1961

*Mar. 8, 9
June 26

REGAS LIMITED (*Defendant*) .....APPELLANT;

AND

LEON LOUIS PLOTKINS (*Plaintiff*) ....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Chose in action—Assignment in Alberta of debt created in Saskatchewan—Conflict of laws—Whether original creditor properly entitled to maintain action in Saskatchewan—Question of procedure governed by lex fori—The Judicature Act, R.S.A. 1955, c. 164, s. 34(15)—The Choses in Action Act, R.S.S. 1953, c. 360.

The liquidator of L. O. Ltd. brought an action to recover the balance owing on a general account for goods sold and delivered by L. O. Ltd. to the defendant in Saskatchewan. The debt owing by the defendant to L. O. Ltd. was the subject of five assignments, the parties to each of which were resident in Alberta. All the assignments were executed in that province. The action was dismissed at trial on the ground that the plaintiff's right to sue arose by virtue of an assignment governed by the law of Alberta, under which an action could not be maintained in the plaintiff's name, since no notice of the assignment to him had been given to the defendant. This decision was reversed by the Court of Appeal, where it was held that there was no contest here as between an assignor and an assignee of the debt; that the claim was for the enforcement of a debt locally situate in Saskatchewan; and that the law of that province would govern, under which the action was maintainable in the name of the plaintiff. The defendant appealed to this Court, contending that the law of Alberta should be applied, and further that even if the law of Saskatchewan applied, the plaintiff was not entitled to maintain the action.

Held: The appeal should be dismissed.

The plaintiff had a valid, equitable assignment under the laws of Alberta, but in order to obtain judgment in that jurisdiction he would have had to join, as a party, the person who held the legal right to the debt under *The Judicature Act. Republica de Guatemala v. Nunez* [1927] 1 K.B. 669; *In re Anziani,* [1930] 1 Ch. 407, distinguished; *Dawson v. Leach and Hazza,* [1935] 3 W.W.R. 547, referred to.

However, the plaintiff did not sue on the debt in Alberta, but in Saskatchewan, and the question whether he could maintain his action there in his own name fell to be determined by the *lex fori,* for the question, in the circumstances of the case, was one of procedure and not of substance. It was not a question of the validity of the assignment, or of the capacity of the parties to it, but as to the proper parties to the proceedings in Saskatchewan, which was a question of procedure to be governed by Saskatchewan law, as set out in *The Choses in Action Act,* under which the plaintiff was entitled to maintain the action.

The item of $10,911.30 charged by the plaintiff against the defendant's account related to a debt owing by the defendant to A.G.S. Ltd., which company assigned the debt to L.O. Ltd. The claim in this action was for the balance due upon a running account between the defendant and L.O. Ltd., which balance was substantially composed of those items

*PRESENT: Locke, Cartwright, Fauteux, Abbott and Martland JJ.

most recently sold to the defendant. Those items were sold by L.O. Ltd. subsequent to the date when the assignment of the debt from A.G.S. Ltd. occurred and after it had been paid by subsequent credits in favour of the defendant. The items in issue in this action did not, therefore, include that debt.

In the light of the evidence, the conclusion reached by the Court of Appeal that interest should be paid at 5 per cent on the balance owing after the account became static, was not erroneous.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], allowing an appeal from a judgment of Hall C.J.Q.B. Appeal dismissed.

R. M. Balfour, Q.C., for the defendant, appellant.

A. W. Embury, for the plaintiff, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Court of Appeal for Saskatchewan[1], which had allowed an appeal from the judgment at trial dismissing the respondent's claim against the appellant.

The respondent's claim was for the balance owing on a general account for goods sold and delivered by Lion Oils Ltd. to the appellant, in Saskatchewan, in the years 1949 and 1950, together with interest at the rate of 5 per cent per annum on the balance due. The appellant did not, on this appeal, question the amount which had been found to be owing by it in the Court below, save as to one item of $10,911.30 which had been charged against the appellant. The appellant did dispute the right to collect interest upon the balance owing.

Lion Oils Ltd., by a special resolution of its shareholders dated November 24, 1950, went into voluntary liquidation and the respondent, Leon Louis Plotkins, was appointed liquidator.

The debt owing by the appellant to Lion Oils Ltd. was the subject of five assignments, as follows:

1. 27 December, 1950, Leon Louis Plotkins, as liquidator of Lion Oils Ltd., to Leon O. Beauchemin.
2. 28 December, 1950, Leon O. Beauchemin to Lion Oils of Canada Limited.
3. 28 May, 1954, Stewart Petroleums Limited (formerly Lion Oils of Canada Limited) to Leon O. Beauchemin and Jackson Stewart.
4. 30 September, 1955, Leon O. Beauchemin and Jackson Stewart to Thomas W. Smith.
5. 30 September, 1955, Thomas W. Smith to Leon Louis Plotkins.

[1] (1959-60), 30 W.W.R. 14, 22 D.L.R. (2d) 169.

1961

REGAS LTD. v. PLOTKINS

Martland J.

Smith had been secretary and comptroller of Lion Oils Ltd. and, when it went into liquidation, was assistant to the liquidator.

Each of the individual parties to these assignments resided in Calgary and Stewart Petroleums Limited had its head office there. Each of the assignments was executed in that city. Notice of the first three assignments was given to the appellant by a letter dated February 2, 1955, although the letter, in referring to the third assignment, did not make any reference to Jackson Stewart.

The learned trial judge dismissed the action on the ground that the respondent's right to sue arose by virtue of an assignment governed by the law of Alberta, under which an action could not be maintained in the respondent's name, since no notice of the assignment to him had been given to the appellant.

This decision was reversed on appeal. Gordon J.A., who delivered the judgment of the Court of Appeal, held that in this case there was no contest as between an assignor and an assignee of the debt. The claim was for the enforcement of a debt locally situate in the Province of Saskatchewan and he held that the law of that Province would govern, under which the action was maintainable in the name of the respondent. He held also that the respondent was entitled to recover interest on the debt and that the item of $10,911.30 had properly been charged against the appellant.

The main question for consideration in this appeal is as to whether or not the respondent was properly entitled to maintain this action in the Province of Saskatchewan. The appellant contends that the law of Alberta should be applied and further argues that, even if the law of Saskatchewan applies, the respondent was not entitled to maintain the action.

The law relating to a legal assignment of a debt or chose in action in Alberta is stated in subs. (15) of s. 34 of *The Judicature Act*, R.S.A. 1955, c. 164, as follows:

> (15) Where a debt or other legal chose in action is assigned by an absolute assignment made in writing under the hand of the assignor and not purporting to be by way of charge only, if express notice in writing of the assignment has been given to the debtor, trustee or other person from

whom the assignor would have been entitled to receive or claim the debt or chose in action, the absolute assignment is effectual in law to pass and transfer

(a) the legal right to the debt or chose in action from the date of the notice of the assignment,

(b) all legal and other remedies for the debt or chose in action, and

(c) power to give a good discharge for the debt or chose in action without concurrence of the assignor,

and is subject to all equities that would have been entitled to priority over the right of the assignee if this subsection had not been enacted.

This provision is identical in its effect to the provision which first appeared in Alberta in 1907, by the enactment of s. 7 of c. 5 of the Alberta Statutes of that year, amending *The Judicature Ordinance of the Northwest Territories.* That amendment was clearly patterned on s. 25(6) of the English *Judicature Act,* which, after the fusion of the Courts of Common Law and Equity, introduced, for the first time, a statutory assignment of a legal chose in action which would take effect at law. Prior to that time a legal chose in action could only be assigned in equity and the action had to be brought in the name of the assignor.

The appellant contends that the identity of the legal owner of the debt must be determined by the proper law of the contract of assignment from which he derives his title, in this case, the law of Alberta. Under that law, he submits, the original creditor, who was the plaintiff in this action, had been deprived of his legal title to the debt and could not give an effectual discharge therefor. In support of his contention he relied upon two English decisions, one a judgment of the Court of Appeal, *Republica de Guatemala v. Nunez*[1], and *In re Anziani*[2].

The facts of the former case were as follows: In 1906 Cabrera, who was then the President of Guatemala, deposited a sum of money with a London bank. In July, 1919, while still President, he addressed a letter to the bankers requesting them to transfer this sum to Nunez, his illegitimate son. Cabrera was deposed and imprisoned in 1920. While imprisoned he assigned, under duress, the sum to the Republic, acknowledging that he had misappropriated it from the public funds. In an action brought by the Republic

[1] [1927] 1 K.B. 669, 96 L.J.K.B. 441.
[2] [1930] 1 Ch. 407, 99 L.J. Ch. 215.

1961

REGAS LTD. v. PLOTKINS

Martland J.

to recover the money, Nunez claimed ownership by virtue of the assignment of 1919. This assignment was valid by English law, but void by the law of Guatemala because (1) being unsupported by consideration, it should have been made on stamped paper and signed by Nunez before a notary, and (2) Nunez, being a minor, lacked capacity to accept a voluntary assignment.

It will be observed that English law was the *lex situs* of the debt and the proper law of the transaction out of which the debt arose, but that Guatemalan law was the *lex loci actus* and the proper law of the assignment and also the *lex domicilii* of the assignor and the assignee.

It was held, both at trial and by the Court of Appeal, that the validity of the assignment to Nunez must be determined by the law of Guatemala.

The judgment of Bankes L.J. in the Court of Appeal was upon the ground that, as both the Republic and Nunez were domiciled and resident in Guatemala at the date of their respective assignments, and as the English depositary claimed no interest in the fund, the question should be determined by the law of their domicile and residence.

Scrutton and Lawrence L.JJ. took the position that the question involved was that of the capacity of Nunez to take the assignment and that this question fell to be determined by the law of his domicile. Scrutton L.J. further held that the non-compliance with the formalities of the assignment to Nunez made the assignment void. Lawrence L.J. held that, as the contract of deposit was made in England and the money recoverable there, it was an English debt locally situated in England and accordingly the validity of the assignment, as distinct from the capacity of Nunez, would have been governed by English law.

In the *Anziani* case it was held that an assignment executed in a foreign jurisdiction, by a person there domiciled, of a chose in action locally situate in England is void if the assignment is void on grounds of substance according to the local law.

In my opinion the present action differs materially from these two cases. The question of the validity of the assignment to the respondent, or of the capacity of the assignor or of the assignee, does not here arise. Although the assignment to the respondent was not a legal assignment, within the

requirements of the Alberta *Judicature Act,* it was not, for that reason, ineffective. It did constitute, under the law of Alberta, a valid, equitable assignment of the debt.

That such an assignment can be properly made and enforced in Alberta is clearly stated by Harvey C.J.A. in *Dawson v. Leach and Hazza*[1], where he says at p. 549:

> The defendants argue that by virtue of sec. 37(*m*) of *The Judicature Act,* R.S.A., 1922, ch. 72, the assignee of a chose in action is the only person who can maintain an action in respect of the chose in action so assigned. The section provides that an absolute assignment upon notice being given "shall be effectual in law . . . to pass and transfer the legal right of such debt or chose in action from the date of such notice and all legal and other remedies for the same and power to give a good discharge for the same without the concurrence of the assignor." Without and before this enactment there could be an equitable assignment passing all equitable rights and this provision made the legal form conform to the equitable procedure. It is clear too that it is dealing with nothing but the legal right as between the assignor and assignee and there is nothing to suggest that while the assignee has all the legal rights and remedies of the assignor some one may not have equitable rights in the chose in action which becomes legally vested in the assignee. That being so the question arises whether he can maintain an action to enforce them.

Harvey C.J.A., after then citing from the judgment of Viscount Cave L.C. in *Performing Right Society v. London Theatre of Varieties*[2], continued his own judgment as follows:

> It would seem from that that it could not be said that this plaintiff has not a right to come into Court to enforce his equitable rights but that probably he could not obtain judgment without having the legal owner made a party to the action.

The position here is, therefore, that the respondent had a valid, equitable assignment under the laws of Alberta, but that in order to obtain judgment in that jurisdiction he would have had to join, as a party, the person who held the legal right to the debt under *The Judicature Act.*

However, the respondent did not sue on the debt in Alberta, but in Saskatchewan, where the debt had been incurred for goods sold and delivered in that Province to the debtor, who resided there. The question is whether he can maintain his action there in his own name and that question, in my opinion, falls to be determined by the *lex fori,* for the question, in the circumstances of this case, is one of procedure and not of substance. It is not a question

[1] [1935] 3 W.W.R. 547, [1936] 1 D.L.R. 31.
[2] [1924] A.C. 1 at 14, 93 L.J.K.B. 33.

1961

REGAS LTD. v. PLOTKINS

Martland J.

of the validity of the assignment, or of the capacity of the parties to it, but as to the proper parties to the proceedings in Saskatchewan, which is a question of procedure which should be governed by Saskatchewan law.

The Saskatchewan law on this point is set out in *The Choses in Action Act,* R.S.S. 1953, c. 360. The relevant provisions of that statute are as follows:

2. Every debt and every chose in action arising out of contract shall be assignable by any form of writing containing apt words in that behalf, but subject to such conditions and restrictions with respect to the right of transfer as may appertain to the original debt or as may be connected with or be contained in the original contract; and the assignee thereof may bring an action thereon in his own name as the party might to whom the debt was originally owing or to whom the right of action originally accrued, or he may proceed in respect of the same as though this Act had not been passed.

3. The word "assignee" in section 2 includes any person now being or hereafter becoming entitled by any first or subsequent assignment or transfer or any derivative title to a debt or chose in action and possessing at the time when the action is instituted the right to receive the subject or proceeds thereof and to give effectual discharge therefor.

4. The plaintiff in an action for the recovery of the subject of an assignment made in conformity with sections 2 and 3 shall in his statement of claim set forth briefly the chain of assignments showing how he claims title, but in all other respects the proceedings may be the same as if the action were brought in the name of the original creditor or of the person to whom the cause of action accrued.

* * *

6. If an assignment is made in conformity with this Act, and notice thereof is given to the debtor or person liable in respect of the subject of the assignment, the assignee shall have, hold and enjoy the same free of any claims, defences or equities which may arise subsequent to the notice by any act of the assignor or otherwise.

The respondent did not, in accordance with s. 4, set forth the chain of assignments previously mentioned. However, Plotkins, as liquidator of Lion Oils Ltd., was the original creditor.

Dealing with this point in the Court of Appeal, Gordon J.A. says:

There was considerable argument before us that even under the Saskatchewan Choses in Action Act the original creditor could not sue in his own name after the debt had been assigned and notice of the assignment given the debtor. In my view, the question was raised and decided by the Court en banc in the case of *Covert v. Janzen,* 9 W.L.R. 287, and as far as I know this decision has been followed ever since and I do not think that the law should now be disturbed by this Court. It was followed by this

Court in the case of *Krinke v. Schafter* [1919] 1 W.W.R. 990 and again in the case of *Kusch v. Peat* [1922] 2 W.W.R. 174. I am, therefore, of the opinion that if the Saskatchewan law applies, the action is maintainable.

The appellant contended that, by virtue of s. 6 of the Act, Beauchemin and Stewart, being the last assignees in respect of whose assignment notice had been given to the appellant, held the debt free of any claims, defences or equities which might arise subsequent to the date of the notice and that they were the only persons who could give an effectual discharge of the debt. However, s. 6 does not in any way preclude an assignee of a debt, who has given notice to the debtor, from himself assigning the debt to another assignee, who would thereafter enjoy the rights conferred by the statute. That is what did occur here and I would agree with Gordon J.A. that, in the light of the Saskatchewan authorities to which he refers, the original creditor may bring suit on the debt even though an assignment has been made.

The appellant further argues that the final assignment was made to Plotkins personally and not to him in his capacity as liquidator of Lion Oils Ltd. It is true that the assignment made by Smith on September 30, 1955, was made to Plotkins and does not refer to him as the liquidator of Lion Oils Ltd., but Plotkins himself testified that the assignment was taken by him in his role as liquidator and his evidence shows that the right to the debt was held by him in that capacity.

I am, therefore, in agreement with the conclusion reached by the Court of Appeal that the respondent was entitled to maintain the action in the Province of Saskatchewan.

With respect to the item of $10,911.30 charged by the respondent against the appellant's account, this sum related to a debt owing by the appellant to a company called Alberta Gas Services Ltd., which company assigned the debt to Lion Oils Ltd. The appellant's submission was not against the validity of the account, but that this item could not properly be claimed in an action which, by the pleadings, was one for goods sold and delivered by Lion Oils Ltd. to the appellant.

It appears, however, that the claim in this action is for the balance due upon a running account between the appellant and Lion Oils Ltd., which balance is substantially composed of those items most recently sold to the appellant.

1961

REGAS LTD. v. PLOTKINS

Martland J.

Those items were sold by Lion Oils Ltd. subsequent to the date when the assignment of the debt from Alberta Gas Services Ltd. occurred and after it had been paid by subsequent credits in favour of the appellant. The items in issue in this action did not, therefore, include that debt.

The last matter is the question of interest. The learned trial judge held that this claim had not been established because the evidence did not prove an agreement to pay interest or an amount upon which it should be calculated. The Court of Appeal held that interest should be paid at 5 per cent on the balance owing after the account became static. The conclusion reached by the learned trial judge does not appear to have been reached on the basis of the credibility of witnesses, but rather is an inference drawn from the evidence adduced, as is the case in respect of the conclusion reached by the Court of Appeal.

The evidence on this matter is that of Plotkins, who testifies that he and Harvey, the representative of the appellant, arranged with a bank for a $25,000 credit for the appellant. However, as the bank insisted on a guarantee of the appellant's indebtedness by Lion Oils Ltd., it was then agreed that the latter company would, itself, extend the credit of approximately the same amount, on condition that the appellant would pay to it 5 per cent interest on outstanding balances as at the end of each year. Harvey, who also testified, did not deny this arrangement, but said that he could not remember it. Interest was, in fact, paid on one occasion after this arrangement was alleged to have been made. In the light of this evidence I am not prepared to say that the conclusion reached by the Court of Appeal was erroneous.

For these reasons I am, therefore, of the opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Balfour & Balfour, Regina.

Solicitors for the plaintiff, respondent: Noonan, Embury, Heald & Molisky, Regina.