G. MARGOLIUS (PLAINTIFF) .....APPELLANT;

AND

A. DIESBOURG (DEFENDANT) .....RESPONDENT.

1936
*Nov. 18.
1937
*Feb. 2.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract under seal—Action at law thereon against a person not a party to the contract.

No person can sue or be sued in an action at law upon a contract under seal unless he is a party to the contract. Authorities reviewed.

Plaintiff sued K. and D. for damages for alleged breach of a contract to purchase goods, which contract was made under seal between plaintiff and K. Plaintiff alleged that subsequent to the contract K. introduced D. as the principal on whose behalf K. had entered into it, and that D. confirmed that representation. The trial judge dismissed the action (on ground of illegality of the contract) and an appeal from his judgment was dismissed by the Court of Appeal for Ontario. K. had not been represented at trial or on the hearing of the appeal, and plaintiff's notice of appeal to this Court was directed only to the defendant D. and asked for judgment against him. At the hearing of the appeal before it this Court pointed out that the contract was under seal and D. was not a party to it, and referred to the principle first above stated.

Held: The action, being solely one at law to recover damages for alleged breach of contract under seal, was not maintainable against D., on the principle first above stated.

The Court could not disregard the said point of law, though D. had not raised it at any time in the proceedings. It appeared upon the very document sued upon and put in at the trial. Nor could the Court entertain the argument that K. was merely an agent for D. and

*PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

1937

MARGOLIUS v. DIESBOURG.

exceeded his authority in attaching a seal to the contract and in making the contract to purchase himself for his own benefit—that was not the basis of the action. Nor could plaintiff succeed upon an alternative contention that D. subsequently ratified the contract and might accordingly be sued upon it. Nor was there any foundation for the application of the doctrine of novation. Nor was this a case where D. had himself received the benefit under the contract and was bound in equity to pay for the same.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario dismissing his appeal from the judgment of Rose, C.J.H.C., dismissing his action. The action was brought to recover damages for alleged breach of a contract to purchase whiskey. The material facts of the case for the purposes of the judgment of this Court are sufficiently stated in that judgment, now reported. The appeal to this Court was dismissed—but without costs, as the ground for dismissal by this Court (namely, that the appellant's action, being solely one at law to recover damages for alleged breach of a contract under seal, was not maintainable against the respondent who was not one of the parties to the contract) had not been raised by the respondent at any stage of the proceedings. (The point was raised by this Court during the argument and opportunity was given to counsel to submit argument upon it).

I. F. Hellmuth K.C. and *J. R. Cartwright K.C.* for the appellant.

A. Racine K.C. and A. F. Gignac for the respondent.

The judgment of the court was delivered by

DAVIS J.—The appellant commenced this action in the Supreme Court of Ontario against the respondent Diesbourg and one Kellner, defendants, by writ of summons issued June 1st, 1934. The material portions of the Statement of Claim are as follows:

2. On or about the 10th day of October, 1933, the defendant Edward H. Kellner, representing himself to the plaintiff as one of a syndicate who are in the market to buy liquor in bond in bonded warehouse for export to the United States, entered into a contract with the plaintiff herein, and the plaintiff alleges that he then told the said defendant that he had an arrangement with Consolidated Distilleries Limited whereby he could sell its brands of whiskey and he also disclosed to the defendant that he, the plaintiff, was making 17 cents per American gallon on said whiskey.

The plaintiff prays leave to refer to contract entered into between George Margolius and Edward H. Kellner which contract is dated the 10th day of October, 1933.

3. The plaintiff further alleges, and the fact is, the defendant Edward H. Kellner subsequently introduced the defendant Arthur Diesbourg to the plaintiff as the principal on whose behalf he had entered into the contract, which representation was confirmed by Arthur Diesbourg and the plaintiff also disclosed to the defendant Arthur Diesbourg the source of his supply and that he was making 17 cents on each and every gallon.

4. According to the agreement the defendant Edward H. Kellner contracted to purchase 200,000 gallons of whiskey at the price of $4.55 per American gallon, wood included, in bonded warehouse which contract the defendants failed to carry out.

5. The plaintiff alleges and the fact is that the defendant Edward H. Kellner and the defendant Arthur Diesbourg failed to fulfil the agreement with the plaintiff, in that they did not carry out the contract pursuant to the terms thereof, in which contract the defendant Arthur Diesbourg is the undisclosed principal and furthermore the said defendant refused to carry out the contract.

6. As a result of the facts set forth in the foregoing paragraphs the plaintiff by reason of breach of contract suffered damages to the extent of 17 cents per American gallon on 200,000 gallons of whiskey which was to be purchased by the defendants.

7. The plaintiff therefore claims from the defendants herein

(*a*) $34,000 damages for breach of contract.

(*b*) The costs of this action.

(*c*) Such further and other relief as to this honourable Court may seem just.

The contract sued upon dated October 10, 1933, is as follows:

THIS AGREEMENT made in duplicate this 10th day of October, A.D. 1933.

BETWEEN: GEORGE MARGOLIUS, of the City of Toronto, in the County of York, Gentleman,

Hereinafter called the Vendor,

Of the FIRST PART;

and

E. H. KELLNER, of the City of Windsor, in the County of Essex, Gentleman,

Hereinafter called the Purchaser,

Of the SECOND PART:

WITNESSETH that in consideration of the sum of TWO DOLLARS ($2) now paid by the purchaser to the vendor (the receipt whereof is hereby by him acknowledged), and of these presents, the parties hereto agree as follows:

1. The purchaser hereby agrees to buy from the vendor and the vendor hereby agrees to sell to the purchaser one hundred thousand gallons (100,000) of Consolidated Distilleries Limited American Type Rye Whiskey and One Hundred thousand gallons (100,000) of Consolidated Distilleries Limited Bourbon Whiskey (measurement to be in American Gallons—128 ounces to the gallon) (Virgin Whiskey four years old or older to test 116 American Proof Gallons), at the price or sum of $4.55 per gallon, wood included, in bond in bonded warehouse in the Province of Ontario, in the Dominion of Canada.

2. The purchaser agrees to pay a deposit of 25 per cent. of the total sale price not later than 3 o'clock in the afternoon of Monday, October

1937

MARGOLIUS v. DIESBOURG.

Davis J.

16th, 1933; the said deposit to be paid to the Canadian Bank of Commerce, Head Office, Toronto, Ontario, to the order of the vendor; to be paid to the said vendor on the said Bank's guarantee of delivery in accordance with the terms hereof.

3. The purchaser hereby undertakes to take delivery of the said whiskey and pay the balance of the purchase price not later than March 31st, 1934; provided that the purchaser may from time to time, before March 31st, 1934, take delivery of any part of the said whiskey, but in not less than carload lots, upon payment in full of the sum of $4.55 per gallon therefor; the intention being that the 25 per cent. deposit to be paid as hereinbefore set forth shall remain as a deposit until the final completion of this contract.

4. The vendor agrees to store the said whiskey in a bonded warehouse in the Province of Ontario, without charge, up to January 31st, 1934, after which date the purchaser shall pay the storage charges.

5. Delivery shall be completed by transferring to the purchaser Government Certificates or other documentary evidence showing the whiskey to be in bond in Ontario.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals.

SIGNED, SEALED AND DELIVERED
in the presence of
"Samuel Ciglen."

"Edward H. Kellner." (seal)
"G. Margolius." (seal)

The action came to trial before the Chief Justice of the High Court without a jury. No one appeared for the defendant Kellner. At the conclusion of the trial, for reasons stated at some length, the learned trial judge dismissed the action with costs to be paid by the plaintiff to the defendant Diesbourg. The learned trial judge thought it ought to be found that Diesbourg was a principal and Kellner his agent and that Diesbourg was liable on the contract if anybody was liable. But the learned judge based his dismissal of the action upon the ground of the illegality of the contract. Secs. 72 and 77 of the Ontario *Liquor Control Act,* R.S.O. 1927, ch. 257, provide that, except as provided by the Act, no person shall within Ontario sell or offer to sell liquor and no person shall within Ontario attempt to purchase or purchase liquor. The trial judge could find no provision in the Act that takes the plaintiff out of the prohibition of sec. 72. Further, the trial judge refused to entertain the argument of counsel for the plaintiff that the plaintiff was not acting for himself but was a representative of distillers, and in any event was unable to find any section in the Act that gives a distiller the right within Ontario to sell to any person other than the Ontario Liquor Control Board. Even if a distiller

had any right to sell, the trial judge did not see how the plaintiff, who is suing upon a contract which professes to evidence a sale by the plaintiff in Ontario, could suggest that the case ought to be treated as if the contracting party, the distiller, were the plaintiff and entitled to have judgment against the purchaser for the purchase price. The contention that the ultimate destination of the liquor was intended to be the United States was considered by the trial judge but he concluded that under the Dominion statute as it stood at the time (the *Export Act,* R.S.C. 1927, ch. 63, as amended 1930—20-21 Geo. V, c. 19) it was not possible for a distiller to sell even to a person in the United States. Under the amending section, notwithstanding the provisions of any other statute or law or regulation, no intoxicating liquor held in bond or otherwise under the control of officials of the Dominion Government under the provisions of the *Excise Act,* the *Customs Act* or any other statute of Canada could be released or removed from any bonding warehouse, distillery, brewery or other building or place in which such liquor was stored in any case in which the liquor proposed to be removed was destined for delivery in any country into which the importation of such liquor was prohibited by law, and the trial judge found that the importation of liquor into the United States at the time the contract was made was prohibited and the parties to the transaction knew it. The trial judge further found that the expectation of the parties that within a short time importation into the United States might become legal made no difference. The transaction at the time that it was entered into was a transaction respecting liquor that could not be released from the bonded warehouse. Further, the trial judge put the disposition of the case upon the ground that the seller, the buyer and the liquor were all in Ontario and the sale was made there, and that the use that the buyer intended to make of the liquor was unimportant, as was also the manner in which under the contract delivery was to be made.

From that judgment the plaintiff served notice of appeal to the Court of Appeal for Ontario. The appeal was heard by the Chief Justice in Appeal, Mr. Justice Riddell and Mr. Justice Fisher, and was dismissed with costs. No written reasons for judgment appear to have been given. The

1937

MARGOLIUS v. DIESBOURG.

Davis J.

formal order of the Court of Appeal recites the presence of counsel for the defendant Diesbourg and that no one appeared for the defendant Kellner. The costs of the appeal were directed to be paid by the plaintiff to the defendant Diesbourg. From that judgment the plaintiff then gave notice of appeal to this Court, and the notice of appeal, which was directed only to the defendant Diesbourg, asked that the said judgment of the Court of Appeal for Ontario "may be reversed and that judgment be entered in favour of the plaintiff against the defendant Diesbourg for the relief claimed in the statement of claim." It is plain that no appeal to this Court was taken against the judgment in so far as the action as against the defendant Kellner had been dismissed.

Mr. Hellmuth in a very able argument presented the facts of the case as the purchase and sale of liquor in bond in Ontario to be exported into the United States when prohibition in that country had ceased. He pointed to clause 5 of the contract which provided that it was only the government certificates and not the liquor itself that were to be delivered to the purchaser, and contended that the transaction was plainly one necessarily involving the export of liquor under Dominion regulations and control and did not fall within the purview of the Ontario statute, if, indeed, anything in that statute could be read in the sense of attempting to interfere with the exportation of liquor, a subject-matter of Dominion legislation. Mr. Hellmuth contended further that, the necessary States of the Union having voted in favour of the repeal of prohibition, the parties were only awaiting the formalities of Congress to give effect to the repeal and that was the reason why March 31, 1934, was specifically mentioned in paragraph 3 of the contract. Mr. Hellmuth stressed the presumption against illegality and argued that if a contract could be performed legally it was not sufficient to show that it could be performed illegally, and that the evidence in this case did not show that it was the intention of the parties to do something with the liquor contrary to law.

It becomes unnecessary for us to determine the grounds of appeal advanced by Mr. Hellmuth and Mr. Cartwright so forcibly on behalf of the appellant. During the argument the Court called attention to the fact that the con-

tract sued upon was a contract under seal made between the appellant and Kellner. The respondent Diesbourg was not a party to the contract. It has long been settled that no person can sue or be sued in an action at law upon a contract under seal, unless the person is a party to the contract. Pollock on Contracts, 10th ed. (1936), at pp. 97 and 98 states the rule thus:

> When a deed is executed by an agent as such but purports to be the deed of the agent and not of the principal, then the principal cannot sue or be sued upon it at law, by reason of the technical rule that those persons only can sue or be sued upon an indenture who are named or described in it as parties.

The cases cited in the foot-note in support of that statement are: *Lord Southampton* v. *Brown* (1); *Beckham* v. *Drake* (2).

The rule was applied in this Court in *Porter* v. *Pelton* (3), where it was held that no action could lie on an agreement under seal that had not been signed by the defendant, even if it were an agreement for his benefit and a seal was not necessary.

The rule, of course, only applies to actions at law. In a proceeding in equity in respect of a contract involving a trust, different considerations prevail, as Pollock says at p. 98:

> But where a trustee contracts in his own name alone, even under seal, and afterwards repudiates the trust, the beneficiary can enforce the contract, making him a defendant without a separate application to the Court for authority to sue in the trustee's name.

The action here is solely one at law to recover damages for alleged breach of contract under seal. Newcombe J. in the *Vandepitte* case (4), carefully reviewed and discussed the well-known cases of *Tweddle* v. *Atkinson* (5); *Gray* v. *Pearson* (6); *Gandy* v. *Gandy* (7); and *Dunlop Pneumatic Tire Co.* v. *Selfridge & Co.* (8). The *Vandepitte* case went to the Privy Council (9), and Lord Wright delivering the judgment said in part at p. 79:

(1) (1827) 6 B. & C. 718, 30 R.R. 511.
(2) (1841) 9 M. & W. at p. 95, affirmed sub nom. *Drake* v. *Beckham*, 11 *ib.* 315, 12 L.J. Ex. 486, 60 R.R. 691.
(3) (1903) 33 Can. S.C.R. 449.
(4) *Preferred Accident Ins. Co. of New York* v. *Vandepitte*, [1932] S.C.R. 22, at 30-31.
(5) (1861) 1 B. & S. 393.
(6) (1870) L.R. 5 C.P. 568.
(7) (1885) 30 Ch. D. 57.
(8) [1915] A.C. 847.
(9) *Vandepitte* v. *Preferred Accident Ins. Corpn. of New York*, [1933] A.C. 70.

1937

MARGOLIUS v. DIESBOURG.

Davis J.

No doubt at common law no one can sue on a contract except those who are contracting parties and (if the contract is not under seal) from and between whom consideration proceeds: the rule is stated by Lord Haldane in *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* (1): "My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*." In that case, as in *Tweddle* v. *Atkinson* (2), only questions of direct contractual rights in law were in issue, but Lord Haldane states the equitable principle which qualifies the legal rule, and which has received effect in many cases, as, for instance, *Robertson* v. *Wait* (3); *Affréteurs Réunis Société Anonyme* v. *Leopold Walford (London) Ld.* (4); *Lloyd's* v. *Harper* (5)—namely, that a party to a contract can constitute himself a trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on the third party. The trustee then can take steps to enforce performance to the beneficiary by the other contracting party as in the case of other equitable rights. The action should be in the name of the trustee; if, however, he refuses to sue, the beneficiary can sue, joining the trustee as a defendant.

In the more recent case of *Harmer* v. *Armstrong* (6), Lord Maugham (then Maugham J.) fully considered what he called "a curious exception" to the general rule that an undisclosed principal may sue or be sued in his own name on any contract duly made on his behalf,

in the case of a contract under seal entered into by an agent, even where the agent is described as acting on behalf of a named principal.

In such a case

the principal can neither sue nor be sued upon it, the rule being that the parties are determined exclusively by the form of the instrument. The reason for the rule is not to my mind a very satisfactory one, but the rule itself is perfectly well settled * * *

Upon appeal the Court of Appeal, while affirming the decision that the agreement was entered into by the defendant Armstrong as agent and trustee for the plaintiffs and himself, reversed the decision that the fact that the agreement was under seal prevented the plaintiffs from enforcing it in the action. Both Lord Maugham (as he now is) and the Court of Appeal came to the conclusion on the facts that the defendant Armstrong had acted in a fiduciary capacity in relation to the agreement—he was a trustee of the agreement for the plaintiffs and as trustee had committed a breach of trust in not enforcing the con-

(1) [1915] A.C. 847, 853.
(2) (1861) 1 B. & S. 393.
(3) (1853) 8 Ex. 299.
(4) [1919] A.C. 801.
(5) (1880) 16 Ch. D. 290.
(6) [1934] 1 Ch. 65.

tract. In those circumstances the Court of Appeal held that the case was plainly one in which the court ought to act on the equitable rule and decree specific performance of the contract.

In the case before us the appellant's action is solely one at law to recover damages for alleged breach of contract under seal. It is not the case of a *cestui que trust* seeking to enforce a contract when the trustee has committed a breach of trust.

The point was not raised by the respondent Diesbourg at any time in the proceedings, and counsel for the appellant contends that the respondent should not now be allowed to set it up in answer to the appellant's claim. But the appellant sued upon the contract and in his statement of claim prayed leave to refer to it at the trial and the first exhibit put in at the trial on behalf of the appellant was the contract itself, plainly under the seals of both parties to it. The Court cannot disregard the point of law, even at this stage of the proceedings, when it plainly appears upon the very document upon which the action is brought. Nor can we entertain the ingenious argument of counsel for the appellant that Kellner was merely an agent for Diesbourg and exceeded his authority in attaching a seal to the contract and in making the contract to purchase himself for his own benefit. That might entitle Diesbourg to an action against Kellner for damages but it is not the basis of the appellant's action. Nor can the appellant succeed upon his alternative contention that Diesbourg subsequently ratified the contract and may accordingly be sued upon it. Nor is there any foundation for the application of the doctrine of novation urged upon us by counsel for the appellant. Nor is this a case where the respondent has himself received the benefit under the contract and is bound in equity to pay for the same.

The action is not maintainable against the respondent. On this ground alone the appeal must be dismissed, but without costs, as the respondent never raised the point at any stage of the proceedings.

Appeal dismissed, without costs.

Solicitors for the appellant: *Smith, Rae, Greer & Cartwright.*

Solicitors for the respondent: *Racine, Gignac & Fleming.*