 225; Dicey, sec. 646.

An argument was advanced by the appellant, based upon the decisions touching the enforceability of causes of action arising from torts committed abroad, which both deserves and requires notice.

Authority can be cited, of the greatest weight, for the proposition that the right of action in respect of a foreign tort is ultimately based upon the obligation *ex delicto* attaching by the law of the *locus commissi* to the wrongful act; Willes J., speaking for the Exchequer Chamber in *Phillips* v. *Eyre* (1), and Holmes J., speaking for the Supreme Court of the United States, in the case of *The Titanic* (*Oceanic Steam Navigation Company* v. *Mellor*) (2). The policy of the English law does not permit the plaintiff to recover in an action upon a tort committed abroad, unless the wrongful act, if done in England, would have been actionable by the law of that country. It was held in *Machado* v. *Fontes* (3), that an action will lie in England in respect of an act committed abroad, if the act is wrongful by the law of England and not justifiable by the law of the country where it is committed, although, by the law of the foreign country, the wrongdoer is not subject to liability enforceable in civil proceedings. It is argued that the decision in *Machado* v. *Fontes* (3) necessarily proceeds upon the hypothesis that the right to recover damages, as well as the measure of damages, is, by English law, matter for the *lex fori*.

There is authority, both unmistakable in effect, and of a high order, for the proposition that the measure of damages in an action for reparation in respect of a tort in a foreign country is not matter of procedure, but matter of the substance of liability; per Turner L.J., *Cope* v. *Doherty* (4); and per Wood V.C. in the same case (5); but it is not necessary, for the purposes of the present appeal, to consider the decision in *Machado* v. *Fontes* (3). The doc-

(1) L.R. 6 Q.B. 1.
(2) [1914] 233 U.S.R. 718 at p. 732.
(3) [1897] 2 Q.B. 231.
(4) [1858] 2 De G. & J. 614 at p. 626.
(5) 4 K. & J. 367 at p. 384.

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trine of that case, according to which the law of England gives a right of action in respect of a foreign tort for damages, when no such right is given by the foreign law, is not necessarily incompatible with the rule which appears to prevail without material qualification as regards contracts, that where rights are given by foreign law, these rights are recognized and enforced by the law of England, except in those cases in which the policy of the law of England forbids it.

For these reasons the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Dickie & De Beck.*

Solicitors for the respondent: *Reid, Wallbridge, Douglas & Gibson.*