NOVATION IN PRIVATE INTERNATIONAL LAW

In *Re United Railways of the Havana and Regla Warehouses Ltd.* [1959] 2 W.L.R. 251, [1959] 1 All E.R. 214, the Court of Appeal (Jenkins, Romer and Willmer L. JJ.), upholding the judgment of Wynn Parry J., held that novation of a contract comprises two features, the discharge of one debtor and the substitution of another, and that the discharge is governed by the proper law of the contract; and that the doctrine of renvoi has no application in the field of contract.

In 1921 a British company which conducted a railway undertaking in Cuba bought a quantity of rolling stock, and raised part of the sum necessary to buy it by issuing trust certificates to the public through a trust company in Pennsylvania. In 1953 the Cuban government took over the assets and undertakings of the company under laws enacted for that purpose and in 1954 the company went into voluntary liquidation. The successors of the trust company, on behalf of the certificate holders, claimed money due from the company under the original agreement.

It was argued on behalf of the liquidators that where a question of statutory novation arises, the matter will be governed by the law of the situs of the debt at the time of the relevant foreign legislation.

The Court of Appeal rejected this view. Novation consists of two distinct elements. The discharge of one debt and the creation of another. As discharge affects the substance of the contract, it should be governed by the proper law of that contract. It was not necessary to decide what law governed the substitution of a new debtor, and the court preferred to express no decided opinion on the matter. They felt, however, that there was much to be said for Wolfe's view *(Private International Law*, 2nd ed., p. 458) that the question should be determined by the law with which the entry of the debtor is most closely connected and that, in the absence of some agreement to the contrary, such law might be the new debtor's personal law or the law of his place of business. *Arab Bank* v. *Barclays Bank (Dominion*, *Colonial and Overseas)* [1954] A.C. 495, [1954] 2 W.L.R. 1022, [1954] 2 All E.R. 226, 98 Sol. Jo. 350, was distinguished on the ground that in the Arab Bank case there was a compulsory transfer of the contractual right of a creditor to receive payment of a debt which was an item of property governed by the lex situs; whereas in novation there is no transfer of property at all, but the extinction of one debt and the creation of another.

The majority of the court (Jenkins and Romer L. JJ.; Willmer L.J. dissenting) held that the proper law of the contract was the law of Pennsylvania, despite the fact that certain clauses of the agreement provided that Cuban law should apply. However, they disregarded these provisions on the ground that they were only designed to ensure that the agreement was formally executed and registered in accordance with Cuban law. This case cannot be said, therefore, to lend support to Dr. Cheshire's views on the conclusiveness of the express intention of the parties in deciding upon the proper law.

All three members of the court were of the opinion that if Cuban law was the proper law of the contract, then it was the domestic law of Cuba, and not Cuban private international law: the doctrine of renvoi holds no place in the field of contract.

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