

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ashbury v. Ellis, from the Court of Appeal, New Zealand; delivered the 17th June 1893.

Present:

THE LORD CHANCELLOR.
LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD SHAND.
HON. GEORGE DENMAN.

[*Delivered by Lord Hobhouse.*]

The main question argued in this case relates to the right of the New Zealand Legislature to authorize judicial proceedings against absentees. The rule of the New Zealand Code (46 Vict., No. 29) which has come under discussion is Rule 53, one of a group of rules which fall under the head of "Proceeding without service." The material part of it is as follows:—

"In actions founded on any contract made or entered into or wholly or in part to be performed within the colony, on proof that any defendant is absent from the colony at the time of the issuing of the writ, and that he is likely to continue absent, and that he has no attorney or agent in the colony known to the plaintiff who will accept service, the Court may give leave to the plaintiff to issue a writ and proceed thereon without service."

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Then come a number of provisions relating to the conditions on which leave should be given, and to its incidents when given.

Another group of rules in the same Code relates to service of process out of the Colony. There seems to have been considerable discussion in the Courts below whether Mr. Justice Williams, who presided in the First Court, should have acted under the last-named set of rules rather than the first. But independently of the fact that, if there is jurisdiction, the matter is one of judicial discretion and not one arising on this appeal, the contention of the Appellant is equally hostile to the validity of both groups of rules.

His broad contention is that the Act of Parliament (15 & 16 Vict., c. 72) which gives to the Legislature of New Zealand power "to make Laws for the Peace, Order, and good Government of New Zealand, provided that no such Laws be repugnant to the Laws of England" does not give it power to subject to its judicial tribunals persons who neither by themselves nor by agents are present in the Colony. It is not contended that the rules in question are repugnant to the laws of England. In fact they are framed on principles adopted in England. But it is said that the moment an attempt is made by New Zealand law to affect persons out of New Zealand, that moment the local limitations of the jurisdiction are exceeded, and the attempt is nugatory. This was put at the bar in so broad and abstract a way that it might be sufficient for their Lordships to answer it by equally abstract propositions. But it will be more satisfactory to state the material facts which have raised the question.

The Appellant, Mr. Ashbury, resides in England. In the year 1885 he went to New Zealand, and there, on the 23rd March of that year, made a written agreement with John Chute Ellis,

the Respondent's brother, for the purchase of a large tract of land. After answering mortgages, the surplus purchase money, 38,440*l.*, was secured, as regards principal by 12 promissory notes payable in England, and as regards interest by 12 promissory notes payable at the Bank of Australasia, in Invercargill, New Zealand. The latest notes are payable on the 20th December 1890. Some crops and stock were to be taken by Ashbury at valuations, and it is a term of the agreement that if, on the completion of the valuations, it is found that the balance of the purchase money is not correctly represented by the promissory notes, new ones shall be given.

In November 1886 Ashbury was again in New Zealand. On the 4th of that month he addressed a letter to the Bank of Australasia, requesting them to treat his agent, John Jerome Zimmer, as empowered to draw accept and endorse in his name bills of exchange and promissory notes. On the 26th of the same month he executed a deed appointing Zimmer his attorney for (amongst other things) managing his estates in New Zealand, and adjusting all accounts depending between him and any person whomsoever. Ashbury then left New Zealand and has never been there again.

About this time Zimmer settled the valuations which were still pending between Ashbury and John Chute Ellis under the agreement of March 1885. He paid a portion of the amount found due, and the rest he secured by nine promissory notes purporting to make Ashbury liable to pay to John Chute Ellis, at the Bank of Australasia, Invercargill, various sums at various dates, the latest of which is the 20th December 1890. Two of the notes bear date the 17th September 1886, and the other seven the 20th September 1886. Ashbury states that they were in fact given in February 1887.

They were paid into the Bank by John Chute Ellis, and Thomas Chute Ellis claims to be endorsee of them for value. They are the notes now sued on in two actions. It seems that before any action was brought, Ashbury revoked Zimmer's agency, and remained without any agent in the Colony.

In the earlier of the actions, founded on three of the notes, an order was made on the 18th February 1891 allowing the Plaintiff Thomas Chute Ellis to proceed under Rule 53 without service. In June the Defendant Ashbury moved to rescind the order, or, in the alternative, for leave to file a defence, and for postponement of the trial pending an application by him to take his evidence by commission in England. On the 23rd June 1891 Mr. Justice Williams refused the first part of the Defendant's motion and granted the second. Precisely similar proceedings took place in the second action.

The Defendant then moved the Court of Appeal to discharge the original orders giving the Plaintiff leave to proceed without service, and to discharge the orders of the 23rd June so far as they maintained the original orders. It was agreed that the arguments and judgment should apply to both actions. On the 19th October 1891 the Court dismissed the appeals with costs. From that decision the Defendant obtained special leave to appeal to Her Majesty in Council.

So far as the decision turns on the precise nature of the case, it is not a very favourable case for denying the right of the New Zealand authorities to try the questions at issue between these parties. Zimmer, being certainly Ashbury's agent in New Zealand for some purposes, makes a contract purporting to bind his principal to the payment of money in New Zealand. This contract is itself the sequel of

another contract by Ashbury for the purchase of land in New Zealand. Ashbury defends himself by contending that Zimmer held no agency empowering him to give the notes, and by alleging that he is in a position to rescind his earlier contract with John Chute Ellis; that he is suing in England for that purpose; that he will have counterclaims to enforce against John Chute Ellis larger than the amount of the notes sued on; and that the notes were endorsed to Thomas Chute Ellis under circumstances disentitling him to stand in any better position than John Chute Ellis. These defences may or may not be made good. They are the matters to be tried in these actions. Whether they can be better tried in England or in New Zealand we need not discuss. It is obvious that they concern rights that have accrued, and acts that have taken place, in New Zealand.

If the New Zealand Legislature had enacted that, in a concrete case such as the present one, the New Zealand Courts should have power to give the Plaintiff a decree notwithstanding that the Defendant held himself aloof, we should hardly have heard the suggestion that such a law was not one for the peace order and good government of New Zealand. Of course they have framed their law in more abstract and flexible terms. But, taking those terms, their Lordships are clear that it is for the peace order and good government of New Zealand, that the Courts of New Zealand should, in any case of contracts made or to be performed in New Zealand, have the power of judging whether they will or will not proceed in the absence of the Defendant. The power is a highly reasonable one. So far as regards service of process on persons not within their local jurisdiction, or substituted service, or notice in lieu thereof, in proper cases the English Courts

have it conferred on them by the Imperial Parliament. The New Zealand Legislature, it is true, has only a limited authority; but in passing the rules under discussion, it has been careful to keep within its limits.

But it was said that a judgment so obtained could not be enforced beyond the limits of New Zealand; and several cases of suits founded on foreign judgments were cited. Their Lordships only refer to this argument to say that it is not relevant to the present issue. When a judgment of any tribunal comes to be enforced in another country, its effect will be judged of by the Courts of that country with regard to all the circumstances of the case. For trying the validity of the New Zealand laws it is sufficient to say that the peace, order, and good government of New Zealand are promoted by the enforcement of the decrees of their own Courts in New Zealand.

The only other contention related to the word "absent" in Rule 53. The Appellant seeks to confine it to persons who at some previous time have been domiciled or resident in New Zealand. It is not easy to appreciate the reasons why such an artificial sense should be put upon the word; and during the argument their Lordships expressed agreement with the Judges of the Court of Appeal, who held that the word is used in its ordinary sense, and describes persons who are not in New Zealand. The result is that, in their Lordships' judgment, this appeal should be dismissed with costs, and they will humbly advise Her Majesty to that effect.
