1877. January 11.

KRISHNA. REDDI GOVINDAREDDI v. STUART.

of the person considering himself aggrieved should be liable to extinction through a delay on the part of the authority to whom is given the power of extending the period within which a suit may be instituted.

But it appears to me there is no middle view. If the extension is *granted* after the expiration of the time limited, the Act (1) does not admit of a distinction being made between the case of a party who applies to Government *within* the expiry of the time and one who applies after the expiry of it. Both, so far as the language of the Act is concerned, would be in the same category, and I think it is the more reasonable course to construe the Act as giving a discretionary power to the Government (a power which it may be presumed they would not exercise unless they were satisfied there had been no want of due diligence) of extending the time for appeal by suit at all times even *after* the expiry of the period limited.

I think the view taken is erroneous, and I would reverse the decision and remand the case for disposal on its merits.

*Appeal allowed.*

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## APPELLATE CIVIL.

*Before Sir W. Morgan, C.J. and Mr. Justice Holloway.*

MATHAPPA CHETTI (DEFENDANT) SPECIAL APPELLANT, *v.* CHELLAPPA CHETTI (PLAINTIFF) SPECIAL RESPONDENT. (2)

1876. October 2.

*Contract—Foreign Court—Jurisdiction.*

A, a Hindu British subject, neither domiciled, resident, nor possessing property in the foreign State of Pudukotta, casually resorted thither and there drew a bill for a sum found due to his creditor B, resident in that State. B. sued A. on this bill in the Civil Court of Pudukotta and got a decree in his favor. B. then sued A. in the Subordinate Court of Madura for enforcement of this decree. A. pleaded that the Pudukotta Court had no jurisdiction to pass the decree sued on and that he had had no notice of the suit. It was found, on regular appeal, that A. had had notice, and decided that the Pudukotta Court had jurisdiction.

*Held*, on Special Appeal, that the Civil Court of Pudukotta had no jurisdiction to try the suit. That the mere making of a contract within the jurisdic-

(1) Act XXVIII of 1860.

(2) Special Appeal No. 539 of 1876 against the decree of P. P. Hutchins, District Judge of Madura, dated 7th April 1876, reversing the decree of A. P Shrinivassa, Subordinate Judge of Madura, dated 5th November 1874.

tion of a Foreign Court does not necessarily render that Court competent to adjudicate upon all the obligatory relations which flow directly or indirectly from it.

The special respondent in this case, the plaintiff in the Court of first instance, that of the Subordinate Judge of Madura, sued for enforcement of the decree of the Civil Court of Pudukotta passed in favor of the plaintiff in a suit brought by him in that Court on a hundi which had been drawn on the 12th March 1870 by the defendant (special appellant) in favor of the plaintiff on a Chetti resident in Bengal, and which had been dishonored by the latter on presentment for acceptance. At the time of the drawing of the hundi, and ever since, the plaintiff permanently resided in the Pudukotta territory, and the defendant in the Madura District.

The defendant pleaded that the Pudukotta Court had no jurisdiction to pass the decree sued on, and that he had had no notice of the suit brought in that Court, which had been tried *ex parte*.

The Subordinate Judge was "of opinion that the judgment sued on was passed by a Court which had no power to pass it."

On appeal, the District Judge found, on the second of the defendant's pleas, (upon which point the Subordinate Judge had given no opinion) that the defendant had notice. On the question, as to which there was a conflict of evidence, whether the hundi was executed by the defendant at the plaintiff's residence in the Pudukotta territory or at the defendant's residence in the Madura District, the District Judge found,—contrarily to the finding of the Subordinate Judge on this point,—that the execution of the hundi took place at the plaintiff's residence. Having found so, the District Judge held that "the seat of the obligation was at Pudukotta, and that the Civil Court there had jurisdiction," and therefore reversed the Subordinate Judge's decree and decreed for plaintiff for the amount sued for.

Mr. *Johnstone* and Mr. *Grant* for the special appellant.

Mr. *Miller* for the special respondent.

HOLLOWAY, J.—The question is whether an action ought to be sustained upon this decree of the Court at Pudukotta against the drawer of a bill neither domiciled, resident, nor possessing

1876. October 2.

MATHAPPA CHETTI v. CHELLAPPA CHETTI.

property in that State, who is found to have casually resorted thither and drawn the bill for a sum found due to his creditor.

As so common a book as Taylor's (1) shows, the whole English doctrine was at the period of his first edition in a state of uncertainty whether foreign judgments ought to be recognized at all. This is not the case now; and after *Godard* v. *Gray* (2) and *Schulsby* v. *Westenholz* (3) there is no doubt of the conclusiveness of a foreign judgment in an action upon that judgment if the defendant was a subject or resident of the country in which the judgment was rendered; with an exception unnecessary to be here considered; because notice of the proceedings is found.

The question which really arises is the very important one, whether the mere making of a contract within the jurisdiction of the foreign court renders that court competent to adjudicate upon all the obligatory relations which flow directly or indirectly from it. It may at once be said that no sound distinction can be drawn between an obligation directly contractual and the right of regress in certain cases against the maker of a bill.

It is of the utmost importance that legislative policy should, so far as it safely can, give credit to the decrees of foreign courts. In two very excellent articles which, as they are written in French, may probably be generally read, M. Asser discusses this question (4), and justly observes that to the bringing about of this desirable result, a common accord upon the grounds on which jurisdiction ought to be assumed is a necessary preliminary.

If Courts, as the French and English, arrogate to themselves jurisdiction whenever on false principles of international law they may choose to regard the obligation as subject to their jurisdiction because the contract was made within the limits, the result will be that other nations will justly treat their decrees as nullities. This the Supreme Court of the United States has already done.

This leads to the inquiry on what principles the question is to be determined. Little weight can be given to the reasoning

(1) See also Parsons on Contracts, Vol. II.

(2) 6 L. R. Q. B. 139 : 40 L. J. Q. B. 62 : 24. L. T. N. S. 89.

(3) 6 L. R. Q. B. 155 : 40 L. J. Q. B. 73 : 24 L. T. N. S. 93.

(4) *Revue de droit International*, I. 93, 403.

of the English Courts so long as they are, consciously or unconsciously, biassed by the wholly exploded doctrine of the real, personal, and mixed statutes.

The handling of this doctrine is well described by a modern French lawyer no less truly than wittily :—"Il me semble voir d'habiles mâitres de l'escrime commencer par se bander les yeux, se livrer ensuite les plus rudes assauts et, aidés d'une certaine Industrie resultant de l'habitude et de l'instinct, se rencontrer quelquefois."(1)

The mischievous application of this so-called mixed statute to wills has been partially corrected by legislation.

Despite numberless exceptions which really destroy the rule, it is still thought that the general rule is " wherever a contract is executed there is a competent forum and the local law of the place of execution is that which is to measure the obligatory relations."

The following passage of Ulpian is the one around which the whole controversy turns as to the law of Rome.—

"Heres absens ibi defendendus est, ubi defunctus debuit, et conveniendus, si ibi inveniatur, nulloque suo proprio privilegio excusatur.—1. Si quis tutelam, vel curam, vel negotia, vel argentariam, vel quid aliud, unde obligatio oritur, certo loci administravit, et si ibi domicilium non habuit, ibi se debebit defendere : et si non defendat, neque ibi domicilium habeat, bona possideri patietur. 2. Proinde et si merces vendidit certo loci, vel disposuit, vel comparavit, videtur, nisi alio loci, ut defenderet, convenit, ibidem se defendere. *Numquid* dicimus eum, qui a mercatore quid comparavit advena, vel ei vendidit, quem scit *inde confestim profecturum*, non oportet ibi bona possideri, sed domicilium sequi ejus ? At si quis ab eo, qui tabernam vel officinam certo loci conductam habuit, in ea causâ est, ut illic conveniatur : quod magis habet rationem. Nam ubi sic venit, ut confestim discedat, quasi a viatore emptis, vel eo, qui transvehebatur, vel eo qui *παραπλεî* (præternavigat) emit : *durissimum est, quotquot locis quis navigans, vel iter faciens delatus est, tot locis se defendi.* At si quo constitit, non dico jure domicilii, sed tabernulam, pergulam, horreum, armarium, officinam conduxit, ibique distraxit, egit : defendere se eo loci debebit. 3. Apud Labeonem quæritur, si

(1) Mailher de Chassat, cited Laurent I *Rev. de droit International*, 254.

1876. October 2.

MATHAPPA CHETTI v. CHELLAPPA CHETTI.

homo provincialis servum institorem vendendarum mercium gratia Romæ habeat, quod cum eo servo contractum est, ita habendum atque si cum domino contractum sit, quare ibi se debebit defendere. 4. Illud sciendum est, eum, qui ita fuit obligatus, ut in Italia solveret, si in provincia habuit domicilium, utrubique posse conveniri, et hic et ibi: et ita et Juliano et multis aliis videtur (1).

Savigny in his book, which marks an epoch in this matter, has sought to construe it as expressing the rule that the place of conclusion of the contract is only treated as the place for jurisdiction and for the governing law because it is generally the place of fulfilment.

A lawyer of enormous learning and industry, and a consummate master of legal history has, perhaps, satisfactorily shown that this is not a correct view of the passage (Voight, *Jus Naturale, &c.*, Vol. IV, Beilage 16). It may probably be conceded to him that Ulpian does in this passage treat as *the general rule* that there is a forum where a man has contracted. At page 295 Voight justly says that our knowledge of antiquity is by no means so complete as to enable us satisfactorily to apply speculative principles based upon the nature of the thing to the construction of the positive testimonies of the sources.

This great scholar's whole object is to set forth the principles of the Roman law, and it did not therefore occur to him to remark that it is to this very nature of the thing that the illustrious Roman appeals, and what is more to our purpose, he in the passage beginning "Numquid dicimus" and ending "se defendi," shows the gross iniquity and absurdity of asserting a jurisdiction at a place at which the other party to the obligation knows that he is a mere traveller, and thus decides against the jurisdiction, what is precisely the present case.

Mr. Wharton at Sec. 793 states the rules as to jurisdiction given by Bar and justly says that they have generally the concurrence of all European jurists. As this book ought to be in the hands of every English lawyer, we will not quote the passage except for the correction of an inaccuracy in rule 2, caused by following the vicious English terminology.

(1) D. V, 1, 19.

" (2) When rendered by the Courts of a State by whose laws a contract is to be adjudicated, in those cases in which the debtor personally resides in such State, or has in it property not merely illusory, provided that in such cases the judgment is based on the contract, whether for its execution or its recission."

This should be " when rendered by the Courts of a State by whose laws a *contractual obligation* is to be adjudicated."

And in rule 5 instead of " have a continuous abiding place," the words should be " are destined continuously to abide." As translated by Wharton the words would be narrower.

He has also omitted in this place the 6th rule, although he has inserted it elsewhere.

" Lastly, that Court of a State to which the parties have voluntarily submitted themselves."

The very recent cases of *Copin* v. *Adamson* and *Copin* v. *Strachan* (1) are examples of this " prerogative jurisdiction" created by the articles of a company which were held to render every member of it liable to the French Court.

We are not here concerned with the local law governing the obligation. It is only desirable to say, as some observations written many years ago under the witchery of Savigny's style treat the two questions as precisely the same, that this view cannot be maintained. If it were so the law of the forum would always be the law to be applied.

The doctrine of Bar, following Molinæus and Thöl, that the domicil of the debtor (in its wide sense) is generally to give the law of the obligation seems best founded both on the nature of the relation and on convenience.

The place of arising of the obligation must be abandoned, for, if not, two subjects by resorting to a foreign country could evade the law of their own, and a contract made on a journey would subject the makers to a law which probably neither of them knows. Savigny's assault upon this rule is quite decisive.

His own rule, the place of fulfilment, although very often giving the true solution, cannot be treated as a principle. (See Bar, Sec. 120).

The true doctrine is that the law should be that of the debtor (in the wider sense). The objections made to it are fully

(1) L. R. 1, Ex. Div., 17.

1876. October 2.

MATHAPPA CHETTI v. CHELLAPPA CHETTI.

answered at page 236, and the difficulties arising out of varying laws of the creditor and debtor are fully solved, as well as the case of bilaterally burdening obligations. That good faith which is a principle of law will always prevent the one party from obtaining performance while neglecting or refusing to perform his own part.

There may, however, be a forum at a place other than the seat of the local law by the second rule which gives jurisdiction.

"To Courts of the State according to whose laws an obligatory contract is to be determined in so far as the debtor personally resides therein or possesses an appreciable amount of property therein as to all claims out of that obligation."

Residence, as the passage of Ulpian shows, does not mean a casual passage through, or a momentary presence in a State, but something much more permanent, although not sufficient to amount to domicilium.

In *Schulsby* v. *Westenholz*, (1) *Blackburn, J.*, said that the question had not been determined whether the English Court would hold that the French Court had jurisdiction if the contract had been executed within its local limits, but expressed an opinion that it probably would.

It is manifest that the great Roman lawyer and all foreign jurists would hold the contrary, and as it seems to us on the soundest principles.

There is no ground or principle that a fact so absolutely unimportant should vest a Court with jurisdiction over a man because in consequence of the widespread relations of commerce, he contracts within its jurisdiction an obligation which be can only fulfil at the place of his domicil.

Satisfied that such a doctrine would be fraught with extreme mischief and stands on no principle, but is the creature of the mixed statute doctrine, we have reversed the decree of the Civil Judge and dismissed the suit with costs.

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(1) 6 L. R. Q. B. 155; 40 L. J. Q. B. 73; 24 L. T. N. S. 93.