

Privy Council Appeal No. 86 of 1925.

Harry Clifford Bowling - - - - - *Appellant*

v.

James Clifton Cox - - - - - *Respondent*

FROM

THE SUPREME COURT OF BRITISH HONDURAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 21ST JUNE, 1926.

Present at the Hearing :

VISCOUNT HALDANE.

LORD ATKINSON.

LORD DARLING.

[*Delivered by* VISCOUNT HALDANE.]

This is an appeal from a decision of the Supreme Court of British Honduras setting aside an order which gave leave to the appellant, as trustee in bankruptcy of one Plummer, who had been made bankrupt in England where he was then domiciled, to serve notice of a writ obtained in British Honduras on the respondent who was outside the jurisdiction of the Courts of the Colony, and was resident at Chicago, in the United States of America. Plummer had been adjudicated bankrupt in England in 1889, and had remained an undischarged bankrupt.

He had, subsequently to his adjudication, gone to British Honduras and had resided for many years and became domiciled there. Since his death large sums had been paid by the executor to his creditors, but a good deal of money, consisting mainly of accrued interest, was still due to them. Plummer died in 1921 and the respondent is the executor of his will. Under the will, which was proved in British Honduras by one Young, as attorney for the executor there has been remitted by Young to the respondent in Chicago large sums of money forming part of the estate of

Plummer. The appellant, who had formally claimed these sums, and commenced the action out of which this appeal arises in British Honduras against Young to recover the money as money had and received to the appellant's use, also applied *ex parte* to the Supreme Court there for leave to issue a concurrent writ for service out of the jurisdiction against the respondent in Chicago. An order was at first made by the Supreme Court allowing such service, but subsequently, on an application by the respondent to set aside the order giving leave for it, the Supreme Court made the order under appeal which set the first order aside. The law relating to the power of the Court to authorise service out of the jurisdiction is contained in S. 29 of Ch. 10 of the Code of Civil Procedure of British Honduras.

This section provides that :—

“ Service out of the jurisdiction of a Writ of Summons or notice of a Writ of Summons may be allowed by the Court or a Judge whenever the whole or any part of the subject matter of the action is land or stock or other property situate within the jurisdiction, or any act, deed, will or thing affecting such land, stock or property, and whenever the contract which is sought to be enforced or rescinded, dissolved, annulled or otherwise affected in any such action, or for the breach whereof, damages or other relief are or is demanded in such action, was made or entered into within the jurisdiction, and whenever there has been a breach within the jurisdiction of any contract wherever made, and whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done, or is situate within the jurisdiction.”

Plummer had died without having obtained a discharge from his bankruptcy and without having paid his creditors in full. His executor, the respondent, paid over £10,000 to the appellant as the trustee in the bankruptcy but did not pay and refuses to pay the interest due to the creditors, which amounted to over £8,000. Young, as the respondent's attorney, has collected assets in British Honduras which include the amount of this £8,000, and has remitted them to the respondent in Chicago. Otherwise the estate appears to have been wound up, so far as the jurisdiction in British Honduras is concerned.

The Chief Justice of the Colony considered, in making the second order, now under appeal, that the case was not one for service out of the jurisdiction. The action, he said, was one of contract, not breach of contract, and he could not see how the implied contract could be held to have been made or entered into within the jurisdiction. The contract, he thought, arose in England on the bankruptcy of Plummer. Apart from this, he regarded the claim as a stale one, and as it was entirely for interest he was not in sympathy with it, and did not think it was one in respect of which he ought to have exercised his discretion to order the case to be tried in the Colony.

It is plain that, so far as these considerations influenced the Chief Justice in exercising his discretion, they were not legitimate. The title to interest was one which it was claimed that the law

gave and was not a matter for the exercise of discretion. The estate had been fully administered in the Colony, excepting so far as the payment of the interest due to the appellant was concerned. To that interest the appellant claimed to have a legal right and to have it tried. The surplus of the estate in British Honduras, in the hands of the respondent and his attorney, might well be money had and received to the use of the appellant. If so, this title to it arose when the respondent and his attorney received it, and not in England or at the time of the bankruptcy in 1889. The money was rather money had and received, in which case the title to it arose, when it was got in by the executor, under an implied contract which the law imputes, and which renders him liable to proceedings in the nature of an assumpsit at Common Law. For the reasons why this is so it is only necessary to refer to the explanation given in the decision of the House of Lords in *Sinclair v. Brougham* (1914, A.C. 398). In another view, the executor had become a trustee in British Honduras of the surplus of the estate. In either aspect the case comes within S. 29 of Chapter 10 of the Code, and the Court below ought to have given effect to this view.

Their Lordships consider that they have no alternative to humbly advising His Majesty that this order appealed from should be discharged and that it should be referred to the Court below to give leave to issue a writ for service out of the jurisdiction. The respondent must pay to the appellant the costs of this appeal and of the application on which the order appealed from was made.

In the Privy Council.

HARRY CLIFFORD BOWLING

v.

JAMES CLIFTON COX.

DELIVERED BY VISCOUNT HALDANE.

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