on that footing. In principle the case appears to me to be governed by the decision in *Taylor* v. *Dunbar*. (1) The evidence shews that the damage to the fruit was due to the joint operation of the handling and the delay. When the policy is looked at, there are no words applicable to a loss occasioned by these causes.

Bowen, L.J. I am of the same opinion. Whether we consider the damage occasioned by the delay or that occasioned by the handling of the fruit, the same principle appears to apply. The proximate cause of the loss was not the collision or any peril of the sea. It was the perishable character of the articles combined with the handling in the one case and the delay in the other. The case appears to me to be undistinguishable in principle from *Taylor* v. *Dunbar*. (1) For these reasons, I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Courtenay, Croome, Son, & Finch.*
Solicitors for defendant: *Waltons, Johnson, & Bubb.*

E. L.

[IN THE COURT OF APPEAL.]

June 26.

ANTONY GIBBS & SONS *v.* LA SOCIÉTÉ INDUSTRIELLE ET COMMERCIALE DES MÉTAUX.

Contract—Conflict of Laws—Foreign Bankruptcy or Liquidation, Discharge by—Lex Loci Contractus—Law of Domicil—Stay of Proceedings—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 5, *s.* 39.

A party to a contract made and to be performed in England is not discharged from liability under such contract by a discharge in bankruptcy or liquidation under the law of a foreign country in which he is domiciled.

Appeal from the judgment of Stephen, J., at the trial.

The action was for non-acceptance of certain quantities of copper purchased by the defendants, a French company, from the plaintiffs, who were merchants carrying on business in London.

The facts, so far as material, were as follows:—

Contracts for the purchase of copper by the defendants from the plaintiffs had been effected through a broker on the London

(1) Law Rep. 4 C. P. 206.

1890

GIBBS & SONS
v.
SOCIÉTÉ
INDUSTRIELLE
ET COMMER-
CIALE DES
MÉTAUX.

Metal Exchange, who in each case drew up and sent to the parties bought and sold notes in the usual way, which were retained by such parties. By these notes the contract was expressed to be subject to the rules and regulations of the London Metal Exchange indorsed thereon; the copper was to be delivered at Liverpool; and payment was to be made in cash in London against warrants. (1) The defendants were a trading company created under and by virtue of certain statutes and articles of association according to the law of France and which carried on business in Paris. It appeared that such company had, since the making of the contracts and before the action, gone into liquidation in France, a judgment of judicial liquidation having been pronounced against it by the Tribunal of Commerce of the Seine. The failure to accept a portion of the copper contracted to be purchased by the defendants had taken place before the judgment of liquidation; but the deliveries of the remainder of the copper did not become due until after such judgment. The defendants gave notice to the plaintiffs that they should not accept such copper, which was therefore not tendered. Notice having been given to the plaintiffs by the liquidator in France that they must come in and prove any claim they had against the defendants or such claim would be barred, and they would be excluded from any share in the distribution of the assets, the plaintiffs thereupon sent in a claim in the liquidation for damages in respect of the loss sustained on resale of the copper. Such claim however contained a reservation of all rights in regard to the action in England which was then pending. The liquidator rejected so much of the claim as concerned the portion of the copper delivery of which was not due until after the judgment of liquidation, on the ground

(1) It has been thought sufficient for the purposes of this report to summarize the effect of the facts with regard to the making of the contracts as above. A question was raised in argument whether they ought to be considered as made in England, and therefore English contracts, or not; but the Court, as will be seen, were clearly of opinion on the facts that the contracts were English contracts. This question turned on the detailed facts of the transactions, which were somewhat more complicated than as above; but it has not been thought that this point involved any question of law such as called for a report.

that no such claim was admissible according to French law. The plaintiffs thereupon commenced proceedings in the French Court to establish their right to claim in the liquidation for the full amount claimed, which proceedings were still pending. Evidence was given by French experts as to the effect of the liquidation proceedings in France according to the French law. It was contended for the defendants, in substance, that the evidence shewed that such proceedings had the effect of dissolving the company for all purposes but liquidation, vesting the entire administration of its assets and affairs for the purposes of the liquidation in the liquidator, and preventing any action from being maintainable against the company; and further, that with regard to the copper of which delivery did not become due until after the judgment of liquidation, the French law was that the vendors might deliver the copper to the liquidator and prove for the price; but as they had not done so, and the copper was not delivered, the contract was cancelled and no claim for damages for non-acceptance was admissible. (1) It was, therefore, contended that either the liquidation proceedings were a defence to the action, or that they formed a ground on which the judge ought to order a stay of proceedings. The learned judge gave judgment for the plaintiffs for the loss sustained on resale in respect of all the copper, including that of which delivery was not due until after the liquidation.

Kennedy, Q.C., and *H. Tindal Atkinson*, for the defendants. It may be that there was no discharge of the defendants from liability in the technical sense in which the term is used in English bankruptcy law; but the effect of the French law of liquidation is that the company is dissolved for all purposes but liquidation, and no action will lie against it, the administration of all its assets and affairs being vested in the liquidator; and therefore the same question arises substantially as in the case of a discharge of the

(1) The evidence given with regard to the French law of liquidation was lengthy, and its effect not altogether clear; but it has not been thought necessary to go into it in detail, because, as will be seen, the judgment of the Court proceeded on the footing that, even if there were in French law what amounted to a discharge of the defendants from liability, it would not be a defence to the action.

1890

GIBBS & SONS v. SOCIÉTÉ INDUSTRIELLE ET COMMERCIALE DES MÉTAUX.

defendant by the bankruptcy law of a foreign country. This company was domiciled in France, and only existed by French law, and after the judgment of liquidation the company was in French law non-existent for the purpose of being sued. With regard to the breaches of contract subsequent to the liquidation, by the French law the contracts were cancelled and no claim could be made for damages for non-acceptance. Therefore, with respect to those breaches there was what was equivalent to a discharge of liability. The result of the authorities is that, where a debtor is domiciled in a foreign country, and by the bankruptcy or liquidation law of such country the administration of the assets of such debtor is vested in a trustee in bankruptcy or liquidator, and an action against the debtor is rendered not maintainable, the law of England, in accordance with the principles of international law on the subject, recognises and gives effect to the foreign bankruptcy or liquidation; and therefore that the effect of the liquidation in this case is to operate as a bar to the action in England. The English law recognises the title of the trustee or liquidator in the foreign bankruptcy or liquidation, and therefore the creditor is not to have a right to the assets in this country, which ought to go to such trustee in bankruptcy or liquidator abroad, to be administered in the bankruptcy or liquidation there. The plaintiffs here have proved in the French liquidation, and therefore have assented to the jurisdiction of the French court and are bound by the French law. If the liquidation in France is not technically an actual defence to the action, it is submitted that the pendency of that liquidation and of the claim of the plaintiffs under it, affords, at any rate, a ground for staying proceedings in the action under s. 24, sub-s. 5, of the Judicature Act, 1873. Under that section and s. 39, the learned judge at the trial had power to grant, and ought to have granted, a stay of proceedings on that ground before judgment, or at any rate it ought to be granted after judgment, and this Court can grant it now. [They cited *Ellis* v. *McHenry* (1); Story, Conflict of Laws, ss. 340, 342; *Phillips* v. *Allan* (2); *Ex parte Robertson* (3);

(1) Law Rep. 6 C. P. 228.
(2) 8 B. & C. 477.
(3) Law Rep. 20 Eq. 733.

Bartley v. *Hodges* (1); *Solomons* v. *Ross* (2); *Sill* v. *Worswick* (3); *In re Davidson's Settlement Trusts* (4); *Phosphate Sewage Co.* v. *Lawson & Sons' Trustee* (5); Westlake, Private International Law, ss. 125, 226; *In re Artola Hermanos* (6); *Baldwin* v. *Hale* (7); *Quelin* v. *Moisson* (8); *Quin* v. *Keefe* (9); *Smith* v. *Buchanan* (10); *Lewis* v. *Owen* (11); *Ogden* v. *Saunders* (12); *Edwards* v. *Ronald.* (13)]

R. T. Reid, Q.C., and *R. S. Wright*, for the plaintiffs. The evidence does not shew that the defendants were discharged by the French law. But, if they were, it would be no defence to the action or ground for staying proceedings. These contracts were English contracts, made and to be performed in England. There is no authority to shew that a party to such a contract in England can be discharged by the law of a foreign country, whether the country of his domicil or not. The plaintiffs are not bound by the law of France, and cannot be taken to have contracted with reference to it. The consequences of the proposition for which the defendants contend would be most startling. It would mean that, whenever an Englishman makes a contract in England with a subject of some foreign country, he is liable to have such contract cancelled by the law of such foreign country however unjust or unreasonable, though he could have enforced it in his own country. *Smith* v. *Buchanan* (10) is an authority which is directly to the contrary. The proof sent in by the plaintiffs in the liquidation was conditional only, and reserved all rights in the action. It did not involve any assent to the French law. [They cited Foote, Private International Jurisprudence, p. 381.]

Kennedy, Q.C., in reply.

LORD ESHER, M.R. In this case the defendants, a French company, entered into negotiations for the purchase of copper

(1) 1 B. & S. 375.
(2) 1 H. Bl. 131.
(3) 1 H. Bl. 665.
(4) Law Rep. 15 Eq. 383.
(5) 5 Court Sess. Cas. 4th Series, 1125, 1138.
(6) 24 Q. B. D. 640.
(7) 1 Wallace, 223.
(8) 1 Knapp, P. C. C. 266.
(9) 2 H. Bl. 553.
(10) 1 East, 6.
(11) 4 B. & A. 654.
(12) 12 Wheaton, 213, 366.
(13) 1 Knapp, P. C. C. 259.

1890

GIBBS & SONS v. SOCIÉTÉ INDUSTRIELLE ET COMMERCIALE DES MÉTAUX.

Lord Esher, M.R.

through a London metal-broker, who effected contracts between them and the plaintiffs in England in the ordinary way. He drew up bought and sold notes, by which the contract was expressed to be according to the rules of the London Metal Exchange. One of these notes he sent to the plaintiffs, and the other he sent to the defendants; and both parties retained the notes so sent to them. The contracts were for the purchase of copper to be delivered in England. It appears to me impossible to deny that these were English contracts. The contracts being so made, the defendants became bound to accept the copper contracted to be sold. The plaintiffs were always ready and willing to deliver the copper; but the defendants were not ready to accept, and absolved the plaintiffs from tendering it. Consequently, according to English law, the plaintiffs are entitled to sue the defendants for non-acceptance of the copper, the measure of damages being the difference between the contract and market price at the time of the breaches of contract. But the defendants are a French company domiciled in and governed by the law of France. They have been, by a judgment of the Tribunal of Commerce of the Seine, pronounced to be in judicial liquidation. It was asserted by the defendants by way of defence to the action that the pronouncing of that judgment by the French tribunal by the law of France operated as a discharge of the defendants from liability to an action on the contracts; and it was asserted that it so discharged them in more than one way. It was said that such a judgment dissolved the French company, so that it no longer existed, and so dissolved their liability to be sued on the contracts. It was further said, that the fact of the plaintiffs having by their agents offered proof of their claims before the French tribunal operated as a discharge of the defendants' liability to this action. It was further said, as to part of the claim, that by the law of France, where a company is in liquidation as in the present case, and there is a contract for the acceptance of goods by such company at a date subsequent to the judgment of liquidation, the vendors cannot prove for damages for the non-acceptance; they can elect to deliver the goods to the liquidator and prove for the price; but, if they do not so elect and the goods are not delivered, the effect is that the contract is cancelled and the

purchasers discharged. Such are the contentions set up by the defendants by way of defence. Then they raise a further point. They say that the judgment against the defendants ought not to have been pronounced, but the judge ought to have stayed the proceedings before judgment, or that, on giving judgment, he ought to have stayed further proceedings generally. The plaintiffs contend, that there was no discharge of the defendants from their obligations under the contract, according to the law of France; but they go further, and contend that, assuming that there was such a discharge by reason of the liquidation proceedings, and that such discharge was for this purpose equivalent in France to a discharge in bankruptcy according to English law, yet such discharge would be no answer to an action in England upon an English contract. We have to decide the questions so raised, or such of them as it may be necessary to decide for the purposes of this case. The question really is, whether anything has been proved which is an answer to the plaintiffs' action in this country according to the law of England. It is clear that these were English contracts according to two rules of law; first, because they were made in England; secondly, because they were to be performed in England. The general rule as to the law which governs a contract is that the law of the country, either where the contract is made, or where it is to be so performed that it must be considered to be a contract of that country, is the law which governs such contract; not merely with regard to its construction, but also with regard to all the conditions applicable to it as a contract. I say "applicable to it as a contract" to exclude mere matters of procedure, which do not affect the contract as such, but relate merely to the procedure of the court in which litigation may take place upon the contract. The parties are taken to have agreed that the law of such country shall be the law which is applicable to the contract. Therefore, if there be a bankruptcy law, or any other law of such country, by which a person who would otherwise be liable under the contract would be discharged, and the facts be such as to bring that law into operation, such law would be a law affecting the contract, and would be applicable to it in the country where the action is brought.

1890

GIBBS & SONS v. SOCIÉTÉ INDUSTRIELLE ET COMMERCIALE DES MÉTAUX.

Lord Esher, M.R.

That, at any rate, is the law of England on the subject. So, where a contract is made or is to be performed in a foreign country, so as to be a contract of that country, and there is a bankruptcy law, or the equivalent of a bankruptcy law, of that country, by which, under the circumstances that have occurred, a party to the contract is discharged from liability, he will be discharged from liability in this country. But it is only in virtue of the principle which I have mentioned that such a discharge from a contract takes place. It is now, however, suggested that, where by the law of the country in which the defendants are domiciled the defendants would, under the circumstances which have arisen, be discharged from liability under a contract, although the contract was not made nor to be performed in such country, it ought to be held that they are discharged in this country. It seems to me obvious that such a proposition is not in accordance with the principle which I have stated. The law invoked is not a law of the country to which the contract belongs, or one by which the contracting parties can be taken to have agreed to be bound; it is the law of another country by which they have not agreed to be bound. As Lord Kenyon said, in *Smith* v. *Buchanan* (1), it is sought to bind the plaintiffs by a law with which they have nothing to do, and to which they have not given any assent either express or implied. The proposition contended for seems to me to contravene the general principle to which I have alluded as governing these matters, and to suggest a principle for which there is no foundation in law or reason. Why should the plaintiffs be bound by the law of a country to which they do not belong, and by which they have not contracted to be bound? Therefore, if it were true that in any of the modes suggested the defendants were by the law of France discharged from liability, I should say that such law did not bind the plaintiffs, and that they were nevertheless entitled, according to English law, to maintain their action upon an English contract. I should say, too, that, if the contract had been made in any foreign country other than France, the plaintiffs could sue upon it in this country, and their action would not be affected by the law of France. In that case the law of

(1) 1 East, 6.

such other foreign country would govern the contract. That would be the conclusion I should come to, even supposing that the propositions stated by the defendants as to the law of France were in fact made out. It is not necessary, in the view I take, to determine whether they were or not. I must say that I do not think it was clearly made out that, in any of the modes suggested, the defendants were by the law of France discharged from liability. I wish to base my judgment, however, on the assumption that they were so discharged. I say that, assuming that to be so, the suggestion that the defendants would be discharged in this country by a law of the country of their domicil is altogether outside the general principle that governs such matters, and cannot be supported. Is there any authority to that effect? I think that the point has been decided by what Lord Kenyon said in *Smith* v. *Buchanan*. (1) I agree with the observation of Mr. Westlake, who says that Lord Kenyon's view was that the defendant's domicil was immaterial, and I think that he put the case upon the principle that the law of the country of the contract was the law that governed not only the interpretation of the contract, but also all the subsequent conditions by which it was affected as a contract. It has been suggested that, in the case of *Bartley* v. *Hodges* (2), Lord Blackburn has doubted the correctness of this view, and has used expressions indicating that a discharge in the country of the defendant's domicil would be recognised in an English court, although the contract was not made in that country. I do not give much weight to what he said merely during the argument. I agree with the suggestion of the plaintiffs' counsel as to this, viz., that he was criticising the language of the plea which said that the defendant was resident, not that he was domiciled in Victoria. But, when I come to the judgment which he ultimately gave, my view of it is that he meant to accept the view taken by Lord Kenyon, and since adopted by several text-writers on the subject. He said, in giving judgment: "The law on this subject is laid down in Story, Conflict of Laws, s. 342, 5th ed. Having stated in previous sections that the discharge of a contract by the law of the place where it was made or to be performed will be a discharge every-

(1) 1 East, 6. (2) 1 B. & S. 375.

1890

GIBBS & SONS
v.
SOCIÉTÉ
INDUSTRIELLE
ET COMMERCIALE DES
MÉTAUX.

Lord Esher, M.R.

where, he goes on to say: 'The converse doctrine is equally well established, namely, that a discharge of a contract by the law of a place where the contract was not made or to be performed will not be a discharge of it in any other country. Thus it has been held in England that a discharge of a contract made there under an insolvent Act of the State of Maryland is no bar to suit upon a contract in the Courts of England.' For this he cites *Smith* v. *Buchanan* (1), and proceeds: 'In America the same doctrine has obtained the fullest sanction.' In addition to that, we have the same doctrine pretty distinctly laid down and acted on in *Phillips* v. *Allan*." (2) It seems to me clear that the meaning of what Lord Blackburn so said is, that he accepted the law as laid down by Story, for which the decision of Lord Kenyon in *Smith* v. *Buchanan* (1) was an authority so far as regards this country. With regard to the case of *Edwards* v. *Ronald* (3), the ground of the decision there was, in my opinion, that the Act of Parliament relied upon, being an Act of the English Imperial Parliament, was binding in Calcutta, and, that being so, it was for this purpose the law of the country in which the contract was made and was being sued on. That ground of decision does not apply here. The case of *Quelin* v. *Moisson* (4) was a somewhat peculiar case, and has not much bearing, in my opinion, upon the present case. There the bankrupt had made a promissory note in favour of a French woman in Nantes. He became bankrupt in France, and the payee of the note proved under the bankruptcy. Then, under circumstances which are not clearly stated—but one is inclined to suspect not very honestly on the part of the payee—the note was indorsed over, and immediately indorsed by the indorsee to a person in Jersey. Negotiable instruments, such as notes and bills of exchange, are peculiar instruments, and give rise to several contracts. There is the original contract by the maker of a note or acceptor of a bill with the payee or drawer, as the case may be. Then, if there is an indorsement over, that gives rise to a contract between the maker or acceptor and the indorsee, as well as to a distinct contract between the indorser and indorsee. When the indorsee is

(1) 1 East, 6.
(2) 8 B. & C. 477.
(3) 1 Knapp, P. C. C. 259.
(4) 1 Knapp, P. C. C. 265.

suing the maker of the note or acceptor of the bill, he is suing on the contract made by such maker or acceptor, which will be governed, I should say, by the law of the country to which such contract belongs. Difficulties may, no doubt, arise with regard to cases on negotiable instruments, which do not appear to me to arise in the present case. It seems to me that in this case the plaintiffs were not bound by the French law; and therefore, assuming that the defendants would be discharged by French law, this case must be determined by the law of England. With regard to the suggestion that there ought to be a stay of proceedings, the answer appears to me to be this. If the judgment given by the learned judge was right, I think there is no ground at the present stage why a stay should be granted. If the judgment were wrong, then no stay would be needed. It seems to me unnecessary to go into the question whether the judge at the trial could grant a stay when the case came on before him for trial, and equally unnecessary to go into the question whether, after judgment pronounced, he could stay proceedings generally, or could only stay execution pending an appeal. I see no ground in law on which any such stay ought to be granted. For these reasons I am of opinion that the judgment was right and should be affirmed.

LINDLEY, L.J. The first thing to be borne in mind is that the contracts sued upon are English contracts, made and to be performed in England. The defence set up is in substance, that the defendants are a French company which is being wound up in France. Where such is the case, there is no remedy by the French law against the defendants except in the winding-up proceedings. The question is whether that is a defence to an action brought here. The defendants must be considered as domiciled in France, and I will assume for a moment, though I think it doubtful, that liquidation proceedings are equivalent to bankruptcy. It is contended for the defendants that by reason of the bankruptcy law in France, in which country the defendants are domiciled, the action cannot proceed. Even if the defendants had obtained what was equivalent to a discharge in bankruptcy according to French law, I think that the proposition so contended

1890

GIBBS & SONS v. SOCIÉTÉ INDUSTRIELLE ET COMMERCIALE DES MÉTAUX.

Lindley, L.J.

for is wrong. There is really no authority for it. An ingenious argument was based upon what I think was a misconception of the view taken by Lord Blackburn in *Bartley* v. *Hodges*. (1) He no doubt referred to the fact that the defendant was not stated to be domiciled in Victoria; but, when his actual judgment is considered, I do not think that the inference to be drawn from that must be extended too far. I cannot read the judgment as anything but an adoption by him of what Lord Kenyon said in *Smith* v. *Buchanan*. (2) He said in substance, that the contract was an English contract, and that neither the plaintiff nor defendant was stated to be domiciled in Victoria; but I do not think it is to be inferred because he made use of the latter expression that he meant that, if they had been, the result would have been different. The expressions so used by him with reference to the domicil of the parties have been considered by Mr. Westlake and Mr. Foote, in their books on Private International Law, and they both come to the conclusion that, if he meant to imply what has been suggested, his view is erroneous. But I do not think that he meant anything of the sort. I cannot see any principle upon which it can be said that the domicil of the defendant is in any respect material. The consequences of adopting the doctrine suggested by the defendants appear to me to be so startling that I decline to adopt it.

But then it is said that the proceedings ought to have been stayed before judgment, or, if not, at any rate they ought to be stayed after it. I cannot conceive any reason why they should be stayed before judgment, or why the plaintiffs should not be allowed to ascertain their legal rights on these English contracts by this action. I should think that it would be the most convenient course for both parties that such rights should be so ascertained. As for staying execution after judgment, who ever heard of a judgment debtor asking for a stay of execution, except pending an appeal? But it is said that the liquidator might ask for a stay, and this is practically an application by the liquidator. I see no reason why such an application on behalf of the liquidator should be granted. Execution could only go against the property of the defendants, and to such execution the plaintiffs

(1) 1 B. & S. 375. (2) 1 East, 6.

have a right. If any property not belonging to the defendants is taken, it can be protected by interpleader proceedings. It seems to me doubtful upon the evidence as to the French law whether the property of the company has vested in the liquidator; but in any case no injustice can arise from allowing execution to go. On these grounds I think that the appeal fails.

LOPES, L.J. Assuming that there were what is equivalent to a discharge in bankruptcy in France, of which I am very doubtful, I am of opinion that such discharge cannot operate as a discharge in respect of a contract made in England, though the defendants be domiciled in France. That proposition seems to me to be the result of the judgment of Lord Kenyon in *Smith* v. *Buchanan* (1) and that of Lord Blackburn in *Bartley* v. *Hodges*. (2) As I read Lord Blackburn's judgment in that case, he entirely agreed with the passage from Story which he read, and adopted the judgment of Lord Kenyon in the earlier case. The result of these cases seems to me to be that the question of the defendants' domicil is immaterial. Consequently, there is no answer to this action. With regard to the suggestion that there ought to be a stay of proceedings, all I can say is, that I fail to see any ground whatever for it. For these reasons I think the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Johnson, Budd, & Johnson.*
Solicitors for defendants: *Murray, Hutchins, & Stirling.*

(1) 1 East, 6. (2) 1 B. & S. 375.

E. L.