1927

Debt Arising under Foreign Law, Measure of Damages

Arthur H. Kent

Law was to establish uniformity of decision throughout the various states. There seems to be little room for doubt that the framers of the act intended, through *Section* 28, to settle this particular conflict adversely to the Massachusetts rule.

The cases as they stand leave the Ohio rule in conflict with the prevailing construction of the Negotiable Instruments Law. Nor can the law of Ohio upon this question be deemed to be finally settled until our courts have considered the application and effect of the provisions of the act which have been above set forth.[30] And the question is not without practical importance, as shown by the frequency with which cases involving it arise in the various jurisdictions.

ARTHUR H. KENT.

CONTRACTS—DEBT ARISING UNDER FOREIGN LAW—MEASURE OF DAMAGES

Suit was brought by Humphrey to reach and apply to a debt due to him from a German bank money seized by the Alien Property Custodian and paid into the Treasury of the United States. Humphrey, an American citizen, had deposited money, payable on demand, in this German bank, and demanded it on or about June 12, 1915. The bank refused payment under a moratorium privilege, and this suit was brought in July, 1921, under the Trading with the Enemy Act.[1] The obligation was payable in Germany in German marks. The District Court ruled that the damages should be measured in terms of dollars at the rate of exchange current when the demand was made. This measure was favorable to the plaintiff, by reason of the fact that the mark had greatly depreciated between the date of the demand and the date on which the action was brought. Judgment for the plaintiff was affirmed in the Circuit Court of Appeals.[2] The Supreme Court granted a writ of certiorari in order to determine whether the time fixed for the translation into dollars was correct.

---

[30]See particularly the North Dakota case of First Nat. Bank v. Radke, note 24, *supra*, in which the court held that its earlier decision in Holbert v. Weber, note 22, *supra*, which adhered to the Massachusetts rule under the N. I. L., would not be followed, because neither sec. 24 nor sec. 28 of the N. I. L. were called to the attention of the court or their application considered in that case. Sec. 28 was held clearly to change the pre-existing rule.

[1]U. S. Comp. Statutes, secs. 3115½a-3115½j.

[2]7 Fed. (2d) 330 (C. C. A. 9th, 1925).

Upon the determination of this question the Court was sharply divided. A bare majority of the justices concurred in reversing the judgment in the courts below, the opinion being written by Mr. Justice Holmes. Mr. Justice Sutherland wrote a forceful dissenting opinion, concurred in by three other justices. The majority opinion distinguishes two earlier decisions of the Court: *Hicks* v. *Guiness*[3] on the ground that the obligation there involved was a simple debt payable in this country; *Sutherland* v. *Mayer*[4] on the ground that it involved a settlement of partnership accounts where one partner was resident in Boston, and part of the partnership funds were here and part abroad. *Die Deutsche Bank Filiale Nurnberg* v. *Humphrey*, 47 Sup. Ct. 166 (Dec. 15, 1926).

The position of the majority of the Court cannot be more clearly stated than in the words of the learned justice himself:

> "A suit in this country is based upon an obligation existing under the foreign law at the time when the suit is brought, and we assume that when the bank failed to pay on demand its liability was fixed at a certain number of marks both by the terms of the contract and by the German law—but we also assume that it was fixed in marks only, not at the extrinsic value that those marks then had in the commodities or in the currency of another country. On the contrary, we repeat, it was and continued to be a liability in marks alone and was open to satisfaction by the payment of that number of marks, at any time, with whatever interest might have accrued, however much the mark might have fallen in value, as compared with other things. An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change the law takes no account of it. Obviously in fact a dollar or a mark may have different values at different times but to the law that establishes it it is always the same. If the debt had been due here and the value of dollars had dropped before suit was brought the plaintiff could recover no more dollars on that account. A foreign debtor should be no worse off."

The majority opinion thus holds that the courts below erred in taking the date a cause of action accrued under German law, *i. e.*, the date of demand, as the proper time for the translation of marks into dollars. But it does not in so many words state what it regards as the true rule. The syllabus to the case represents the decision as laying down the rule that the date of the bringing of the action in our courts is the proper date for such translation. And that is given as the gist of the decision in the

[3] 269 U. S. 71, 46 Sup. Ct. 46, 70 L. ed. 168 (1925).

[4] 46 Sup. Ct. 538 (May 24, 1926).

report of the case in the American Bar Association Journal for December, 1926, p. 861. On the other hand the dissenting opinion interprets the majority opinion as holding that the date of entry of judgment is the proper date. In view of the considerable time which might elapse between the bringing of the suit and the rendition of judgment, with German currency constantly and rapidly depreciating, it might make a great difference to the plaintiff which of these rules is the one actually adopted by the Court. It is submitted that the logic of Mr. Justice Holmes' argument points clearly to the date of entry of judgment as the correct rule, since under the German law the same number of marks, plus interest for the delay, would satisfy the obligation at the date of entry of judgment as at the date suit is brought.

The dissenting opinion criticises the majority opinion as interpreting too narrowly the decision in *Hicks* v. *Guiness*[6] where the debt was payable in the United States, and insists that the distinction drawn by Mr. Justice Holmes in the principal case from the fact that the debt was payable in Germany is fallacious; that the view that the judgment date should govern puts undue emphasis upon the character of the thing to be delivered and ignores completely the time when the delivery was to be made; that there is no good reason for making a distinction between a contract for the payment of marks and one for the delivery of goods in Germany, since, so far as we are concerned, marks are not money but a commodity; that the plaintiff is entitled to be compensated for his loss in our courts, and in dollars, and so it is necessary to ask, When did that loss occur, just as it would be necessary to make that inquiry in order to fix in dollars the value of wheat in a suit to recover for non-delivery of that commodity. In either case, the basis of recovery ought to be the value in dollars of the thing lost at the time of the loss. The opinion then criticises the rule adopted by the majority as uncertain and incapable of uniform application, in that the amount which the plaintiff will recover under it will depend upon whether suit is promptly brought or promptly prosecuted; whether the defendant interposes dilatory measures; whether the call of the docket is largely in arrears or up-to-date; and in some cases upon whether there is a successful appeal and a new trial, with the consequent annullment of the old judgment and rendition of a new one.

---

[6]Note 3, *supra*.

That there should be so sharp a division of opinion among the justices upon the question presented is not at all surprising, for many conflicting considerations enter into its solution. There is a similar sharp conflict between the courts of different jurisdictions. At least four distinct rules have been laid down as to the rate of foreign exchange to be taken into account in assessing damages for breach of a foreign contract.[6]

One line of cases, principally in Massachusetts and New York, holds that the current rate of exchange, in an action upon a foreign debt, will not be considered at all in computing the sum due in American dollars, but that the par of exchange should govern.[7] By par of exchange is meant the amount which the standard coin of either country would produce when coined at the mint of the other. The par of exchange is not liable to vary, whereas the current rate of exchange may vary extensively. Most of these cases were decided at a time when gold was at a premium. This rule has the advantage of certainty and definiteness, and avoids losses to contracting parties due to depreciation of currencies. The chief objection to it is that it often does violence to the contract of the parties by translating an obligation which by its terms might be satisfied by the payment of one or more legal tender media into, in effect, an obligation to pay gold.

The second rule finding some support in decided cases is that the sum due in American money is to be computed according to the current rate of exchange at the time the action is brought in our courts.[8] This rule has the merit of avoiding any danger of prejudice to the plaintiff due to depreciation of the foreign currency during the considerable period of time which may elapse, for one reason or another, between the filing of suit and entry of judgment, and so avoids one of the principal criticisms made by Mr. Justice Sutherland of the rule adopted in the principal case by the majority opinion. It is also urged in favor of this rule

[6]Notes in 11 A. L. R. 363 and 33 A. L. R. 1285 contain a complete collection of the case authorities.

[7]Burgess v. Alliance Ins. Co., 10 Allen (Mass.) 221 (1865), insurance policy on property in foreign country; Reiser v. Parker, 1 Low. Dec. Fed. Cas. No. 11,685 (1868), debt for goods sold in England; Ladd v. Arkell, 8 Jones & S. (N. Y.) 150 (1875), ditto; Benners v. Clemens, 58 Pa. 24 (1868), debt contracted in England and payable in English currency; Bush v. Baldrey, 11 Allen (Mass.) 367 (1865); Stringer v. Combs, 62 Me. 160, 16 Am. Rep. 414 (1873); Swanson v. Cooke, 45 Barb. (N. Y.) 574 (1866).

[8]Revillon v. Demme, 114 Misc. 1, 185 N. Y. Supp. 443 (1920), action on debt payable in France.

that the bringing of the action in an American court is equivalent to a demand of satisfaction here, that it then becomes the duty of the defendant under our law to pay, and that the rights and liabilities of the parties under our law should become crystallized as of that date. But this rule, whatever its practical merits, has not found extensive support in the authorities, and is perhaps difficult to maintain upon theoretical grounds. It does not meet the objection made by Mr. Justice Holmes that, where suit is brought here upon a German contract, it is an obligation created by German law which is being enforced, and the plaintiff should stand in no better position here than he would were he suing in Germany.

In one or two recent cases the contract has expressly provided what rate of exchange should govern. Such contractual provisions have been properly sustained, and the rate of exchange provided in the contract held to govern.[9]

Save for those cases adopting the par of exchange rule, the chief difference in view in the decisions is that represented by the two opinions in the principal case, *viz.*, should the rate of exchange at the time of trial and judgment or at the time of default upon the contract govern. Where the contract is one for the payment of money, *i. e.*, a contract creating a debt, the weight of authority is in accord with the majority opinion, and applies the rate of exchange at the time of trial and judgment.[10] But if the contract be one for the delivery of goods or rendition of services, where default in performance gives rise only to liability for unliquidated damages, perhaps the weight of authority is that the rate of

---

[9]Marine Ins. Co. v. McLanahan, 290 Fed. 685 (C. C. A. 4th, 1923).

[10]Lee v. Wilcocks, 5 Serg. & R. (Pa.) 48 (1819), semble; Marburg v. Marburg, 26 Md. 8, 90 Am. Dec. 84 (1866); Hawes v. Woolcock, 26 Wis. 629 (1870); Robinson v. Hall, 2 How. Pr. (N. Y.) 342 (1864); The Saigon Maru, 267 Fed. 881 (D. C. D. Ore., 1920), affirmed in 272 Fed. 799 (C. C. A. 9th, 1921); Nickerson v. Soesman, 98 Mass. 364 (1867), action by merchant against factor for breach of contract in refusing to surrender notes and other evidences of indebtedness, court refusing to apply par of exchange rule to such a case; Sirie v. Godfrey, 196 App. Div. 529, 188 N. Y. Supp. 52 (1921); The Hurona, 268 Fed. 910 (S. D. N. Y., 1920); Liberty Nat. Bank v. Burr, 270 Fed. 251 (E. D. Pa., 1921); Cropper v. Nelson, Fed. Cas. No. 3,417 (1811). All but one or two of the above cases were actions upon debts payable in foreign countries.

exchange at the time of default will apply.[11] A few jurisdictions have not made any such distinction, but apply the rate of exchange at the time of default to both types of cases.[12]

While the distinction between the two kinds of contracts may at first glance seem a plausible one, it is by no means necessary, and it is believed that Mr. Justice Sutherland's argument that the distinction is fallacious is sound. Unless we are to fall victim to the inveterate tendency to conceive of an action of debt as proprietary, rather than contractual, in character, it would seem that an action upon a contract to pay money is just as much an action for damages for non-performance as is an action upon a contract to deliver goods. The only difference is that in the first case the damages are liquidated; in the second, unliquidated. If it be urged that payment of money is always performance of the contract in the one case, but only a substitute for performance in the other, it may be fairly answered that payment of money after the due date is not a performance in any case, but only compensation for failure to perform.[13]

---

[11]Di Fernando v. Simon Smits & Co., 89 L. J. K. B. N. S. 1039 (1920); Barry v. Van Den Hurk, 2 K. B. 709 (1920), where the rule worked to disadvantage of plaintiff through the depreciation of sterling; LeBeaupin v. Crispin, 2 K. B. 714 (1920), where rule again worked to plaintiff's disadvantage for the same reason; Page v. Levenson, 281 Fed. 555 (D. C. D. Md., 1922). In all the above cases the action was upon a foreign contract, with damages unliquidated.

The same rule was applied, however, in the following cases where the action was to recover upon a foreign debt claim: Scott v. Bevan, 2 Barn. & Ad. 78, 109 Eng. Reprint (1831); Cash v. Kennion, 11 Ves. Jr. 314, 32 Eng. Reprint 1109 (1805), dictum by Lord Eldon; Butler v. Merchant, Tex. Civ. App. 27 S. W. 193 (1894); Hoppe v. Russo-Asiatic Bank, 235 N. Y. 37, 138 N. E. 497 (1923); Gross v. Mendel, 225 N. Y. 633, 121 N. E. 871 (1918); Dante v. Miniggio, 54 App. D. C. 386, 298 Fed. 845 (C. A. D. C., 1924); Grunwald v. Freese, 4 Cal. Unrep. 182, 34 Pac. 73 (1893).

[12]Uliendahl v. Pankhurst, W. & Co. 39 Times L. R. 628, 67 Sol. Jo. 791 (1923); Peyrae v. Wilkinson, W. N. 291, 68 Sol. Jo. 253 (1923); Hoppe v. Russo-Asiatic Bank, 235 N. Y. 37, 138 N. E. 497 (1923); Guiness v. Miller, 291 Fed. 769 (S. D. N. Y., 1923), affirmed in 299 Fed. 538 (C. C. A. 2d, 1924); Dante v. Miniggio, note 11, *supra*. But *cf.* with the above-cited English cases, Cohn v. Boulken, 36 Times L. R. 767, 67 Sol. Jo. 636 (1920).

[13]Guiness v. Miller, note 12, *supra*. The court said: "There is, in my judgment, no sound basis for distinction between torts and contracts to pay fixed sums of money. The confusion arises from the assumption that payment after the due date is performance. But that appears to be untrue. A promise to pay a sum at a given day is not a promise to pay then or later. When the promisor defaults, he fails to perform the only promise he has made, and his liability is asmuch a new creation of the law as though he had failed to deliver a chattel;—."

Suppose, for instance, that suit is brought here upon a broken contract for the delivery of one thousand bushels of wheat in Germany at a specified date. We assume that the German law, under accepted principles of the conflict of laws, will be looked to by our courts as governing the obligation and interpretation of the contract, and the measure of damages for non-performance, and that the German law is proved. We further assume that the plaintiff would have been entitled under German law to recover one thousand marks as damages for non-performance if suit had been brought in a German court immediately after default.[14] Would it be urged that, if the plaintiff delayed his suit in Germany until there had been a material depreciation of the mark, he could recover a larger number of marks sufficient to make up for such depreciation? Would not the payment of one thousand marks in legal tender currency, plus whatever amount might be allowed as interest, satisfy the judgment when rendered, provided, of course, it did not call for payment in gold, just as though the contract had called for the payment of one thousand marks in German currency? And if the plaintiff, under the principles of the conflict of laws, should not be allowed to improve his position by suing the party in default in the courts of another jurisdiction in the one case, upon what theory should he be permitted so to improve his position in the other?

But though, for the purposes of the argument, the soundness of this criticism by Mr. Justice Sutherland be conceded, it by no means follows that the rule laid down by the majority opinion is unsound. Rather the error may be in the rule which has been applied in the unliquidated damage cases. We cannot agree that it makes no difference whether the money due under a contract is payable in America or Germany. In the one case, the contract is an American contract, its obligation and interpretation controlled by American law; in the other a German contract, with its obligation and interpretation controlled by German law, at least in the absence of evidence that the parties intended some other law to apply. The issue seems to resolve itself to this— To what extent, if any, do sound principles of comity obligate

[14]As a matter of fact, the German Code makes specific performance the normal remedy in all cases, and damages is a purely secondary remedy, to be allowed only where for some reason specific performance cannot be obtained. No attempt is here made to determine whether this fact should affect the legal result under the principles of the conflict of laws.

our courts to give effect to the legal tender statutes of Germany, where suit is brought upon a German contract? There is, of course, a regrettable lack of agreement among courts as to the fundamental principles of the conflict of laws. Too often there is a paucity of understanding of their meaning and the proper scope of their application, after they have been agreed upon in the abstract. Whether it be a domestic or a foreign contract which is sued upon, it is necessarily our own law which the courts apply. But, in deference to certain more or less definitely defined principles based upon considerations of justice, convenience and practical policy, or, perhaps, better to carry out the presumed intention of the parties, our courts, in determining the obligation and proper interpretation of the foreign contract, look to, or borrow, as it were, the law of the place where the contract was made or the law of the place where it was to be performed, rather than looking to the rules of the local law. And courts quite naturally differ as to how far these considerations of justice and policy require them to go.

The opinion of Mr. Justice Holmes applies rigidly the principle that, where a plaintiff seeks a remedy in our courts upon a foreign cause of action, he can thereby place himself in no more advantageous position, that is, can recover no more, than if he were bringing his suit in the courts of the jurisdiction under whose law the cause of action arose. And since the legal tender laws of Germany would in this case preclude the German courts from taking into account the depreciation of the mark, in determining how many marks would satisfy the defendant's liability upon the broken contract, the above principle requires an American court also to ignore the depreciation. This rigid application of the principle no doubt works a great hardship upon the plaintiff in the instant case. Furthermore, as the dissenting opinion points out, the amount plaintiff will recover may often be prejudicially affected by the delay in obtaining judgment arising from procedural difficulties, congested court calendars, and dilatory tactics upon the part of the defendant. But this is not the only situation where a plaintiff may be materially injured by the law's delays. Yet the law, beyond allowing interest in certain cases, does not modify its rules in order to compensate the plaintiff for the loss he has suffered thereby. Moreover, while the rule that the rate of exchange at the time of default applies, would work to the plaintiff's advantage in any case where the foreign currency has depreciated materially, it would work correspondingly to his disadvantage in any case where our own currency has depreciated in international exchange, as it did in the years following the Civil War.[15]

ARTHUR H. KENT.

STOP PAYMENT ORDERS ON CERTIFIED CHECKS

The rule in Ohio and perhaps in some other jurisdictions[1] is well established that the drawer of a check which has been certified cannot stop payment thereon after certification. The leading case in Ohio establishing that proposition is *Blake* v. *The Hamilton Dime Savings Bank Company*, 79 Ohio St. 189, decided in 1908.

It is regrettable that this particular case should, on its facts, the parties to the action and the reasoning of the court, be the source of authority for the Ohio rule; for though the general rule that protects *bona fide* holders is well established and sound,[2] the opinion of the court in this case seems to constitute any holder of

---

[15]Hawes v. Woolcock, 26 Wis. 629 (1870). The court said: "Perhaps a strict application of logical reasoning to the question would lead to the result that the premium should be estimated at the rate when the note fell due. That was when the money should have been paid, and when the default in performing the contract occurred. This conclusion would be supported by the analogy derived from the rule of damages upon contracts to deliver specific articles, fixing the market price at the time they ought to have been delivered as the criterion. This rule might sometimes be to the advantage of the holder of the notes as in the present case. In other cases, where the premium was less at the time the note became due than at the time of trial it would be to his detriment. And in view of these uncertainties and fluctuations in the rate, upon the grounds of policy as well as for its tendency to do as complete justice between the parties as is possible, we have come to the conclusion that the true rule in such cases is to give judgment for such an amount as will, at the time of the judgment, purchase the amount due on the note in the funds or currency in which it is payable. To accomplish this, of course, the premium should be estimated at the rate prevailing at the time of trial. By this rule, the holder would neither gain nor lose by the fluctuations in the rate, but whenever he obtained judgment would obtain it for a sum which would then procure him the exact amount to which he was entitled in the proper currency. This does complete justice between the parties, and seems, therefore, to indicate the true extent to which the difference of exchange in such cases should affect the amount of recovery."

[1]Dicta in National Commercial Bank v. Miller, 77 Ala. 176; Kahn v. Walton, 46 Ohio St. 195, 20 N. E. 203 (1889); Pease & Dwyer v. State National Bank, 114 Tenn. 693, 88 S. W. 172 (1905).