[HIGH COURT OF AUSTRALIA.]

GLOVER AND ANOTHER . . . . . PLAINTIFFS;

AND

WALTERS . . . . . DEFENDANT.

H. C. OF A. 1950.

MELBOURNE, *Feb.* 21, 22.

Dixon J.

High Court—Jurisdiction—Practice—Writ of ne exeat colonia—Circumstances in which writ will issue.

The High Court has power to issue a writ of *ne exeat colonia* in a proper case.

Circumstances in which the writ will issue, considered.

Boehm v. *Wood*, (1823) Turn. & R. 333 [37 E.R. 1128], *De Carriere* v. *De Calonne*, (1799) 4 Ves. 577, at p. 890 [31 E.R. 297, at p. 303], *Marquis of Ailsa* v. *Watson*, (1851) 6 R.J. 63, and *Smith* v. *Knarston*, (1872) 3 V.L.R. 174, referred to.

APPLICATION and SUMMONS.

The plaintiffs in an action in the High Court applied for the issue against the defendant of a writ of *ne exeat colonia*. The defendant took out a summons to have the action stayed on the ground that it was an abuse of process inasmuch as the plaintiffs had already instituted in the Supreme Court of South Australia an action founded on the same cause of action. The applications came before *Dixon* J., in whose judgment hereunder the facts appear.

C. I. Menhennitt, for the plaintiffs.

A. D. G. Adam, for the defendant.

Cur. adv. vult.

Feb. 22.

DIXON J. delivered the following judgment:—

This is an application by the plaintiffs in the suit for a writ of *ne exeat colonia*. The plaintiffs reside in South Australia and the defendant in Victoria and it is upon this diversity of residence that the jurisdiction of the Court over the suit is founded.

I do not doubt the power of this Court to issue a writ of *ne exeat colonia* in a proper case. It is a prerogative writ used for the purpose of preventing a subject quitting the country without giving bail or security to answer a money claim of an equitable nature.

Formerly the writ was issued out of the High Court of Chancery. The writ is directed to the Marshal commanding him to cause the defendant personally to come before him and give sufficient bail or security in the sum mentioned in the order and adequate to the nature of the case; that the defendant will not go or attempt to go into parts beyond the seas without leave of the Court, and in case the defendant shall refuse to give such bail or security then the Marshal is commanded to commit the defendant to prison, there to be kept in safe custody until he shall do it of his own accord, and when the Marshal has taken such security he is to certify to the Court. The writ is not issued except for an equitable debt or demand. There must be a sum certain to be indorsed upon the writ as that for which bail is to be taken. In matters of account it need not be finally ascertained but it must be sworn to as an amount which at least would be shown by an account when taken. There is an instance of the grant of the writ in a suit for specific performance against a purchaser: *Boehm* v. *Wood* (1). But a decree had been made in that case and the purchase money payable had been almost finally ascertained. Speaking generally, the writ of *ne exeat* does not issue unless there is an equitable debt in a sum certain. For a legal debt the plaintiffs must rely upon mesne process or the statutory provisions for holding to bail in jurisdictions where these remedies exist. In *Boehm* v. *Wood* (1) Lord *Eldon* stated some of the essential conditions. He said (2): "There are certain circumstances attending the application for the writ which admit of no dispute. In the first place the debt must be equitable; in the second place it must be due; and in the third place it must be a debt in respect of which the Court can see its way to direct what sum shall be marked upon the writ. To the rule that the debt must be equitable there is one case of exception, the case of account; that exception stands upon this ground, that this Court has jurisdiction in matters of account as well as a court of law, and that the proceedings at law in such matters are attended with very great difficulties. This Court has therefore said, though it be a general rule that the debt shall be equitable, and the affidavit as to the amount positive, yet, in matters of account, that shall be considered as an equitable debt which is also a legal debt, and it shall be sufficient for the party to swear to his belief as to the amount of the balance."

The plaintiff to obtain the writ must show that he has such an equitable claim, that the defendant is about to depart beyond the seas and either that he is doing so to avoid the jurisdiction or that

(1) (1823) Turn. & R. 333 [37 E.R. 1128].

(2) (1823) Turn. & R., at pp. 343, 344 [37 E.R., at p. 1132].

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the debt will be endangered or, at all events, that the remedy for its recovery will be prejudiced.

The foundation of the present suit is a claim that the defendant obtained from the plaintiffs £1,541 by misrepresentation and breach of warranty. The writ of summons was issued out of this Court on 16th February 1950 but the same claim was put in suit by an action in the Supreme Court of South Australia commenced on 3rd June 1948. The relief claimed in both actions is rescission and the return of the money, alternatively the return of the money by reason of breach of contract or damages.

The facts alleged are these: It was alleged that on 23rd April 1948 the defendant and the plaintiffs entered into an agreement in writing by which the defendant purported to sell to the plaintiffs his right, title and interest in some formulas and prescriptions under a trade name, or an alleged trade name, of "Pestblitz" and that the agreement recited that he was the sole proprietor of the process or formulas and that the trade name was registered. A verbal representation was also relied on and it was alleged that on the faith of the representations the defendant obtained from the plaintiffs the sum of £1,541. It was then alleged that the representations were false and the warranties were false and that when the plaintiffs discovered the falsity they repudiated the agreement and that then the consideration for the payment by the plaintiffs of the sum of £1,541 wholly failed and that the defendant became on 19th May 1948 and still is indebted to the plaintiffs in the sum of £1,541.

The action in South Australia proceeded to the delivery of the defence and a counterclaim. An order for discovery was made on 8th July 1949 with which the defendant did not comply until 19th October 1949 and then only as the result of an application to the Supreme Court. On 3rd February 1950 an order for further discovery by the defendant was made. On 7th February the passport authorities, who had withheld a passport from the defendant because of the pending action, informed the plaintiffs that it was not the practice to withhold a passport indefinitely and that one would be granted to the defendant at the end of fourteen days. As the defendant was in Melbourne the plaintiffs found themselves unable to obtain the statutory equivalent of a *capias ad respondendum* from the Supreme Court of South Australia and they therefore instituted this action in the High Court. They added to their claim a prayer for a writ of *ne exeat*.

If I thought that otherwise a case was made for the issue of this writ I would have thought it necessary to impose a condition that the plaintiffs discontinue the action in the Supreme Court of South Australia. I do not think that this Court ought to grant the writ

except for the purpose of ensuring that the plaintiffs' remedies in this Court are not defeated, endangered or prejudiced. The writ in this Court is a remedy incidental to the exercise of the jurisdiction to determine the suit and give relief. It is not a remedy to be granted here as auxiliary to the effective exercise of other jurisdictions. Besides it would be necessary to exercise control over the proceedings in order to ensure that the defendant was not further delayed in his departure than was necessary and that his bail was not held liable or his security retained longer than could be helped. For those purposes it might be proper to expedite the hearing of the suit.

But I do not think that this is a proper case for the issue of a writ of *ne exeat*. In the first place the claim put forward by the plaintiffs is that they have rescinded or disaffirmed the contract so that the consideration for the payment of £1,541 has failed, with the result that the defendant became indebted to the plaintiffs in that sum. On this footing it is recoverable at law as money had and received. But to justify the writ I think that it is still generally true, as *Smith's Chancery Practice*, 7th ed., p. 841, says, "that the debt must be shown to be an equitable demand upon which the plaintiff cannot sue at law." The encroachment on this principle goes not much further than cases of account falling within the concurrent jurisdiction of Chancery. In the second place the plaintiffs have not satisfied me that the defendant is departing in order to avoid the jurisdiction or that the plaintiffs' claim will be endangered or prejudiced. The defendant says that he is going on a business trip, that he will return, that his absence will be short and that his family and his interests are in Australia. There is nothing improbable in his story and nothing tangible giving rise to any solid doubt. One of the plaintiffs does say in very general terms that he believes the debt will be in danger of being lost to the plaintiffs, but he gives no satisfactory reasons for that particular belief. The plaintiffs' solicitor in his affidavit emphasizes the difficulty of obtaining further discovery of documents and answers to interrogatories if the defendant goes abroad, a matter with which I am not very much impressed. These seem to me inadequate materials, and materials which disclose insufficient grounds, upon which to issue the writ.

In earlier times, when arrest on mesne process was an ordinary incident of common-law actions, there was perhaps a tendency to treat the writ of *ne exeat* as the equitable counterpart of common-law process. But even in 1799 Lord *Loughborough* said: "But whatever is the case of proceedings at law (that is, on mesne process) an application for the writ of *ne exeat regno* is to the discretionary power of this Court, acting beyond the limits of the common law

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and applying a remedy certainly in its origin not distinctly applicable to private transactions between subject and subject." : *De Carriere* v. *De Calonne* (1). Sir *William a'Beckett*, first Chief Justice of Victoria, in *Marquis of Ailsa* v. *Watson* (2) made the following observations: " ' This writ,' said Lord *Eldon* in one of the cases where it was asked for ' is a most powerful instrument and I never apply it without apprehension.' These are strong words and show how very clear a case should be made to the Court to induce it to order such a writ to issue." In *Smith* v. *Knarston* (3) *Molesworth* J. set aside a writ of *ne exeat*, which he had issued, when it appeared that the defendant was a sea captain whose ship, though sailing for Newcastle, traded between that port and Melbourne and that he would return before the final taking of the accounts between him and the plaintiff. This was evidenced only by the defendant's affidavit.

These authorities show that the writ is not to be issued except with care and where real ground appears for believing that the defendant is seeking to avoid the jurisdiction or for apprehending that if the defendant is allowed to depart the plaintiff will lose his debt or be prejudiced in his remedy. In the present case I do not think sufficiently solid grounds of real apprehension are disclosed.

For the foregoing reasons I refuse the application.

The plaintiffs applied *ex parte* but the defendant appeared *gratis* on the hearing of the application, that is to say without being served with notice of motion or summons. In these circumstances I think that I should make no order for costs upon the application for the writ of *ne exeat*. But the defendant issued a summons to stay the action as an abuse of process. On this summons I think that the defendant is entitled to an order putting the plaintiffs to their election between the action in this Court and that in the Supreme Court of South Australia. I shall make an order that the action be forever stayed unless the plaintiffs within one month discontinue the action in the Supreme Court of South Australia and that they pay to the defendant five guineas costs of the summons. This latter order will be drawn up as in chambers and will include a certificate for counsel.

Order accordingly.

Solicitors for the plaintiffs : *Villeneuve Smith & Harford*, Adelaide, by *Ellison, Hewison & Whitehead.*

Solicitors for the defendant : *Alexander Grant, Dickson & King.*

E. F. H.

(1) (1799) 4 Ves., at p. 890 [31 E.R., at p. 303].

(2) (1851) 6 R.J. 63.

(3) (1872) 3 V.L.R. 174.