Privy Council Appeal No. 64 *of* 1924.

Leonard James Martin - - - - - - *Appellant*

v.

Percy Wyfold Stout - - - - - - *Respondent*

FROM

HIS BRITANNIC MAJESTY'S SUPREME COURT FOR EGYPT SITTING AT CAIRO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 8TH DECEMBER, 1924.

Present at the Hearing:

LORD DUNEDIN.
LORD ATKINSON.
LORD SALVESEN.

[*Delivered by* LORD ATKINSON.]

This is an appeal from a judgment of the Supreme Consular Court of Egypt in its civil jurisdiction (for convenience styled hereafter as the Consular Court), dismissing the appellant's application for an order to set aside the writ of summons in the action hereinafter described, and the service of such writ.

This action was instituted in the above-mentioned Court on the 17th May, 1922, by the respondent to recover from the appellant damages, the amount of which was not stated, for the alleged breach by the appellant of two agreements both dated the 30th September, 1921, alleged to have been made between the plaintiff and the defendant, the respondent and appellant, respectively, in this appeal. The Consular Court, it is admitted, has no jurisdiction such as have the English Courts to allow by leave of the Court or a Judge the service of a writ of summons or the notice of a writ of summons outside the jurisdiction of such Courts. The writ of summons in this case takes the form it would naturally

have taken if both plaintiff and defendant were resident in Egypt, but as the defendant was, in fact, not resident in Egypt but in England on and before the 17th May, 1922, the date of the issue of the writ, the plaintiff endeavoured to get over this difficulty by applying for, and obtaining from the Consular Court, the following order :—

" In His Britannic Majesty's Supreme Court for Egypt, Cairo.
" Civil Jurisdiction. Case No. 57 of 1922.

" Between

" Percy Wyfold Stout ... ... Plaintiff

" and

" Leonard James Martin ... ... Defendant.

" Wednesday the 17th day of May, 1922.

" On the application of Reginald Silley, Esq., Counsel for plaintiff under rule 119, and on reading the affidavit of Percy Wyfold Stout sworn this day and the exhibits to same and on its being shown that there is reasonable probability of the writ coming to the knowledge of the defendant if served upon C. H. Perrott, Esq., barrister-at-law.

" It is ordered

" That service of the said writ be effected upon C. H. Perrott, Esq., barrister-at-law, and that such service be good and effective service upon the defendant.

" By the Court,
" (Sgd.) G. FARWAGI,
" Registrar."

The affidavit upon which this application was founded sets out succinctly the main facts of the respondent's case. It runs as follows :—

" I, Percy Wyfold Stout, of Maadi, Cairo, make oath and say :—

" 1. I am the plaintiff in the above action.

" 2. On the 30th day of September, 1921, I entered into a contract with the defendant for the sale of a concession dated 12th April, 1921, and another dated 30th December, 1920, granted to me by the Egyptian Government for the irrigation of certain areas in Upper Egypt and for the financing of the said concessions. I refer to the said agreement for the precise terms thereof.

" 3. On the same date, 30th September, 1921, I entered into an agreement with said defendant whereby I entered the employ of the defendant in and about the said matters for a period of two years at a salary of £3,000 a year, to which contract I refer for the precise terms thereof.

" 4. The first quarter's salary of £750 was paid me by the said Martin, but the payment due on 31st March last has not been made, and the defendant has refused to make such payment.

" 5. By a letter dated 2nd November, 1921, Mr. Perrott, barrister-at-law, sent me draft statutes of a proposed company to be formed in Egypt.

" 6. After a short stay in Egypt the defendant left for London on the 28th day of April, 1922, and has since then instructed his London solicitors to inform me that he repudiated the said two agreements. I am advised and verily believe that the defendant has committed breaches of both the above mentioned agreements for which I am entitled to damages.

" 7. I am informed by the said C. H. Perrott and verily believe that he is the legal adviser in Egypt to the defendant, and I verily believe that a

writ served upon Mr. C. H. Perrott will be brought by him to the knowledge of the defendant.

" Sworn by the said Percy Wyfold Stout in H.B.M. Consulate, Cairo, this 17th day of May, 1922. } (Sgd.) PERCY WYFOLD STOUT.

" Before me,

" (Sgd.) G. FARWAGI,

" British Pro-Consul and Registrar."

The appellant procured a notice dated the 30th May, 1922, to be served by his solicitor, Mr. Russell, of an application to be made to the Supreme Court for Egypt, exercising its civil jurisdiction at Cairo, to have the writ of summons in the respondent, Stout's, action, and the service thereof set aside. This motion did not come before the Court until the 28th December, 1923, when it was dismissed with costs. By an order of the Court dated the 1st March, 1924, leave was given to the present appellant, Martin, to appeal against this last-mentioned order to His Majesty the King in Council. The questions for decision on this appeal are whether the causes of action in respect of which the writ of summons was issued are within the jurisdiction of the Supreme Court of Egypt as defined by Article 5 of the Ottoman Order, 1910, and, if so, whether this writ of summons could be legally served by substituted service upon a defendant actually residing and at the time being out of the jurisdiction of the Court.

The communication from the appellant's solicitor referred to in the sixth paragraph of his affidavit was the following telegram :—

" *L.J.M.*1.—*Telegram, Defendant's Solicitors to Plaintiff.*

" Stout. Turf Club. Cairo. 15.5.22.

" During examination to ascertain whether papers handed us by Martin and claimed by your solicitors were private papers or related to concession, we have come to conclusion that (Martin) must not go on with business and have so advised him Stop We are instructed give you formal notice Martin repudiates any liability under the two contracts dated 30th September last Stop Demands repayment £16,000 holds you liable for damages Sugden.

There could be no more distinct repudiation of those two contracts of the 30th September, no more clear and emphatic expression of an intention on Mr. Martin's part no longer to be bound by them (which latter is apparently the test according to English law, *see* Lord Collins in *General Bill Posting Co., Ltd.*, v. *Atkinson*, [1909], A.C. 118), than those contained in this telegram, while, on the other hand, in no way could this repudiation by Mr. Martin be more unequivocably accepted by Mr. Stout, and by him acted upon, than by instituting within 48 hours of the telegram reaching him an action claiming to recover damages for breaches of those very contracts so repudiated. It is well to bear in mind, having regard to the ingenious argument addressed to the Board by Mr. Henn Collins on behalf of the respondent, that the relief

prayed for by Mr. Stout in his writ was not a decree enforcing specific performance of these contracts or either of them, nor yet the recovery of an ascertained and measured debt of any kind due to him by Martin, but the recovery of damages for breaches of those contracts, and that alone.

It is provided by the 90th Section of the aforesaid Order in Council that, subject to its provisions, the civil jurisdiction of every Court acting under the Order shall, as far as circumstances admit, be exercised on the principles of, and in conformity with, the English law for the time being in force. It is essential, therefore, to consider what effect upon contracts such as those of the 30th September, and the rights and liabilities of the parties thereto, would such a repudiation as that contained in this telegram, accepted and acted upon as the respondent Stout has accepted and acted upon. The repudiation would have to be according to the principles of the English law.

In the *Mersey Steel & Iron Company* v. *Naylor, Benzon & Co.*, 9 A.C. 434, Lord Blackburn, in homely but very effective language, laid down the law touching the breach of contracts to be performed at a future time by the repudiation of them by some of the parties to them before that time arrived. He said :—

> "I myself have no doubt that *Withers* v. *Reynolds* (2 B. and AD. 882) correctly lays down the law to this extent that where there is a contract to be performed in future and one of the parties has said to the other in effect : 'If you go on and perform your side of the contract I will not perform mine.' In *Withers* v. *Reynolds* it was : 'You may bring your straw but I will not pay you up on delivery as under the contract I ought to do. I will keep one bundle of straw in hand so as to have a check on you.' That, in effect, amounts to saying : I will not perform the contract.' "

In that case the other party may say, "You have given me distinct notice you will not perform the contract. I will not act till you have broken it, but I will treat you as having put an end to the contract and, if necessary, I will sue you for damages ; but at all events I will not go on with the contract." That was settled in *Hochster* v. *De la Tour* (2 E. B. 678), in the Queen's Bench, and has never been doubted since, because there has been a breach of the contract, although the time indicated in the contract has not arrived.

Many other authorities might be cited in support of this well-established principle of English law, that where a contract is to be performed on a future day or is dependent on a contingency, and one of the parties to the contract repudiates it and shows by word or act that he does not intend to perform it, the other party is entitled to sue him for breach of the contract without waiting for the arrival of the time fixed for performance, or the happening of the contingency on which the contract is dependent, and is himself absolved from the further performance of his part of the contract. If he elects to do this, the contract is completely at an end, and the party in default is not entitled to an opportunity to change his mind. But the repudiation of a contract by one of

the parties to it does not of itself discharge the contract. It only gives to the other party the option of either treating the contract as at an end, or of waiting until the stipulated time has arrived or the contingency upon which the performance of the contract was dependent has happened.

In *Tredegar & Co.* v. *Hawthorne* (18 T.L.R. 716) Collins, M.R. (as he then was), is reported to have said : " It was clear law that repudiation by one party to a contract was a nullity unless it was accepted by the other party to the contract " ; and Mathew, L.J., said that repudiation was of no effect unless it was acted upon by the other party. If acted upon, there was what was called an anticipatory breach of contract, and the damages were to be calculated at the acceptance of the repudiation.

This Order in Council, styled the Ottoman Order in Council, 1910, is the quasi-legislative enactment establishing the Court, the order of which is, in this case, impeached. It defines the jurisdiction of the Court, and prescribes its procedure. By its 2nd article the limits of the Order are defined to be the dominions of the Sublime Ottoman Porte, but as respects Egypt, it provides that those limits do not extend to any place south of the 22nd parallel of North Latitude ; and further provides that the expression " Ottoman Dominions " and " Egypt " are, for the purpose of the Order, to be construed accordingly. The portions of Egypt north of this parallel are the limits within which in Egypt the Order applies. A British subject is, by Section 3, defined to include a British protected person, and an Ottoman Tribunal is defined to include Egyptian Tribunals, except where the context otherwise requires. The Court established by the Order is, by its 8th Section, defined to be His Majesty's Supreme Court for the Sublime Ottoman Porte, is in the Order referred to as the Supreme Court, and is comprised in the term *Court*.

The 5th article, upon the construction of which the question for decision mainly turns, enumerates and describes some of the persons and matters to whom and to which the jurisdiction conferred by the Order extends : (1) British subjects as defined in the Order within the limits of the Order. That, in their Lordships' view, must mean British subjects in the portion of Egypt north of the 22nd parallel of North Latitude. (2) To property and all personal or proprietary rights and liabilties within the said limits, of British subjects, whether such subjects are within the said limits or not. The other subsections are irrelevant to this case.

It is not quite clear whether the words " within the said limits," as applied to British subjects themselves, do not mean British subjects resident within the limits, and not merely British subjects temporarily or momentarily stopping or resting within them in transit from some place south of the above-mentioned parallel to some place north of it ; for instance, in travelling from Khartum to Port Said or Alexandria. A somewhat similar

difficulty presents itself as to the meaning of the words " within the said limits," as applied to all personal rights and liabilities of British subjects who are not within the limits. For instance, if a trader residing in Khartum contracted to deliver goods at Cairo and failed to do so, or published a libel in a Cairo newspaper, would his liability for damages for breach of contract or for libel come within this subsection, though he may never in his life have been north of the 22nd parallel ? This difficulty of construction would seem to suggest that the liability within the limits to which the subsection refers means the liability of a person himself resident within the limits.

The 129th article of the Ottoman Order in Council, which runs as follows—

> " 129. The Judge of the Supreme Court may make rules of Court—
>
> " (*a*) For regulating the pleading practice and procedure in the Courts established under this order with respect to all matters within the jurisdiction of the respective Courts.
>
> " (*c*) For prescribing any forms to be used.

enables the Judge of the Supreme Court to make rules for, amongst other things —(*a*) regulating the pleading practice and procedure in Courts established under the Order with respect to all matters within the jurisdiction of the respective Courts. Rules have been made which purport to have been made under this provision. The following eight of them alone bear in any way upon this case. They run as follows :—

> " 104. Every action shall be commenced by a writ of summons. . . .
>
> " 105. Every writ of summons shall be indorsed with a statement sufficient to give notice of the nature of the claim or of the relief or remedy required in the action and when damages are claimed with a statement of the amount of such damages.
>
> " 112. When the plaintiff seeks to obtain redress upon more than one cause of action or claim he shall state in the indorsement the grounds of each claim separately and shall also state separately the redress he claims in respect of each.
>
> " 116. (4)—Except as otherwise provided in these Rules, and unless the Court thinks it just and expedient otherwise to direct, service shall be personal, that is, the summons shall be delivered to the person to be served himself.
>
> " (5)—An order for service may be varied from time to time with respect to the mode of service directed by the order.
>
> " (8)—Ordinarily service shall not be made out of the particular jurisdiction, except under an order for that purpose made by the Court within whose jurisdiction service is to be made, which order may be made on the request of the Court issuing the summons.
>
> " (9)—Where, however, the urgency or other particular circumstances of the case appear to any Court so to require (for reasons recorded in the Minutes), the Court may order that service be made out of its particular jurisdiction.
>
> " 119. Where it appears to the Court (either after or without an attempt at personal service) that for any reason personal service cannot be conveniently effected, the Court may order that service be effected

(*b*) By delivery thereof to some person being an agent of the person to be served or to some other person within the jurisdiction of the Court on its being proved that there is reasonable probability that the document will, through that agent or other person, come to the knowledge of the person to be served ;

" Provided that where the person to be served is not within the limits of the Principal Order, an order under this Rule shall not be made by a Provincial Court, except such order as is authorised by paragraph (*b*).

" 334. The Rules of the Supreme Court in England do not apply in the Ottoman Dominions, but where the local practice is in doubt regard may be had in the discretion of the Court to the practice and procedure of the High Court and other Courts in England."

Neither in the Order itself nor in any rule made under it is any provision to be found similar to that contained in Order 11, rule 1, of the Rules of the Supreme Court in England of 1883, authorising a Court or Judge to allow a writ of summons to be served out of its jurisdiction. No form is prescribed for such a writ either by the Order or by the rules.

The writ of summons in this case violates the provision of the rule numbered 105, in that the amount of the damages claimed is not mentioned, while the form of affidavit prescribed to support the application to substitute service runs as follows :—

" (Formal Parts, Form 2.)

" I, I.S. (address and description), make oath and say as follows :—

" (State facts showing either that the summons has come to the knowledge of defendant, or that he wilfully evades service of the same. Or that upon inquiry at his usual place of abode, or at any other place where prior to the time when the writ was entered he might probably have been met with, he could not be found so as to be served, and that in either case there is just ground to believe that he has gone out of the jurisdiction of the Court, or otherwise absconded to avoid being served.

" State Deponent's means of knowledge of the facts deposed to.")

The affidavit of the respondent Stout, dated 30th May, 1922, supporting the application to substitute service in no way complies with this form. An affidavit sworn by Martin, the appellant, in London, on the 18th January, 1923, was filed in the Supreme Court and was used in evidence on the application to substitute service of the writ of summons. In it the appellant stated that he is of British nationality, is domiciled in England ; that he visited Egypt some time in 1922 ; never resided there, never had any intention to reside there ; that C. H. Perrott, barrister-at-law, had advised him occasionally in connection with the agreements the subject matter of the action, but that he had not been and was not, at the time of swearing the affidavit, his agent, and had not any authority to accept service on Mr. Martin's behalf. He further stated that the agreements of the 30th September were negotiated between him and Stout, the respondent, in England, and were completed in England, and further that, on the 15th May, 1922, he instructed his English solicitors, Messrs. Sugden & Hextall, to inform the appellant Stout by telegram that he (Martin) repudiated both these agreements. The Supreme Court delivered

judgment in the case on the 28th December, 1923, and decided, apparently the matter of fact, that service of the writ on C. H. Perrott would most probably come to the knowledge of Martin, the appellant. There was evidence undoubtedly before the Court upon which it might reasonably have come to that conclusion. It must therefore be accepted in this appeal; but the Court decided the case expressly on the ground that, under subsection 2 of Article 5 of the Order, there was a personal liability on Martin *arising* (*sic*) within the geographical area governed by the Order in Council. Their Lordships are with all respect entirely unable to concur with the Supreme Court in that conclusion. They think it is in conflict with well-established authority. The distinct repudiation by Martin of his liability under the contract by his telegram of the 15th May, 1922, handed in at London, was a breach of his contract, involving liability attaching to him. It was, however, conditional on Stout accepting and acting upon the repudiation. He did accept and act upon it in the most emphatic way. In his affidavit to ground the application to substitute service he swore he had been advised and believed that by this telegram Martin had committed breaches of both the agreements, for which breaches he, Stout, was entitled to damages, and he applied for substituted service of the writ, claiming damages for these very breaches. The following three cases clearly establish that Martin's breaches of his agreements were, according to English Law, committed in London, where this repudiating telegram was handed in to the telegraph office, and that any liability on him was, therefore, incurred in England and not in Egypt. In *Cherry* v. *Thompson* (L.R. 7 Q.B. 573) the plaintiff and the defendant, both British subjects being in Germany, became engaged to marry. The plaintiff came to England and there received a letter from the lady, written and posted by her in Germany, in which she declined to carry out her engagement. It was held that the breach of the contract to marry occurred in Germany, the receipt of the letter only providing evidence of the breach, and not constituting the breach itself. Blackburn, J., as he then was, delivered the judgment of the Court. At p. 579 he said:

> "In the case of *Frost* v. *Knight* (L.R. 7 Ex. 111) the judgment, delivered in the Court of Exchequer Chamber, shows with great force the reasons why the renouncing of the relation of betrothed parties by one party is, at the option of the other, a breach of the promise to marry, though the time for performance of the contract was not yet arrived. In this case the receipt of the letter by the plaintiff in England furnished him with evidence that the defendant had in Germany renounced that relation. Had his letter followed him to Ireland he would have received the evidence in Ireland, but the act, which he had the option to treat as a breach, took place in Germany and in Germany alone."

In *Holland* v. *Bennett* [1902], (1 K.B. 867) the plaintiff was employed by the defendant, who was a foreigner resident abroad, as the London correspondent of a newspaper of which the defendant was the proprietor. The defendant, by a

letter written and posted abroad, directed to the plaintiff in England, gave the latter notice of dismissal. In an action for wrongful dismissal brought by the plaintiff, leave was given to issue a writ, of which notice was to be served upon the defendant out of the jurisdiction. Notice of the writ had been accordingly served upon him abroad. It was held that the alleged breach of contract, having arisen out of the jurisdiction, the case did not fall within Order 11, rule 1, and that the writ and service should consequently be set aside. *Cherry* v. *Thompson* was approved of and followed, and Vaughan Williams, L.J., in delivering judgment, said :—

> " The effect of the decisions is that there was a complete breach of the contract when the letter giving notice of dismissal was posted abroad, and under these circumstances the order was right and the appeal must be dismissed."

The last case that need be referred to is *Mubzenbecher* v. *La Aseguradora Espanola* [1906], 1 K.B. 254. In that case the Agent-General of the defendant company, a company domiciled at Teneriffe, came to London with full authority to revoke a certain agreement entered into between the company and the plaintiff to employ the latter as their exclusive agent in England and elsewhere for a period of five years. He did revoke this agreement by a notice in writing sent through the London Post Office to the plaintiff's address. It was held that there was a breach of the plaintiff's contract of service within the jurisdiction, because the contract was revoked by one having full authority in that behalf by a notice sent through the London post. Collins, M.R. (as he then was), in giving judgment, said :—

> " In my view there can be no doubt that there was a breach of the contract within the jurisdiction because the case is not that of sending a letter from abroad as in *Cherry* v. *Thompson*, but of an act done here in sending to the plaintiffs a letter of dismissal. That act was done by the agent-general of the defendants with their authority and on their behalf, and was thus an act done by them within the jurisdiction."

In their Lordships' view no liability arising out of these two contracts of the 30th September, 1921, or the breach of them, rested on the appellant, Martin, within the geographical limits mentioned in Article 2 of the Ottoman Order.

They think the judgment appealed from was wrong, and should be reversed, and this appeal be allowed with costs here and below, and the action dismissed, and they will humbly advise His Majesty accordingly.

In the Privy Council.

LEONARD JAMES MARTIN

v.

PERCY WYFOLD STOUT.

DELIVERED BY LORD ATKINSON.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1924.