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*Apr. 29.
*Oct. 11.

GEORGE E. DUKE AND ANOTHER (DEFENDANTS) ..... } APPELLANTS;

AND

JOSEPHINE ANDLER AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Conflict of laws—Jurisdiction over foreign immoveables—Decrees in rem and in personam—Actions on foreign judgments.

A judgment of a court of the state of California on a question of title and ownership of real property situate in British Columbia cannot be recognized as final and be enforced by the courts of that province, in accordance with the general rule that the courts of any country have no jurisdiction to adjudicate on the right and title to lands not situate in such country.

APPEAL from the Court of Appeal for British Columbia (1), varying the judgment of the trial judge, W. A. Macdonald J. (2).

The material facts of the case and the questions at issue are fully stated in the judgment now reported.

Geo. F. Henderson K.C. and *D. K. MacTavish* for the appellants.

Alfred Bull K.C. for the respondents.

The judgment of the court was delivered by

SMITH J.—On the 25th day of September, 1925, the appellant, G. E. Duke, entered into a contract with Josephine Promis, Augusta Col, Sophia, Sophia Promis, Mary Gillespie and Oscar Promis for the purchase of certain real

*PRESENT:—Duff, Rinfret, Lamont, Smith and Cannon JJ.

(1) (1931) 45 B.C. Rep. 96; [1932] 1 W.W.R. 257; [1932] 2 D.L.R. 19.

(2) (1931) 43 B.C. Rep. 549; [1931] 3 D.L.R. 561.

estate in the city of Victoria, in the province of British Columbia.

The contract reads:

> We the undersigned (naming the above vendors) have this day granted, transferred, sold and conveyed to G. E. Duke the following described real property situated in Victoria city, B.C., Dominion of Canada.

Then follows the particular description, the price, $55,000 payable $10,000 cash and a note for $45,000 to be secured by a mortgage on certain property in the city of Berkeley, in California,

> the said mortgage to be subject to an existing encumbrance now of record in the sum of $22,150 as a first lien on the property.

There is then the following provision:

> Upon evidence of good merchantable title being vested in G. E. Duke, he will immediately cause to be paid in to the Alameda County Title Insurance Company the sum of ten thousand ($10,000) dollars U.S. lawful money, together with note and mortgage to be delivered to the vendors.

All the parties to the contract were, at the time, residents of California, and the survivors and executors of the two vendors, who died shortly after the date of the contract, have continued to be residents of that state.

This contract or another conveyance was placed in the hands of the Alameda County Title Insurance Company, it is claimed in escrow, which company handed over the contract or the other conveyance to the defendant George E. Duke, who registered same and thus became the registered owner of the Victoria property, which he conveyed to his wife, the defendant Margaret E. Duke, who mortgaged it for $30,000.

The vendors brought action in the Superior Court of the state of California in and for the county of Alameda, against the defendants, to rescind and cancel the contract and the mortgage, and to require the defendants to re-convey to the plaintiffs the Victoria property, alleging that George E. Duke obtained possession of the conveyance without the knowledge of the plaintiffs and without complying with the terms of the agreement, and in violation of the escrow agreement, " in this," that he delivered the mortgage stipulated for subject to an encumbrance of $9,605 in addition to the encumbrance of $22,150 mentioned in the agreement.

The defence to the complaint about the $9,605 encumbrance, stated shortly, was that the vendors falsely represented to defendant G. E. Duke that the Victoria property was then producing net earnings of $6,775 per year, and that the then tenants were ready and anxious to obtain new

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leases on the same terms as the existing leases, whereas in fact the net earnings were not greater than $3,903 per year, and the then tenants were unwilling to renew their leases on the same terms, but were preparing to quit unless extensive repairs were made, and that, to retain them, repairs costing $11,525 had to be made, which sum defendant G. E. Duke claimed as damages for false representations inducing him to make the contract, and which he was entitled to set off against the $9,605 encumbrance.

The defence further alleged that the Alameda County Title Insurance Company was authorized by the plaintiff to cause the deed to be recorded, vesting the title to the Victoria property in defendant G. E. Duke before any part of the consideration therefor was to be paid or delivered by the defendant to the plaintiffs, "all in conformity to said contract."

I take it that this means that such is the proper construction to be put on the terms of the contract.

The learned trial judge in the California court found that defendant G. E. Duke agreed to deliver the $45,000 mortgage free and clear of the $9,605 encumbrance before taking title to the Victoria property, and that there were no false representations, and no set off, as alleged.

He also finds that the defendant G. E. Duke got possession of the deed without paying the $10,000, though there is no such claim in the plaintiff's pleadings, the only non-compliance with the terms of the agreement alleged being that referred to above.

The judgment entered in the Superior Court of California, omitting the style of cause, is as follows:

The Court having made and filed its Findings of Fact and Conclusions of Law herein, now, therefore, in accordance therewith,

It is ORDERED, ADJUDGED AND DECREED that the defendants, G. E. Duke and Margaret E. Duke, execute, acknowledge and deliver, and cause to be recorded and registered according to the forms and laws of British Columbia, Dominion of Canada within thirty (30) days of notice of entry hereof, a deed of conveyance of said "Victoria Property" to Josephine Promis, Augusta Col, Mary Gillespie, A. G. Col and Josephine Andler, plaintiffs herein, and vesting in them the title thereto, subject to an encumbrance of Thirty Thousand ($30,000) Dollars now of record, and subject to no other liens or encumbrance whatsoever, and to do and perform, or cause to be done or performed such other act or acts as may be necessary or proper in the premises, to the end that the plaintiffs may be restored to the ownership and possession of said "Victoria Property"—which said "Victoria Property" is described as follows, to wit:

All and singular these certain parcels or tracts of land and premises situate, lying and being

Lots Three and Four, Block Seventy-five, Victoria City, recorded in Absolute Fees Book Fol. 22, Vol. 22, (Date of Registration May 10, 1904, 11, 10 a.m.).

Lots Eleven (11) and Twelve (12) Block Seventy-five (75) Map 219, Victoria City; recorded in Absolute Fees Book Fol. 30, Vol. 23. (Date of Registration, February 21, 1906, 10 a.m.).

Together with all improvements thereon.

It is further ORDERED AND ADJUDGED that in the event of the failure or refusal of G. E. Duke and/or Margaret E. Duke, defendants herein, to so convey said "Victoria Property" within said time, George E. Gross, Clerk of this Court, be, and he is hereby, appointed as Commissioner of this Court; and said George E. Gross, as such Commissioner, is hereby ordered and empowered to make, execute and deliver such deed, and cause the same to be so recorded and registered, and to do and perform any and all other acts as may be necessary or proper, to effect and perfect a conveyance of said "Victoria Property" to the plaintiffs herein named, as and for said G. E. Duke and Margaret E. Duke, defendants herein, as their act and deed.

It is further ORDERED, ADJUDGED AND DECREED that that certain instrument in writing designated as "contract of sale" dated the 25th day of September, 1925, and attached to Plaintiffs' complaint herein as Exhibit "A," wherein and whereby Josephine Promis, Augusta Col, Sophia Promis, Mary Gillespie and Oscar Promis, agreed to grant, transfer, sell and convey to G. E. Duke, one of the defendants herein, the said "Victoria Property" for certain considerations therein mentioned, be, and the same is hereby, cancelled and rendered null and void and of no effect whatsoever.

It is further ORDERED, ADJUDGED and DECREED, that the plaintiffs herein named do have and recover of and from the defendants G. E. Duke and Margaret E. Duke the sum of $16,804.11, together with plaintiffs' costs and disbursements incurred herein, taxed in the sum of $

Dated this 30th day of July, 1928.

(Sgd.) JOHN J. ALLEN,
Judge.

The defendants refused to execute a conveyance, as ordered by this judgment, and a conveyance was executed in their name by George E. Gross, County Clerk and Commissioner of the Superior Court, pursuant to the terms of the judgment.

The plaintiffs then brought the present action in the Supreme Court of British Columbia for a declaration that, by virtue of the conveyance referred to, or, alternatively, by virtue of the conveyance and of the judgment referred to, and in the further alternative by virtue of the judgment alone, the plaintiffs are the owners of and entitled to be registered as owners in fee simple of the Victoria property in question, subject to the mortgage of $30,000 and interest, mentioned above.

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There is the further claim that the court, in the exercise of its jurisdiction to implement the judgment of the Superior Court of the State of California, do vest the property in the plaintiffs.

Judgment was given, declaring that, by virtue of the judgment of the Superior Court of California and of the conveyance made in pursuance of it, the plaintiffs are the owners of the property in Victoria subject to the $30,000 mortgage and a certain registered lease, and that the property vest in the plaintiffs, subject to these charges.

On appeal, the Court of Appeal of British Columbia, by a majority of three to one, varied this judgment by striking out the first adjudicating paragraph and substituting a paragraph in different language, vesting the property in the plaintiffs.

Mr. Justice McPhillips, dissenting, would have allowed the appeal and dismissed the action.

From this judgment of the majority, the present appeal is taken.

The question involved is whether or not the judgment of the foreign court on the question of title and ownership of this real property situate in British Columbia is to be recognized as final and to be enforced by the courts of British Columbia.

The general rule that the courts of any country have no jurisdiction to adjudicate on the right and title to lands not situate in such country is not disputed.

Considering the operation of foreign law in regard to real and immovable property, Story's Conflict of Laws (8th ed.), p. 591, says:

> And here the general principle of the common law is, that the laws of the place where such property is situate, exclusively govern, in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them. The title therefore to real property can be acquired, passed and lost only according to the *lex rei sitae*. This is generally, although (as we shall see) not universally, admitted by courts and jurists, foreign as well as domestic.

Then, at page 757, paragraph 543, dealing with the jurisdiction of a nation over a person in its domain, there is the following:

> A suit cannot, for instance, be maintained against him, so as absolutely to bind his property situate elsewhere, and, *a fortiori*, not so as absolutely to bind his rights and titles to immovable property situate elsewhere.

Dicey's Conflict of Laws (4th ed.), p. 393, citing Story and Piggott (3rd ed.), has the following:

> The courts of a foreign country have no jurisdiction—(1) to adjudicate upon the title, or the right to the possession, of any immovable not situate in such country; or (2) (semble) to give any redress for any injury in respect of any immovable not situate in such country.
>
> The undoubted rule, in short, is that, if a court pronounce a judgment affecting land out of the jurisdiction, the courts of the country where it is situated—and, it is presumed, also the courts of any other country—are justified in refusing to be bound by it, or to recognize it; and this even if the judgment proceed on the *lex loci rei sitae*.
>
> This rule is merely an application of a more general principle that no court ought to give a judgment the enforcement whereof lies beyond the court's power, and especially if it would bring the court into conflict with the admitted authority of a foreign sovereign, or what is the same thing, the jurisdiction of a foreign court.

There is, however, a long line of cases in which it has been held that English courts will enforce rights affecting real estate in foreign countries if such rights are based on contract, fraud or trust, and the defendant resides in England.

An early case of this kind is *Penn.* v. *Lord Baltimore* (1), where an agreement in reference to lands in Pennsylvania made in England was sought to be enforced, the residence of the parties being in England. It was held that there was jurisdiction. The Lord Chancellor says, p. 447:

> The conscience of the party was bound by this agreement, and, being within the jurisdiction of this Court, which acts *in personam*, the court may properly decree it as an agreement, if a foundation for it.

See also *Deschamps* v. *Miller* (2).

In numerous decisions, however, besides *Penn.* v. *Lord Baltimore* (1), it has been pointed out that, in exercising jurisdiction in such cases, the courts act *in personam*.

In the case of *Lord Cranstown* v. *Johnston* (3), defendant, being a creditor of the plaintiff, obtained judgment in the Island of St. Christopher, and at the sale under the execution, of which the plaintiff had no notice, purchased the plaintiff's interest in lands of plaintiff there at much less than the value. Both parties residing in England, it was held there was jurisdiction, and the defendant was ordered to reconvey on payment of the amount owing.

In *Norton* v. *Florence* (4), Jessels, M.R., states that the decision in *Lord Cranstown* v. *Johnston* (3) must be understood as limited to jurisdiction *in personam*.

(1) (1750) 1 Ves. Sr. 443.
(2) [1908] 1 Ch. 856, at 863.
(3) (1796) 3 Ves. Jun. 170.
(4) (1877) 7 Ch. Div. 332.

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In *Paget* v. *Ede* (1), it was held than an equity of redemption is not an estate but merely a right, and that a decree of foreclosure, being a decree *in personam,* could be made in England as the mortgagor and mortgagee resided in England, though the lands were not in England.

In Re Pollard, Ex. P. In re Thomas Courtney and *George Courtney* (2), there is the following passage in the judgment:

> It is true that in this country contracts for sale or (whether expressed or implied) for charging lands, are in certain cases made by the courts of equity to operate *in rem;* but in contracts respecting lands in countries not within the jurisdiction of these courts, they can only be enforced by proceedings *in personam,* which courts of equity are constantly in the habit of doing, not thereby in any respect interfering with the *lex loci rei sitae.*

In *Angus* v. *Angus* (3):

> To a bill brought for possession of lands in Scotland and for discovery of the rents and profits and of deeds and fraud in obtaining them, it was pleaded that the matter was out of the jurisdiction.
>
> The Lord Chancellor says:
>
> "This court acts upon the person as to the fraud and discovery, therefore the plea must be over-ruled. To have made this a good plea, there ought to have been a further averment, that the defendant was resident in Scotland. This had been a good bill as to fraud and discovery if the land had been in France, if the persons were resident here, for the jurisdiction of the court as to fraud is upon the conscience of the party.
>
> "I am in doubt as to parts of the bill for relief; for I cannot give the plaintiff possession any other way than by compulsion on the defendant's person whilst it is within the jurisdiction of the court."

In *British South Africa Company* v. *Companhia de Moçambique* (4), it was held by the Queen's Bench Division that the courts in England had no jurisdiction to entertain an action for a declaration of title to lands in South Africa; and by the House of Lords, no jurisdiction to entertain an action for damages in such lands. Lord Herschell, p. 624, says:

> No nation can execute its judgments, whether against persons or movables or real property in the country of another. On the other hand, if the courts of a country were to claim, as against a person resident there, jurisdiction to adjudicate upon the title to land in a foreign country, and to enforce its adjudication *in personam,* it is by no means certain that any rule of international law would be violated * * *.

And, at p. 626:

> Whilst courts of equity have never claimed to act directly upon land situate abroad, they have purported to act upon the conscience of persons living here.

(1) (1874) L.R. 18 Eq. 118.
(2) (1840) 1 Mont. & C. 239.
(3) (1736-7) West T. Hard. 23.
(4) [1893] A.C. 602.

Lord Halsbury, at p. 631, says:

There is a concurrence of opinion of most jurists, if not all, as to the difference between what we call realty and personalty, by whatever words those things are distinguished in the jurisprudence of foreign countries, which affects very materially the right to try. Vattel distinguishes the questions which may properly be tried when defendant has his settled place of abode, but always subject to this, that, if the matter relates to an estate in land or to a right annexed to such an estate (quoting Vattel) "in such a case, inasmuch as property of the kind is to be held according to the laws of the country where it is situated, and as the right of granting it is vested in the ruler of the country, controversies relating to such property can only be decided in the state in which it depends."

In *Henderson* v. *Bank of Hamilton* (1), in this court it is pointed out that courts of equity held that where personal equities existed between parties over whom they had jurisdiction, though such equities might have reference to lands situate without the jurisdiction, they would give relief by a decree operating not directly upon the lands, but strictly *in personam,* and that such decrees would have been unenforceable in the foreign jurisdiction, and might have brought the courts decreeing them into collision with the former, within whose local jurisdiction the lands were situated. *British South Africa Co.* v. *Companhia de Moçambique,* just referred to (2), is cited and relied on.

The title to real property therefore must be determined by the standard of the laws relating to it of the country where it is situated. The grounds upon which, and the circumstances under which a conveyance would be set aside under the law of California may differ from those under which it would be set aside under the law of British Columbia. The conveyance from appellant G. E. Duke to his wife, the appellant Margaret E. Duke, could only be set aside in British Columbia by virtue of the statute law of that province, and the courts of one country are not presumed to know the laws of another country.

In *Norris* v. *Chambres* (3), a claim was made for a lien on real property in Prussia. After stating a certain manner in which a lien on land may be acquired in England, the decision proceeds:

Assuming this to be so, this is purely a *lex loci* which attaches to persons resident in England and dealing in land in England. If this be not the law of Prussia, I cannot make it so, because two out of three parties dealing with the estate are Englishmen, and I have no evidence before me that this is the Prussian law on this subject, and, if it be so, the Prussian courts of justice are the proper tribunals to enforce these rights.

(1) (1894) 23 S.C.R. 716. (2) [1893] A.C. 602.
(3) (1860) 29 Beav. 246.

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An adjudication as to title to the lands in question, to have any effect in British Columbia, must be an adjudication on the basis of British Columbia law relating to real property applied to the facts.

The objection to accepting the judgment of a foreign court as conclusive on a question of title to land is shewn by what is laid down by Lord Cottingham, L.C., in *Ex Parte Pollard,* cited above (1), in the following language:

> If, indeed, the law of the country where the land is situate, should not permit or not enable the defendant to do what the court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act, but where there is no such impediment, the courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effects of such contract might be in the country where the lands are situate, or of the manner in which the courts of such countries might deal with such equities.

The courts of California therefore must be assumed to have based their judgments on California law, without being influenced by any consideration of the effect on the title, of the contract and of equities arising from it and what followed, according to the law of British Columbia, and without any regard to the statute law of British Columbia bearing on the conveyance from George E. Duke to his wife.

It may be that on the facts as found, the courts of British Columbia, in applying the laws of British Columbia, would reach the same conclusion as the California courts, but it is to be remembered that findings of fact may in some cases be based on the particular law to be applied to them. For instance, a finding of fraud depends on what constitutes fraud under the particular law to be applied.

In any event, we must deal with the question as a general proposition, and not merely from the point of view of the facts in this particular case.

The question at issue here has come before the Supreme Court of the United States in a number of cases, but it is to be noted that there is a special clause in the constitution of the United States dealing with the credit to be given by the courts of one state to the judgments of the courts of another. It appears, however, that this clause does not make judgments of the courts of one state dealing with lands in another binding on the courts of the latter.

(1) (1840) 1 Mont. & C. 239.

In *Carpenter* v. *Strange* (1), the Court of New York State, where the parties resided, decreed that a conveyance of land in Tennessee alleged to be fraudulent was absolutely null and void. The courts of Tennessee refused to recognize this part of the judgment, and were upheld by the Supreme Court. The following is a passage from the judgment:

> The courts of Tennessee were not obliged to surrender jurisdiction to the courts of New York over real estate in Tennessee, exclusively subject to its laws and the jurisdiction of its courts (p. 106).

Again, in *Fall* v. *Eastin* (2), in the judgment of the same court there is the following passage:

> A court of chancery, acting *in personam,* may well decree the conveyance of land in any other state and may well enforce its decree by process against the defendant. But neither the decree itself nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court (p. 9).

Respondents put much reliance on the case of *Houlditch* v. *Donnegal* (3). Upon a bill in chancery in England by creditors a decree was made to execute the trusts of a deed by which lands in Ireland were vested in trustees for payment of debts. A receiver was appointed and an injunction granted, and a bill was filed in the Court of Chancery in Ireland to carry the former decree into execution. The Irish court held that it had no jurisdiction. It was held, reversing this judgment, that there was jurisdiction. The basis of this decision was that a foreign judgment is only *prima facie* evidence, and the propriety of the English decree might be enquired into in the Irish court.

This doctrine, that a foreign judgment is only *prima facie* evidence, is now considered erroneous. Dicey's Conflict of Laws, 4th ed., 449, and cases there cited.

Mr. Justice Martin places reliance on the cases of *Law* v. *Hansen* (4); *Nouvion* v. *Freeman* (5), and, in the House of Lords (6); and a number of others of similar import.

The remarks that he quotes from these decisions are the enunciation of the general rule that the judgment of a foreign court of competent jurisdiction having the force of *res judicata* in the foreign country has the like force in England.

(1) (1891) 141 U.S.R. 87.
(2) (1909) 215 U.S.R. 1.
(3) (1834) 8 Bligh 301.
(4) (1895) 25 Can. S.C.R. 69.
(5) (1887) 37 Ch. D. 244.
(6) (1889) 15 App. Cas. 1.

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The question here is whether or not the judgment of the foreign court in question, adjudicating on the right and title to real property in British Columbia, is one of the exceptions to this general rule.

The numerous decisions referred to above seem to establish beyond question that such a judgment is *in personam* only, and affects the conscience of the parties within the jurisdiction of the court, and stands on an entirely different footing in the courts of the country where the land is situated from the ordinary judgment coming within the general rule, such as a foreign judgment for debt.

In the present case the plaintiffs sue in British Columbia to enforce a judgment of the California courts deciding that the plaintiffs are the owners of the British Columbia land in question, rather than the defendants, one of whom is the registered owner. In California, it must be conceded that that judgment has effect only *in personam,* but if the courts of British Columbia were obliged to enforce it between the same parties, without question, there would be no practical difference, in effect, between such a judgment and a judgment for a debt, and the distinction so much insisted on in the authorities referred to would be of no real consequence.

In my opinion the rule stated by Dicey quoted above, that the courts of a foreign country have no jurisdiction to adjudicate upon the title or the right to the possession of any immovable not situate in such country, and the statement in the authorities referred to, that controversies in reference to land can only be decided in the state in which it depends, and that judgments of foreign courts purporting to deal with the title and with rights to lands in another country can only be enforced by proceedings *in personam,* shew that the judgment of the court of California here in question does not, in British Columbia, affect the title to the lands in question, and is not a judgment that should be enforced by the courts of British Columbia as binding there on the parties.

The appeal should be allowed, and the action dismissed, with costs to defendants throughout.

Appeal allowed with costs.

Solicitors for the appellants: *Crease & Crease.*

Solicitors for the respondents: *Walsh, Bull, Housser, Tupper & Molson.*