

WILLIAM LAW AND OTHERS (DE- } APPELLANTS;
FENDANTS)

1895
*May 8.
*Dec. 9.

AND

GUSTAV CONRAD HANSEN (PLAIN- } RESPONDENT.
TIFF)

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Action—Bar to—Foreign judgment—Estoppel—Res judicata—Judgment obtained after action begun—R. S. N. S. 5 ser. c. 104, s. 12 s.s. 7 ; orders 24 and 70 rule 2 ; order 35 rule 38.

A judgment of a foreign court having the force of *res judicata* in the foreign country has the like force in Canada.

Unless prevented by rules of pleading a foreign judgment can be made available to bar a domestic action begun before such judgment was obtained. *The Delta* (1 P. D. 393) distinguished. The combined effect of orders 24 and 70 rule 2, and s. 12, s.s. 7 of c. 104 R. S. N. S. 5 ser. will permit this to be done in Nova Scotia.

The provision of R. S. N. S. 5 ser. c. 104, order 35, rule 38, that evidence of a judgment recovered in a foreign country shall not be conclusive, in an action on such judgment in Nova Scotia, of its correctness, but that the defendant may defend such suit as fully as if brought for the original cause of action, cannot be invoked in favour of the defendant in Nova Scotia who has brought an unsuccessful action in a foreign court against the plaintiff.

APPEAL from a decision of the Supreme Court of Nova Scotia, affirming the judgment of the plaintiff at the trial.

The action was brought by Hansen for damages occasioned by a collision between his ship "The Rolf" and defendants' barque "The Emilie L. Boyd." Prior to the commencement of this action the defendants had taken proceedings against "The Rolf" in the District Court of the United States for the Eastern District of New York, which resulted in a decision that "The

*PRESENT :—Sir Henry Strong C.J., and Taschereau, Gwynne, Sedgewick and King JJ.

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Boyd" was solely in fault for the collision, and this decision was affirmed by the United States Circuit Court of Appeal, the court of final resort in such cases. The present action was begun before judgment was given by the District Court, and the defendants pleaded thereto that the collision was solely due to the negligence of those in charge of "The Rolf." The plaintiff did not reply to this plea until the action in New York was concluded, when he set up the judgment therein as a conclusive answer. On the trial, before Mr. Justice Townshend, plaintiff had judgment, the learned judge holding that defendants were estopped by the foreign judgment from contesting the question as to whose negligence caused the collision, although he was of opinion, upon the evidence, that "The Rolf" was to blame. The judgment of the trial judge was affirmed by the full court, and the defendants then appealed to this court.

Borden Q.C. for the appellants. Under the authorities there is a distinction both between a foreign and domestic judgment and between a foreign and domestic *lis pendens* as to the effect on subsequent proceedings. *Westlake on Private International Law* (1).

A foreign *lis pendens* gives no right to a party to have the second action stayed. *Westlake on Private International Law* (2); *McHenry v. Lewis* (3); *Peruvian Guano Co. v. Bockwoldt* (4); *Marsden on Collisions* (5).

In Nova Scotia a foreign judgment is not an estoppel. R.S.N.S. 5 ser. ch. 104. Order 35, Rule 38 of Judicature Act Rules.

Plaintiff was bound to elect whether he would rely on estoppel or on the merits. *Bigelow on Estoppel* (6); *Scarf v. Jardine* (7).

(1) 3 ed. p. 354.

(2) 3 ed. pp. 357-8.

(3) 22 Ch. D. 397.

(4) 23 Ch. D. 225.

(5) 3 ed. p. 224.

(6) 5 ed. p. 103.

(7) 7 App. Cas. 345.

Newcombe Q.C. and *Drysdale* for the respondent. A judgment as a plea is a bar, and as evidence conclusive between the parties. *Duchess of Kingston's Case* (1), per DeGrey C.J.; and Lord Westbury applied this remark of Chief Justice DeGrey to a foreign judgment in *Hunter v. Stewart* (2).

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The foreign judgment is conclusive though obtained after the institution of the domestic action. *Marble v. Keyes* (3); *Memphis &c. Railroad Co. v. Grayson* (4); *Schuler v. Israel* (5).

The judgment of the court was delivered by :

KING J.—This is an appeal from a judgment of the Supreme Court of Nova Scotia in favour of the plaintiff, the present respondent.

The action was brought for damages occasioned by a collision on the high seas between respondent's ship "Rolf," and the appellants' barque "Emilie C. Boyd," which resulted in the total loss of "The Boyd" and in considerable damage to "The Rolf."

The appellants are domiciled in the province of Nova Scotia and the respondent in Norway. Prior to the commencement of this action the defendants in it began proceedings in the District Court of the United States for the Eastern District of New York, against "The Rolf" in respect of the collision. The vessel was arrested and afterwards released on bail, the owner of "The Rolf" appearing and defending the action. The libel charged generally that the collision was not due to any fault or negligence on the part of the owners of "The Boyd," or of those in charge of her, but was wholly due to the negligence of those in charge of "The Rolf" specifying various negligent acts and omissions. To this the owner of "The Rolf" replied, admitting the

(1) 2 Sm. L.C. 9 ed. 812

(3) 9 Gray (Mass.) 221.

(2) 31 L.J. Ch. 346 ; 4 DeG. F. & J. 178.

(4) 88 Ala. 572; 16 Am. St. Rep. 69.

(5) 120 U.S.R. 506.

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jurisdiction of the court, but denying that the collision was due to the fault or negligence of those in charge of "The Rolf," and charging that it was wholly due to the fault or negligence of those in charge of "The Boyd."

The cause came on for trial before Benedict J., and on the 5th August, 1891, it was adjudged and decreed that the collision was due solely to the fault of those navigating "The Boyd," and that the libel should be dismissed with costs. This judgment was, on the 5th March, 1892, affirmed on appeal by the United States Circuit Court of Appeal, the court of final resort.

Prior to the judgment of the District Court a statement of claim had been delivered by the owner of "The Rolf," and a statement of defence and also a counter claim had been filed by the owners of "The Boyd," but nothing further was done until the conclusion of the action in New York when the defendant in that action, and the plaintiff in this, filed a reply and answer to the statement of defence and counter-claim respectively setting up the foreign judgment as a conclusive answer. Upon trial before Mr. Justice Townshend the defendants were held to be precluded from again contesting the question of their negligence and judgment was rendered against them, although the learned judge expressed the opinion that, if free to do so, he should have arrived at a different conclusion upon the merits. This judgment was affirmed by the Supreme Court of Nova Scotia, Mr. Justice Weatherbe dissenting.

It is now established in English law that a judgment of a foreign court of competent jurisdiction having the force of *res judicata* in the foreign country has the like force in England. *Bank of Australasia v. Nias* (1); *Bank of Australasia v. Harding* (2); *De Cosse Brissac v. Rathbone* (3); *Godard v. Gray* (4).

(1) 16 Q. B. 717.

(2) 9 C. B. 661.

(3) 6 H. & N. 301.

(4) L. R. 6 Q. B. 139.

Before the conclusive character of foreign judgments in proceedings actively brought for the enforcement of their obligations was definitely settled, it was established that a judgment for the defendant in the foreign court was a conclusive bar to any attempt to re-open the matter in the English courts.

The *exceptio rei judicatae* under such circumstances, says Story (1), is entitled to universal conclusiveness and respect. This distinction has been very frequently recognized as having a just foundation in international justice \* \* We think it clear upon principle that if a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him. *Schibsby v. Westenholtz* (2).

Next, as to the extent to which the judgment concludes. Judgments *in rem* are conclusive against all the world, not only as to the *rem* itself but also as to the ground on which the tribunal professes to decide, or may be presumed to have decided. As to what constitutes proceedings *in rem* see *Castrique v. Imrie* (3). Judgments *in personam* bind parties and privies, and, generally speaking, are conclusive at least upon the material issues tendered by the plaintiff's complaint.

The doctrine of estoppel by a former judgment between the same parties is one of the most beneficial principles of our jurisprudence, and has been less affected by legislation than almost any other.

Per Miller J. in *Aurora City v. West* (4).

The very object of instituting courts of justice is that litigation should be decided, and decided finally. That has been felt by all jurists.

Per Willes J. in *Great Northern Railroad Co v. Mossop* (5).

In the present case the appellants, as the plaintiffs in the District Court of the United States, distinctly ten-

(1) Conflict of Laws s. 578. (4) 7 Wall. 105.  
 (2) L.R. 6 Q.B. 155. (5) 17 C.B. 140.  
 (3) L.R. 4 H.L., per Blackburn  
 J. p. 429.

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dered the material issue that "The Rolf" was solely, and "The Boyd" not at all, to blame. Issue was joined upon this, and it was decided against the then plaintiffs.

In the present action they raise the precise issue again by their statement of defence and counter-claim. The evidence is, that by the law of New York the decision upon the issue in the first action is deemed *res judicata* in the second. Its effect, therefore, would be to preclude defendants from again agitating the matter.

This conclusion, however, is as yet premature, for the defendants have several contentions remaining.

First, that as the foreign judgment was obtained after the present action was begun it has not the force of *res judicata*. *The Delta* (1) is cited in support. One of the grounds of decision in that case was that the foreign judgments not having been given on the merits of the case, but on matters of form only, they could not be set up as a bar to a decision on the merits. It was also expressed to be doubtful whether the evidence showed that the judgments would have the force of *res judicata* in the foreign countries.

In these circumstances, although the principal ground of the judgment was expressed to be that at the time of action brought there was no *res judicata* but only a *lis alibi pendens*, there was no foundation for the application at all.

The case was one of collision between "The Delta" and "The Foscolo." An action and a cross action were first begun in the foreign country. Afterwards an action and a cross action were brought in England. Subsequent to the bringing of the English action by "The Foscolo" against "The Delta," judgment was rendered in both the foreign actions against "The Foscolo," in the one suit for want of appearance, and in the other for want of prosecution. Then "The Delta" sought to set up

(1) 1 P.D. 393.

these judgments as conclusive against "The Foscolo" in the English actions.

Assuming that the foreign judgments had been on the merits, and had the force of *res judicata* abroad, the reasons of the learned judge are as follows :

If the owners of "The Delta" had wished to escape from having two suits against them for the same matter brought to a hearing they should have put the owners of "The Foscolo" to their election, compelling them to abandon one or the other of the suits.

That is a rule of procedure entirely inapplicable in the case before us, where there are not two suits against the respondent and therefore no case for election at all.

The next reason is as follows :

As regards the suit against "The Foscolo" (*i.e.* the English cross suit) that was brought by the owners of "The Delta" while the foreign *lis* was pending ; they cannot be heard therefore to object that that *lis* is a bar to a decision on the merits in this suit.

As a matter of fact the cross suit brought in England by "The Delta" against "The Foscolo" was not brought until after the judgments were obtained in the foreign suits ; (see p. 403 near foot). It was, as to the cross action, a case, therefore, of waiver of the foreign judgment and of suing on the original cause of action.

Apart from technical rules of pleading there would not seem to be satisfactory reason, upon principle, for declining to give effect to a foreign judgment merely because it was obtained after the beginning of the action in which it is sought to be made available. The considerations of justice and public policy which dictate the rule of *res judicata* as applied to foreign judgments operate to prevent the defeat of the rule by technical considerations. Why should a plaintiff in a foreign action, by commencing fresh proceedings in another country on the eve of judgment rendered, become entitled to litigate the matter anew ?

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Again, a person in the position of respondent, by discontinuing his suit and beginning again, may avail himself of the effect of the foreign judgment. It would result merely in a question of costs. No substantial objection therefore can be said to lie against the bringing forward of a defence based upon a judgment recovered after action brought.

In the United States courts it is held that when a matter is once adjudicated it is conclusively determined as between the parties and privies, and this determination is binding as an estoppel in all other actions whether commenced before or after the action in which the adjudication was made. *Finley v. Hanbest* (1); *Schuler v. Israel* (2). If the judgment is conclusive in its character in an action to be begun to-morrow, it ought to be possible, upon appropriate terms, to make it available in an action for the identical matter begun yesterday.

It is said that the rules of pleading do not admit of this being done, but I agree with the learned judges forming the majority of the Nova Scotia Court that the combined effect of orders 24 and 70 rule 2, and sec. 12, subsec. 7 of ch. 104 R.S. N.S., is sufficient to enable the essential rights of the parties to be brought in course of adjudication.

It is, however, further urged for the appellant, that by virtue of the provisions of ch. 104, order 35, rule 38 of R.S. N.S., the foreign judgment in this case cannot be relied upon as an estoppel.

The enactment is as follows:—

The record or other evidence of a judgment recovered in any other province or country against any person domiciled in Nova Scotia, shall not be conclusive evidence in any action brought on such judgment in any court of this province of the correctness of such judgment, but the defendant may controvert all or any of the facts on which such judgment is founded, or the cause of action in the suit in

(1) 30 Penn. 190.

(2) 120 U. S. 506.



which such judgment was given, and may raise the same defence in such suit on such judgment as he could have done as fully as if such suit had been brought for the original cause of action.

This is an enactment available only by persons domiciled in Nova Scotia. It is intended as a weapon of defence, and not of offence. It is not lightly to be supposed that the legislature, while leaving the foreign subject to be proceeded against in Nova Scotia upon the judgment obtained abroad by the person of Nova Scotia domicile, intended that the latter should be protected against the consequences of his own unsuccessful incursions into the foreign field. The closing words of the clause seem to show that nothing of this kind was intended. The domiciled defendant in the Nova Scotia action is to be free to open up the foreign judgment sought to be enforced against him "as fully as if such suit (in Nova Scotia) had been brought for the original cause of action." The defendant in the foreign suit cannot be said to have had an original cause of action in the proceedings abroad.

I therefore think the Act cannot be invoked for the appellant.

Further, it appears to me that the judgment should be sustained upon the merits. The reasons of the District Court of the United States seem satisfactory to my mind.

The result is that the appeal should be dismissed.

*Appeal dismissed with costs.*

Solicitors for the appellants: *Borden, Ritchie, Parker & Chisholm.*

Solicitors for the respondent: *Drysdale & McInnes.*

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