ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Macpherson.

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Sept. 6.

THE CORINGA OIL COMPANY, LIMITED (DEFENDANTS) *v.* KOEGLER AND OTHERS (PLAINTIFFS).

Contract Act (IX of 1872), s. 28—Agreement to refer to Arbitration—Suit for Damages for Breach of Contract—Suit for Specific Performance of Contract to refer.

A contract entered into between the plaintiffs and the defendants contained a clause, that "in case of any dispute the same to be decided by two competent London brokers—one to be appointed by the buyers' and the other by the sellers' agents; such brokers' decision to be final," but did not provide that no action should be brought till such decision was pronounced. Matter of dispute arising the defendants refused to appoint an arbitrator. In a suit for damages for breach of the contract, *held* that the contract was not one of the nature referred to in s. 28, Act IX of 1872. That section only refers to contracts which wholly or partially prohibit the parties absolutely from having recourse to a Court of Law. The first exception in that section applies only to a class of contracts where the parties have agreed that no action shall be brought, until some question of amount has first been decided by the arbitrators.

Semble:—A suit will not lie to enforce an agreement to refer to arbitration, even in the case referred to in the first exception to s. 28 of Act IX of 1872.

APPEAL from a decision of Phear, J., dated 31st of May 1875, and a decision of Pontifex, J., dated the 22nd of May 1876.

The suit was one for damages for breach of contract. The facts are fully set forth in the report of the case before Phear, J., in the Court below (1). The case first came on for settlement of issues, and an issue was raised as to whether the plaint disclosed any cause of action, which was decided in favor of the plaintiff. The case was then heard before Pontifex, J., on the merits, and a decree given for the plaintiffs. The defendants appealed from both decisions, but the appeal from the latter decision was confined exclusively to the facts of the case,

(1) I. L. R., 1 Calc., 42.

and is therefore omitted from this report. The ground of appeal from the decision of Phear, J., was "That such a contract, as is mentioned in Act IX of 1872, s. 28, Exception 1, was proved to exist between the plaintiffs and the defendant company in respect of the subject of this suit, and that the existence of such a contract was and is by the said Act a bar to this suit."

Mr. *Evans* and Mr. *Macrae* for the appellants.

Mr. *Branson* and Mr. *Jackson* for the respondents.

Mr. *Evans* contended that the contract was one which clearly came within s. 28 of Act IX of 1872, and fulfilled all the requirements of Exception I of that section, and therefore inasmuch as the present suit was not one for specific performance of the contract to refer, or for the recovery of the amount awarded, the only suits which by the express words of the section could be brought in such a case, the suit was barred. By the express words of the Contract Act, the plaintiffs' proper course was a suit for specific performance of the agreement to refer. The learned Judge in the Court below holds that to bring an agreement within Exception I of s. 28, the agreement must exclude the Courts in all respects except the matter which is the subject of the award, but it is submitted this is not so; it amounts to saying that a case cannot come under the saving of Exception I, unless it would but for the exception have come under the rule laid down in the original section; *i.e.*, this contract cannot come under the exception though within it, because it does not contain a clause excluding the jurisdiction of the Courts on matters other than the subject referred to arbitration. It is submitted that this contract is not only not illegal but is a bar to the present suit.

Mr. *Branson*, for the respondent, relied on the judgment of the Court below, beginning at p. 50 of the report in I. L. R., 1 Calc. The contract does not come within s. 28, because it does not contain a clause that the Courts shall be excluded in all matters except what is decided by the arbitrators. The contract must come within the class of contracts mentioned in the rule before the benefit of the exception can be taken;

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and, unless it comes strictly within the section, it should be held not to be within it at all, because it would leave the plaintiffs without any remedy, as pointed out by Phear, J. If they had sued for specific performance it is difficult to see, even if the action were maintainable, how they could have obtained any practical relief.

Mr. *Macrae* in reply.—A decree for specific performance of a contract to refer can be enforced (see ss. 200, 326, Act VIII of 1859), by proceeding against the defendants for contempt of the order of the Court. The plaintiffs too might have sued for breach of the contract to refer. But they have brought a suit which the legislature has expressly prohibited.

The following judgments were delivered :—

GARTH, C.J.—The first point which we have to decide is that which was argued before Phear, J., in the Court below, and his judgment upon which is reported in the January number of the Indian Law Reports, page 47.

The defendant contends, that the contract upon which this suit is founded is one of the class described in the 1st Exception of s. 28 of the Contract Act, and, consequently, that as the dispute which has arisen between him and the plaintiffs remains undecided by arbitration, no suit can be brought upon it, except for a specific performance of the agreement to refer. Certainly, as Phear, J. very truly observes, the plaintiffs, if this were so, would be in an unfortunate position, because the defendant has distinctly refused to refer the dispute to arbitration; and, as according to the present law, no suit will lie to compel him to refer, the defendant, if he is right in his contention, may, by his own breach of the contract, deprive the plaintiffs of any remedy whatever. Happily for the interests of justice in the present case, we think it quite clear that Phear, J. is right, and that the contract is not one of those described in the 28th section of the Contract Act.

That section does not apply to contracts which merely contain a provision *for referring disputes to arbitration*, but to those which wholly or partially prohibit the parties from having recourse to a

Court of Law. If, for instance, a contract were to contain a stipulation, that no action should be brought upon it, that stipulation would, under the first part of s. 28, be void, because it would restrict both parties from enforcing their rights under the contract in the ordinary legal tribunals; and so, if a contract were to contain a double stipulation, that any dispute between the parties should be settled by arbitration, and that neither party should enforce their rights under it in a Court of Law, that would be a valid stipulation, so far as regards its first branch; *viz.*, that all disputes between the parties should be referred to arbitration, because that of itself would not have the effect of ousting the jurisdiction of the Courts; but the latter branch of the stipulation would be void, because by that the jurisdiction of the Court would be necessarily excluded.

Then the 1st exception in the 28th section applies only to a class of contracts where (as in the cases of *Scott* v. *Avery* (1) and *Tredwen* v. *Holman* (2), cited by Phear, J.) the parties have agreed that no action shall be brought until some question of amount has first been decided by a reference; as, for instance, the amount of damage which the assured has sustained in a marine or fire policy. Such an agreement does not exclude the jurisdiction of the Courts; it only stays the plaintiffs' hand till some particular amount of money has been first ascertained by reference.

Now it is clear that in this case the contract does not exclude the jurisdiction of the Courts at all; it merely provides, as hundreds of commercial contracts provide, for a reference of disputes to arbitration, and it is perfectly clear law that such a clause does not oust the jurisdiction of the Courts. . . . .

This appeal will, therefore, be dismissed with costs on scale No. 2.

MACPHERSON, J.—I see no reason to differ from Phear, J., in the conclusions he arrived at on the point of law, and I agree in thinking the appeal should be dismissed with costs.

Appeal dismissed.

Attorney for the appellants: Mr. *Hechle.*

Attorney for the respondents: Mr. *Pittar.*

(1) 5 H. L. C., 811. (2) 8 Jur., N. S., 1080; S. C., 1 H. & C., 72.