EXHIBIT 1

PROFESSOR JONATHAN M. HARRIS, BCL, MA, PhD

Academic position:

- Professor of International Commercial Law, Law School, University of Birmingham (since January 2002)

- As from 1 October 2009, I am working at the University of Birmingham on a part-time basis and combine this with practice as a tenant at Serle Court Chambers in London.

- As from 1 September 2011, I will be taking up the position of Professor of International Commercial Law at King's College, London on a part-time basis (to be held in tandem with my tenancy at Serle Court Chambers)

Previous positions:

September 2000- December 2001- *Reader in Law, University of Nottingham*

September 1995- August 2000- *Lecturer in Law, University of Birmingham*

Authored books

The Hague Trusts Convention (Oxford, Hart Publishing, 2002)

International Sale of Goods in the Conflict of Laws (Oxford, OUP, 2005)

Dicey, Morris and Collins, The Conflict of Laws, 14th edition, (London, Sweet and Maxwell, 2006)

I am the editor of eight chapters in the 14th edition of what is widely considered to be the foremost English work on private international law.

Dicey, Morris and Collins, The Conflict of Laws -First Supplement to the 14th edition (London, Sweet and Maxwell, 2007)

Dicey, Morris and Collins, The Conflict of Laws -Second Supplement to the 14th edition (London, Sweet and Maxwell, 2008)

Dicey, Morris and Collins, The Conflict of Laws -Third Supplement to the 14th edition (London, Sweet and Maxwell, 2009)

Dicey, Morris and Collins, The Conflict of Laws -Fourth Supplement to the 14th edition- (London, Sweet and Maxwell, 2010)

Authorship of substantial parts of books

Benjamin's Sale of Goods (8th edition, 2010). I am responsible for the conflict of laws section, which has been very extensively rewritten to take account of the entry into force of the Rome I Regulation. My contribution is in excess of 200 book pages.

Underhill and Hayton, Law Relating to Trusts and Trustees (16th edition, 2003; and 17th edition, 2006). I was responsible for the part of the book which deals with private international aspects of trusts.

Product Liability by Prof. John Miller and Dr Richard Goldberg (Oxford, OUP, 2004). I wrote around 100 book pages of this work.

Journal publications and chapters in books

"The Ambivalent Plaintiff and the Scope of *Forum Non Conveniens"*, (1996) 15 *Civil Justice Quarterly* 279-283.

"Recognition of Foreign Judgments at Common Law- the Anti-Suit Injunction Link", (1997) 17 *Oxford Journal of Legal Studies* 477-498.

"Anti-Suit Injunctions- a Home Comfort?", [1997] *Lloyd's Maritime and Commercial Law Quarterly* 413-422.

"Rights *in Rem* and the Brussels Convention", (1997) 22 *European Law Review* 179-185.

"Staying Proceedings for another Contracting State to the Brussels Convention", (1997) 113 *Law Quarterly Review* 557-562.

"Restraint of Foreign Proceedings- the View from the other Side of the Fence", (1997) 16 *Civil Justice Quarterly* 283-289.

"Launching the Rocket- Capacity and the Creation of *Inter Vivos* Transnational Trusts", (1997) 6 *Journal of International Trusts and Corporate Planning* 118-132 and 165-179 (two-part article) ISSN 1350-7605; also published in Glasson (ed) *International Trust Laws* (Jordans), Chapter C.3, pp. 1- 28.

A new edition of this article (which was extensively revised and updated) was published in January 2006 in Glasson (ed) *International Trust Laws.*

"Choice of Law in Tort- Blending in with the Landscape of the Conflict of Laws?", (1998) 61 *Modern Law Review* 33-55.

"Jurisdiction Clauses and Void Contracts", (1998) 23 *European Law Review"* 279-285.

"Related Actions and the Brussels Convention", [1998] *Lloyd's Maritime and Commercial Law Quarterly* 145-152.

"Public Policy and the Enforcement of International Arbitration Awards: Controlling the Unruly Horse", [1998] *Lloyd's Maritime and Commercial Law Quarterly* 568-578 (with Frank Meisel).

"Transnational Trust Litigation: Jurisdiction and the Enforcement of Foreign Judgments", Glasson (ed) *International Trust Laws* (1998, Jordans), Chapter C.1, pp. 1-71. Substantially revised and updated in 2000 for the same publication; Chapter C.1 pp. 1-74. *Substantially revised and updated* in December 1999 for publication in the *Journal of International Trusts and Corporate Planning* as a three-part article: see (1999) 7 J Int P 227-254; (2000) 8 J Int P 37-57; (2000) 8 J Int 101-132.

"Civil Jurisdiction and Judgments" and "Enforcement of Foreign Judgments"- Book Reviews, (1999) 18 *Civil Justice Quarterly* 185-188.

"Justiciability, Choice of Law and the Brussels Convention", [1999] *Lloyd's Maritime and Commercial Law Quarterly* 360-369.

"Use and Abuse of the Brussels Convention," (1999) 115 *Law Quarterly Review* 576-583.

"Autonomy in International Contracts"- Book Review, (2000, January) 19 *Civil Justice Quarterly* 92-94.

"Contractual Freedom and the Conflict of Laws", (2000) 20 *Oxford Journal of Legal Studies* 247-269.

"Transnational Health Care Litigation and the Private International Law (Miscellaneous Provisions) Act 1995, Part III" , in Goldberg and Lonbay (eds) *Pharmaceutical Medicine, Biotechnology and European Law* (Cambridge University Press, 2000), chapter 9, pp. 205-229.

"Consumer Protection in Private International Law", in *Property and Protection: Essays in Honour of Brian Harvey* (Oxford, Hart Publishing, 2000), chapter 11, pp. 245-268.

"Law's Future(s)- the Conflict of Laws", in Hayton (ed) *Law's Future(s)* (Oxford, Hart Publishing, 2000) (with Prof. David McClean), chapter 9, pp.161-184.

"Forum Shopping in International Libel", (2000) 116 *Law Quarterly Review* 562-569.

Ordering the Sale of Land Situated Overseas", [2001] *Lloyd's Maritime and Commercial Law Quarterly* 205-214.

"The Brussels Regulation", (2001) 20 *Civil Justice Quarterly* 218-224.

"Joinder of Parties Located Overseas", (2001) 20 *Civil Justice Quarterly* 290-300

"Jurisdiction and the Enforcement of Foreign Judgments in Transnational Trusts Litigation", in J Glasson (ed), *The International Trust*, chapter 1, pages 9-87.

"Launching the Rocket- Capacity and the Creation of *Inter Vivos* Transnational Trusts", in J Glasson (ed), *The International Trust*, chapter 2, pages 89-119.

"The Trust in Private International Law", in *Festschrift for Sir Peter North* (Oxford, OUP, 2002), pp 187-213.

"Tracing and the Conflict of Laws", (2002) 73 *British Yearbook of International* Law, 65- 102.

"Does Choice of Law Make Any Sense?" (2004) 57 *Current Legal Problems*" 305-353.

"Variation of Trusts Governed by Foreign Law upon Divorce", (2005) 121 *Law Quarterly Review* 16-23.

"Arbitration Clauses and the Restraint of Proceedings in Another Member State of the European Union", [2005] *Lloyd's Maritime and Commercial Law Quarterly* 159-167.

"Stays of Proceedings and the Brussels Convention", (2005) 54 *International and Comparative Law Quarterly* 933-950.

"Commercial Trusts in European Private Law", [2006] *Lloyd's Maritime and Commercial Law Quarterly* 278-282.

"Damages and the Application of Foreign Law: *Harding v Wealands*", *The Lawyer, September 2006.*

"Jurisdiction and the Enforcement of Foreign Judgments in Transnational Trusts Litigation", in J Glasson (ed), *The International Trust*, 2nd ed. (Jordans, 2006) pp 3-109.

"Launching the Rocket- Capacity and the Creation of *Inter Vivos* Transnational Trusts" in J Glasson (ed), *The International Trust*, 2nd ed. (Jordans, 2006), pp 111-156.

"Reflections on the Rome I Regulation Proposal on Choice of Law for Contractual Obligations" in *The Brussels Agenda*, December 2006 (published by the Law Society of England and Wales). Available at http://www.lawsociety.org.uk/secure/file/159739/e:/teamsite-deployed/documents//templatedata/Newsletter/Brussels%20Agenda/Documents/Brussels%20Agenda%20-%20December%202006.pdf

"The Recognition and Enforcement of US Class Action Judgments in England", in (2006) 22 *Contratto e Impresa/ Europa*, 617-650.

"The New Private International Law Rules of the Trusts (Amendment No 4) (Jersey) Law - A Retrograde Step?", [2007] (February) *Jersey and Guernsey Law Review* 9-19.

"Conflict of Laws and the Hague Trusts Convention", chapter C1 in *Planning and Administration of Offshore and Onshore Trusts* (Tolleys).

"Comity Overcomes Statutory Resistance", [2007] (May) *Jersey and Guernsey Law Review* 184-201.

"Sale of Goods and the Relentless March of the Brussels I Regulation", (2007) 123 *Law Quarterly Review* 522-528.

"EU Private International Law"- Book Review, (2007) 32 *European Law Review* 597-600.

"Green Paper on Succession And Wills", Report of Evidence to House of Lords European Union Committee, 2nd Report of 2007-8, HL Paper 12, pp 1-12.

"Reflections on the Proposed EU Regulation on Wills and Succession", published as a guest editorial on www.conflictoflaws.net (February 2008)

"Guernsey's New Private International Law Rules for Trusts- Model Offshore Solution or Recipe for Conflict?", [2008] (October) *Jersey and Guernsey Law Review* 289-317.

"The Brussels I Regulation, the ECJ and the Rulebook", (2008) 124 *Law Quarterly Review* 523-529.

"The Proposed EU Regulation on Succession and Wills: Prospects and Challenges", (2008) 22 *Trust Law International* 181-235.

"The Brussels I Regulation and the Re-Emergence of the English Common Law", [2008] *European Legal Forum* 181-189.

"Understanding the English Response to the Europeanization of Private International Law", (2008) 4 *Journal of Private International Law* 347-395.

"The ECJ decision in *West Tankers*", published as a guest editorial on www.conflictoflaws.net (February 2009).

"Mandatory Rules and Public Policy in the Rome I Regulation", in Ferrari and Leible (eds) *The Rome I Regulation* (Munich, Sellier, 2009) 269-342.

"Agreements on Jurisdiction and Choice of Law: Where Next?", [2009] *Lloyd's Maritime and Commercial Law Quarterly* 537-561.

"Service Contracts, Carriage by Air and the Brussels I Regulation", (2010) 126 *Law Quarterly Review* 30-36 (with Martin George).

"Mandatory Rules Revisited" in Ahern and Binchy (eds), *The Rome I Regulation on Choice of Law in Contract* (forthcoming).

"Civil Jurisdiction and Judgments", (2010) 16 *Trusts and Trustees* 873-876.

"European Aspects of *Granatino v Radmacher"* (2011) 103 *Family Law Journal* 2-4.

"*Granatino v Radmacher* and its Implications for Cross-Border Trusts Disputes" (2011) 17 *Trusts and Trustees* 112-123.

Editorships of journals and convening of journal conferences

I am one of two founding editors of the *Journal of Private International Law*, (with Prof. Paul Beaumont, Aberdeen), launched by Hart Publishing of Oxford in April 2005 at a conference held at the University of Aberdeen. The journal was initially published twice per year. As from 2008, it is now published three times per year. We also have an associated website: www.conflictoflaws.net and hold regular international conference under the auspices of the journal.

A major conference was held at Birmingham University on 26-27 June 2007, which was highly successful.

We convened a further *Journal of Private International Law* conference in collaboration with Herbert Smith, a leading London law firm, on 19 September 2008. The event was held at Herbert Smith's premises.

We co-convened a highly successful two-day *Journal of Private International Law* conference at New York University on 18-19 April 2009.

A three-day *Journal of Private International Law* conference will take place at the University of Milan on 14-16 April 2011.

I am on the editorial board of the journal *Trusts and Trustees.*

I was formerly an Assistant Editor of the journal *Civil Justice Quarterly* for more than seven years; on the editorial board of the *Journal of International Trust and Corporate Planning*.

Book series editorship

I am the joint founder and series editor (with Prof. Paul Beaumont) of the *Studies in Private International Law* monograph series published by Hart Publishing.

Teaching

I am course leader for the LLB Conflict of Laws course in Birmingham, on which I am the sole teacher. I am also course leader for the LLM Commercial Conflict of Laws course. I have been teaching these courses since 1995.

I have lectured and given tutorials on the compulsory LLB and CPE Equity and Trusts courses at the University of Birmingham (and when working at the University of Nottingham) for many years.

Teaching evaluations from students for all my teaching are very positive.

I currently supervise five doctoral students pursuing research in the Conflict of Laws. In recent years, three students that I supervised went on to begin highly successful careers as lecturers at leading universities.

Administration

Law School

- 2003- 2009 *Director of Research*- I had overall responsibility in the School for research and produced the School's return to the Research Assessment Exercise (RAE).

In the RAE 2008, the School recorded its best ever results. In terms of the percentage of its activity judged to be of 3* or 4* standard, the School was ranked equal 7th. It received especially high ratings for the quality of its research environment and esteem factors, on the basis of information which I presented in drafting the School's RA5a document.

- August 2006- 2009 *Deputy Head of School*

I advised the Head of School extensively on all aspects of the running of the School.

- 2003- 2009 *Law School's Management Committee*

College of Arts and Law

- 2008- present *College Promotions Panel*

This small panel is responsible for considering promotions to all positions within the College of Arts and Law.

- 2008- 2009 *College Research and Knowledge Transfer Committee*

Previous administrative posts

2005- 2008 *University Research and Knowledge Transfer Committee*

2002- 2004 *Deputy Director, LLM degree*
2000- 2001 *Tutor for LLM Admissions, University of Nottingham.*
1997- 2000 *Tutor for Undergraduate Admissions, Law School, University of Birmingham.*

Visiting Professor, University of New South Wales, Australia

In the summer of 2010, I was a visiting professor at the University of New South Wales (UNSW), Australia. I wrote and delivered a very successful LLM course on Anglo-Australian private international law. I have been invited to return to UNSW in 2012.

External examining

I am an external examiner on the LLB and LLM degrees at the University of Bristol.

I am also an external examiner on the LLM degree at King's College, London.

Government advisory work

From 2007, I advised the Ministry of Justice on the proposed EU Regulation on Cross-Border Succession and Wills. In this capacity, I gave evidence to the North Committee on Private International Law in September 2007; and to the House of Lords Select Committee on European Union Law in October 2007. I also attended meetings at the European Commission in December 2007 and in June 2008.

In October 2009, the European Commission's Proposal was issued. I was retained to advise the Ministry of Justice as to whether the United Kingdom should opt into the Regulation.

Legislative work

I was extensively involved in the drafting of a new Trusts Act for the British Virgin Islands and have had a major influence upon the content of the new Private International Law provisions of the Act. The approach adopted is a unique development, which, it is hoped, will prove an inspiration for other offshore jurisdictions around the world.

Some recent addresses

I regularly speak at events around the world. Some major recent addresses include:

- "The Future of Private International Law in England and Wales" at the British Institute of International and Comparative Law on 24 October 2006 (chaired by Lord Mance).

- "English Law and European Concepts of Private International Law" at the European University Institute, Florence on 26 October 2007.

- "The Proposed Rome I Regulation on Choice of Law in Contract" at the Bar European Group annual conference in Rome in May 2007 (chaired by Lord Justice Laws).

- "International Wills and Succession" at the annual Trusts and Estates Conference in Provence, France in February 2008.

- "The Rome I Regulation: Should the UK Opt-In?" at the British Institute of International and Comparative Law on 18 June 2008 (chaired by Lady Justice Arden).

- "The Proposed EU Regulation on Succession and Wills" at the European Research Academy, Trier, Germany on 26 September 2008.

- "Jurisdiction in Relation to International Trusts Disputes" at the annual Trusts and Estates Conference in Provence, France in February 2009.

- "Mandatory Rules and Public Policy" at a conference on the Rome I Regulation at the University of Verona on 20 March 2009.

- "The Rome II Regulation", COMBAR seminar at the Inner Temple, London on 10 March 2009.

- "Jurisdiction Clauses in Trusts Instruments", Chancery Bar Association Seminar at Lincoln's Inn, London on 11 May 2009 (chaired by Mrs Justice Proudman).

- "The Recognition of Foreign Judgments in Breach of Arbitration Agreements" at the British Institute of International and Comparative Law on 12 May 2009 (chaired by Mr Justice Coleman).

- "Choice of Law for Maritime Torts" at the London Shipping Law Centre on 26 May 2009.

- "Mandatory Rules and the Rome I Regulation", at Trinity College, Dublin on 9-10 October 2009.

- "Succession Conflicts Affecting Trusts" at the Trusts and Estates Litigation Symposium, London on 13 October 2009.

- "The EU Regulates Cross Border Successions: First Reaction to the Commission Proposal" at the British Institute of International and Comparative Law on 10 November 2009 (chair and speaker).

- "Jurisdiction Agreements on Trial" at the British Institute of International and Comparative Law on 10 November 2009.

- "Workshop on Jurisdiction and Enforcement of Foreign Trusts Judgments" at the Chancery Bar Association Annual Conference on 23 January 2010.

- "Cross-Border Succession- the European Commission's Proposal" at the European Research Academy, Trier, Germany on 18 February 2010.

- "The EU Succession Regulation" at the annual Trusts and Estates Conference in Provence, France in February 2010.

- "The Changing Face of the Commercial Court" at the Bar Council 25th annual conference on 6 November 2010.

- "*Granatino v Radmacher* and its Impact upon Trusts" at the 9th International Trusts Congress on 2 December 2010.

- "The Revised Lugano Convention" at STEP seminar in Geneva on 8 February 2011.

- "Arbitration and the Commission's Proposal to revise the Judgments Regulation" at the British Institute of International and Comparative Law on 10 February 2011.

Barrister and tenant at Serle Court, London

I am a qualified barrister and have held a full tenancy at Serle Court in London since 1 May 2009 (although I have only been practising actively at Serle Court since 1 October 2009). I specialise in the fields of commercial and chancery law; and especially in private international law and international trusts work.

Prior to moving to Serle Court, I held a door tenancy at Brick Court Chambers in London from August 2006-April 2009 inclusive (having completed pupillage at Brick Court in August 2006).

Cases of note include:

Granatino v Radmacher, heard before nine members of the Supreme Court on 22-23 March 2010. The case concerns the weight to be given to a pre-nuptial agreement in ancillary relief proceedings and has been very widely reported in the press.

OJSC Oil Co Yugraneft (In Liquidation) v Abramovich & Others [2008] EWHC 2613 (Comm). Involved in successful application for reverse summary judgment involving choice of law issues relating to knowing assistance and knowing receipt.

General Motors Corporation v Royal & Sun Alliance Insurance [2007] EWHC 2206 (Comm). Instructed in successful application for anti-suit injunction.

Sibir Energy Plc v Roman Abramovich & Others (Court of Appeal, Eastern Caribbean, 2006). Provided extensive advice on choice of law issues in trusts in successful defence of the claim.

Mubarak v Mubarak (Jersey Court of Appeal [2008] JCA 196). Instructed on appeal to the Jersey Court of Appeal relating to the effect of an English ancillary relief order in Jersey.

Charman v Charman. Acted in high profile litigation relating to the enforceability of the Court of Appeal's judgment ([2007] EWCA Civ 503) against trusts assets in Bermuda.

Other activities

Member of Advisory Council of British Institute of International and Comparative Law.

Honorary Life Member of Association of Contentious Trust and Probate Specialists (ACTAPS). (The other Honorary Members largely consist of senior members of the judiciary).

Full member of Society of Trust and Estate Practitioners (STEP).

Previous education and qualifications

I graduated in 1994 with a first class honours degree in law from Oxford University, where I studied at Jesus College (being ranked in the top ten in both Moderations and Finals) and completed the BCL degree at the same institution in 1995.

I received a substantial number of prizes at Oxford for academic excellence during my studies, including a prize for my Finals results and for being the outstanding law student at Jesus College. I was also an Open Scholar at Jesus College.

I was subsequently awarded a PhD degree by the University of Birmingham on the basis of my published work. The external examiner for this was Prof. David Hayton.

EXHIBIT 2

International and Comparative Law Quarterly

(incorporating the *Quarterly* of the Society of Comparative Legislation and International Law and the *Transactions* of the Grotius Society)

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cited do not, on the whole, go as far as the Court thought they did and certainly do not justify—on their own—abandoning the content–conduit divide, nor does the case law wholeheartedly vindicate the view that competition in telecommunications infrastructure is preferable to monopoly provision. Second, the substitution by the Court of its economic view for that of a governmental agency will be novel enough in many other jurisdictions; making that substitution without reference to any supportive empirical evidence will be unlikely to find favour at all. Despite these concerns, the *Retrofit* decision is a fascinating addition to free expression jurisprudence and worthy of close study for the lessons (both positive and negative) which it teaches.

ANDREW S. BUTLER*

THE *RES JUDICATA* EFFECT IN ENGLAND OF A US CLASS ACTION SETTLEMENT

IN US courts the procedural device of the class action is available by virtue of Rule 23 of the Federal Rules of Civil Procedure. Subject to certain conditions, this rule enables one person to bring an action on behalf of a large number of others (the "class members") and the resolution of such an action, whether it is by way of judgment following trial or by the entry of an order of settlement, has *res judicata* effect on the class members. In most cases the majority of class members are all resident in the United States.

This article looks at whether class members who are resident outside the United States, specifically those who are resident in England, would be bound by a US class action settlement so that they cannot litigate the same issues in England.

This question is important in both jurisdictions. In England it is important because it has an obvious effect on the decision a potential class member may make to opt out of, or remain in, or ignore, a class action of which he or she has received notice. In the United States it is important because doubts as to the binding nature of a judgment or settlement in a foreign jurisdiction have influenced the manner in which particular class actions have been structured. For instance, in *Bersch* v. *Drexel Firestone Inc.*[1] the "dubious binding effect" of a defendants' judgment on absent foreign plaintiffs was a significant factor in the court's decision to exclude from the action all persons who were not resident or citizens of the United States. In *In re Silicone Gel Breast Implant Prods. Liab. Litig.*[2] the court found that many foreign plaintiffs wanted to be in the class (notwithstanding that many thought the terms unfair to foreign plaintiffs). Owing to the uncertainty of their position, foreign claimants were afforded a guaranteed second right to opt out of

* Lecturer, Faculty of Law, Victoria University of Wellington, and Researcher, European University Institute, Florence. Sincere thanks to Patricia Bailey for commenting on an earlier draft of this note.

1. 519 F.2d 974, 986 (2d Cir. 1975).
2. 1994 US Dist. LEXIS 12521 (N.D. Ala. 1 Sept. 1994).

the class action after the amounts payable to them were determined.[3] In addition, some foreign claimants, who might otherwise have been excluded, were given the right to opt into the settlement.[4]

The focus of this article is on settlements rather than judgments. The class action has proved to be a tool which promotes settlement. Not only does it allow plaintiffs to unite and thus improve their bargaining position but it also allows defendants to dispose of the claims of *all* members of a class, thereby avoiding the risk and inconvenience of dealing with large numbers of suits brought in a variety of jurisdictions. Nevertheless, what is said here in relation to settlements ought to apply to judgments reached following trial as well; indeed, some of the conclusions might apply more strongly where the case has proceeded to trial and judgment.

This article considers the hypothetical situation of the settlement of a class action brought in a US federal court against an English defendant. For the purpose of the article it is assumed that the US court has subject-matter jurisdiction over the case.

Settlement of a class action can occur either before or after certification of the class. In the former case counsel for the parties would agree on a settlement, which would then be put to the judge for provisional approval.[5] If the judge considers that the settlement meets certain minimum standards,[6] a hearing date will be set at which the judge will consider both whether to approve the settlement and whether to certify the class for settlement purposes.[7] An order will generally be entered directing that notice of this hearing date and the terms of the settlement be given to potential class members, and that they be permitted to opt out or to appear at the hearing and object to the settlement or certification. Evidence at the hearing may be given by way of affidavits, submissions, live witnesses or some combination

3. *Idem*, *45.

4. *Idem*, *54.

5. Fed. R. Civ. Pro. 23(e) provides that a class action settlement is subject to the approval of the assigned judge. Case law has developed expanding upon this notion. Generally speaking, in reaching a decision, the judge must protect the interests of the absent class members.

6. The *Manual for Complex Litigation, Second*, §30.44 (1985) states: "If the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that notice be given to the class members of a formal fairness hearing, at which evidence may be presented in support of and in opposition to the settlement."

7. Often the parties will stipulate that they accept class certification for settlement purposes as part of their agreement. If counsel for the parties have agreed upon a settlement, and are prepared to stipulate as to their acceptance of the class certification for this purpose, then the court's enquiry as to whether the class truly meets the criteria prescribed in R.23 may be less rigorous. However, the Third Circuit has recently taken the view that "there is no language in [R.23] that can be read to authorize separate, liberalized criteria for settlement classes". *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.* 55 F.3d 768, 799 (3d Cir. 1995), cert. denied *sub nom General Motors Corp.* v. *French* 133 L.Ed 2d 45, 116 S.Ct. 88; *Georgine* v. *Amchem Prods. Inc.* 83 F.3d 610 (3d Cir. 10 May 1996), cert. granted, sub nom *Amchem Prods.* v. *Windsor* 1996 US LEXIS 6586 (US Nov. 1, 1996). In other words, if the class would not be certified for the purposes of trial, it will not be certified for settlement purposes.

thereof. If all goes well the judge will, after time for reflection, sign an order approving the settlement as fair, reasonable and adequate.[8]

Alternatively, settlement could take place after class certification. In that case separate notices would be sent to class members, the first advising them of the certification hearing, the second of the settlement.

In the hypothetical case posed here, I assume that settlement occurs prior to certification, so that the settlement and certification hearings are one. In this scenario, after negotiations between counsel, a settlement is reached and put to the judge. The judge orders that notice of a hearing in relation to the settlement, and of the terms of the settlement itself, and the opportunity to opt out or to appear and object be given to the class members, which is done. The judge then holds a hearing and, after time for reflection, signs an order (the "Order") approving the settlement as fair, reasonable and adequate.

This article investigates the extent to which the Order would be enforceable by the defendant against a class member who did not opt out and who subsequently brings an action against the defendant in England on the same grounds as were alleged in the US class action.

The focus of this article is on the use of the Order as *res judicata*. This is because there is neither a bilateral nor multilateral treaty or convention between the United States and England which impacts upon the enforcement of such an order.

I reach the conclusion that the Order has a good chance of supporting a plea of *res judicata* in England. It is a final judgment of a court of competent jurisdiction which disposes of the rights of the parties. Under the assumptions of the hypothetical case, the plaintiffs were given notice of the action and the chance to withdraw or object. The judge, acting under an obligation to protect the absent class members, held a hearing, considered the evidence and made a ruling. That ruling is entitled to be upheld by the English court, and is unlikely to be rejected on the grounds of breach of natural justice. However, it is difficult to be certain of this conclusion because the matter has not yet been litigated in England. As a consequence, my conclusions are drawn from principles expressed in various cases which deal with aspects of the issue, rather than the whole of it.

A. Class Actions Under Rule 23

Before going further, a brief explanation of class action procedure in the United States is probably useful. Class actions are governed by Rule 23 of the Federal Rules of Court Procedure. A representative suit must first satisfy each of the four threshold requirements of Rule 23(a). These are that (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defences of the representative parties are

8. The criteria generally used in determining whether a settlement is fair, reasonable and adequate are: (1) likelihood of recovery, or likelihood of success; (2) amount and nature of discovery or evidence; (3) settlement terms and conditions; (4) recommendation and experience of counsel; (5) future expense and likely duration of litigation; (6) recommendation of neutral parties, if any; (7) number of objectors and nature of objections; (8) the presence of good faith and the absence of collusion: H. Newberg, *Newberg on Class Actions* (3rd edn, 1992), §11–43.

typical of the claims or defences of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. Next, the representative suit must fall into at least one of the three subdivisions of Rule 23(b).[9] Newberg classifies these subdivisions as follows:[10]

> Rule 23(b)(1) classes are designed to avoid prejudice to the defendant or absent class members if individual actions were prosecuted in contrast to a class suit yielding a unitary adjudication. Classes under Rule 23(b)(2) are proper when injunctive relief is appropriate because the defendant has acted or refused to act on grounds generally applicable to the class. Finally, Rule 23(b)(3) makes class actions suitable when a class action is superior to other available methods for adjudication of the controversy and common questions predominate over individual ones.

Often a proposed class action may fall into more than one of these categories. Rule 23(b)(3) is the broadest and, indeed, might be seen to encompass the other actions. There are, however, important distinctions between subdivisions (b)(1) and (b)(2), as compared with subdivision (b)(3), with regard to exclusion rights and notice requirements. In Rule 23(b)(3) classes only, in contrast to actions certified under Rule 23(b)(1) or (2), all class members who can be identified through reasonable effort must be given notice of the class certification hearing[11] and absent class members have the right to exclude themselves from the class and from the binding effect of the judgment[12] or to enter an appearance through counsel.[13]

9. R.23(b) provides:
"(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
(1) the prosecution of separate actions by or against individual members of the class would create a risk of: (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

10. Newberg, *op. cit. supra* n.8, at §4.01.

11. R.23(c)(2) provides: "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

12. *Ibid.*

13. *Ibid.*

As a consequence, the appropriate categorisation of the class action may influence the outcome of the suit, and certainly its impact on potential plaintiffs.

In this article I focus on the most common case—a class action brought pursuant to Rule 23(b)(3).

B. Reciprocal Enforcement

1. Treaties and conventions

Although various attempts have been made to establish a treaty between the United States and England in relation to the reciprocal enforcement of judgments, no such treaty has been signed to date.[14]

2. The common law

In the absence of such international agreements, a party wishing to enforce a foreign judgment in England must proceed under the common law. In this respect we encounter a difficulty in analysis. The problem is that the discussion of the enforcement of foreign judgments in the case law and the treatises focuses on the enforcement of foreign judgments in relation to certain sums awarded against a *defendant*. We are, of course, more concerned with the impact of the judgment on the plaintiffs, i.e. we are concerned with *recognition* of the judgment rather than *enforcement*. Although this distinction is recognised in some texts,[15] for the most part the discussion of the case law does not easily translate to the situation under review. For instance, there is much discussion about the court's jurisdiction over the defendant but never any reference to the situation where the plaintiff may

14. See ABA Section of International Law and Practice, *Enforcing Foreign Judgments in the United States and United States Judgments Abroad* (Ronald A. Brand (Ed.), 1992), p.93. See also Dicey and Morris, *The Conflict of Laws* (12th edn, 1993), p.460 where the authors state that "several important foreign countries (including the United States) do not yet have treaties with the United Kingdom for the reciprocal enforcement and recognition of judgments".

There is considerable English case authority confirming this. In *Owens Bank Ltd* v. *Etoile Commerciale SA* [1995] 1 W.L.R. 44 (PC) Lord Templeman stated: "There are many countries including, for example, the United States of America with whom the United Kingdom has no reciprocal arrangements." In the United States there is equally recent authority. In *Leslie* v. *Lloyd's of London* No.H–90–1907, 1995 US Dist. LEXIS 15380, at *107–108 (S.D. Tex. 28 Aug. 1995) it was found that "England and the United States are not parties to any treaty providing for the reciprocal enforcement of judgments."

There are, however, moves afoot to put in place a multilateral convention on the recognition and enforcement of foreign judgments. At the June 1992 meeting of the Special Commission on General Affairs and Policy of the Hague Conference on Private International Law, the US delegation proposed that the Convention undertake work on a convention dealing with the recognition and enforcement of foreign judgments. A working group was formed to report to the next Hague Conference. In May 1993 the 17th Session of the Hague Conference on Private International Law decided "to include in the agenda for the work of the Conference the question of the recognition and enforcement of foreign judgments in civil and commercial matters": Hague Conference on Private International Law: Final Act, 29 May 1993 (Final Edn, 17th Sess. 1993). A Special Commission met in the Hague on 20–24 June 1994, to begin preliminary work on a convention. Nothing has, as yet, come to fruition. Arthur T. von Mehren, "Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?" (1994) 57 Law & Contemp. Probs. 271–272.

15. See e.g. Dicey and Morris, *idem*, p.454.

claim not to have submitted to the jurisdiction. This is because the question of jurisdiction over a plaintiff in an English court, a court of general jurisdiction, is generally a moot point; by filing proceedings the plaintiff has voluntarily submitted to the court's jurisdiction.[16] The usual question in relation to plaintiffs is whether they have standing to bring an action before the court—not whether the court has jurisdiction over them.

This question is taken up in greater detail in the next section of this article, which deals with the recognition of foreign judgments and their ability to operate as *res judicata*.

C. Res Judicata

1. *Introduction*

This section considers whether the Order is likely to support a plea of *res judicata* in England. In the first part I consider the English precedent which has considered the effect of a US class action judgment. In the second part I consider the elements of the plea of *res judicata*. Effectively, these are that the judgment in respect of which *res judicata* is claimed is a final decision on the merits made by a court of competent jurisdiction over the parties to, and the subject matter of, the litigation. In the final part of this section I consider whether there are any arguments which might negate an otherwise successful plea of *res judicata*.

Res judicata is a rule of evidence which provides the basis for a defence of estoppel. It is usually divided into two subgroups: "cause of action estoppel" (called "claim preclusion" in the United States) and "issue estoppel" ("issue preclusion" in the United States). In the former case *res judicata* is pleaded by way of defence to the entire cause of action, rather than to a single issue, and it amounts to an assertion that all the legal rights and obligations of the parties have been concluded by the earlier judgment. In the latter case only a single matter at issue is the basis for the estoppel. In relation to the Order, we are concerned with cause of action estoppel.

2. *Recognition of a US class action*

As yet, English courts have not considered the question of the binding nature of a US judgment approving a settlement of a class action.[17] Indeed, in only one English case has the issue of the recognition of a US class action judgment been discussed: *Campos* v. *Kentucky & Ind. Terminal Ry.*[18] This case, which was decided under an earlier incantation of Rule 23, dealt with a so-called "spurious" class action, that is, one which was not intended to be binding on anyone who was not an original party or did not intervene.[19] The defendant in the English action pleaded

16. This is not so in relation to courts of limited jurisdiction, such as the US federal courts.

17. Nor have, to my knowledge, the courts of Canada, Australia or New Zealand.

18. [1962] 2 Lloyd's Rep. 459 (QB). Because the judge had already found in favour of the defendants, the discussion of the *res judicata* effect of the US class action was *obiter*.

19. As such, it was not a true class action, a fact recognised by the Advisory Committee when amending the rules in 1966: "The 'spurious' class action envisaged by original Rule 23 was in any event an anomaly because, although denominated a 'class' action and pleaded as such, it was supposed not to adjudicate the rights or liabilities of any person not a party."

that the controversy between the parties had already been decided because the plaintiff fell within the plaintiff class (of bondholders) in relation to which a US federal court had already issued a judgment. McNair J in the Queen's Bench Division held that even assuming that the class action gave valid support for a plea of *res judicata* in an American court against an absent member of the class, the plea of *res judicata* would fail because:

(1) the English plaintiff was not a bondholder at the time of the initiation of the US proceedings; and
(2) English private international law would not permit a foreign judgment to give rise to a plea of *res judicata* in the English courts "unless the party alleged to be bound had been served with the process which led to the foreign judgment".[20]

The assumption that the class action judgment would have *res judicata* effect in the United States, although not necessarily justified by the facts in *Campos*, is clearly the case in relation to the hypothetical Order under discussion here.[21] Further, the first of McNair J's objections to the defendant's plea of *res judicata* will usually be inapplicable as it is, in many ways, just a technical objection which will not affect the majority of cases. However, the second objection could pose a real problem for the defendant, should a putative plaintiff sue in England, because individual members of the class action would not be served with process. This may not, however, be an insurmountable problem, because they would at least have been given *notice* and the opportunity to opt out or be heard. This issue is discussed at greater length in Part C.5 of this article.

3. Elements of the res judicata *defence*

In *Carl Zeiss Stiftung* v. *Rayner and Keeler Ltd and Others (No.2)*[22] Lord Reid held that the general principle for a successful plea of *res judicata* was "that the earlier judgment relied on must have been a *final judgment*, and that there must be *identity of parties* and of *subject-matter* in the former and the present litigation".[23]

In a separate judgment in that case, Lord Guest put the test slightly differently:[24]

> The rule of estoppel by res judicata, which is a rule of evidence, is that where *a final decision* has been pronounced by a judicial tribunal of *competent jurisdiction* over the *parties* to and the *subject-matter* of the litigation, any party or privy to such litigation as against any other party or privy is estopped in any subsequent litigation from disputing or questioning such *decision on the merits*.

Each of these various requirements is examined in turn below.

(a) Final judgment. In *Carl Zeiss* Lord Reid stated[25]:

> It is clear that there can be no estoppel of this character unless the former judgment was a final judgment on the merits ... [This] means that the merits of the cause of

20. [1962] 2 Lloyd's Rep. 459, 473 (QB).
21. See e.g. *Plummer* v. *Chemical Bank* 668 F.2d 654, 660 (2d Cir. 1982).
22. [1967] 1 A.C. 853 (HL).
23. *Idem*, pp.909–910 (emphasis added).
24. *Idem*, p.933 (emphasis added).
25. *Idem*, p.918.

> action must be finally disposed of so that the matter cannot be raised again in the foreign country.

His Lordship relied on *Nouvion* v. *Freeman*[26] for this proposition. Another formulation of the concept is that the court's judgment on that cause of action is one that cannot be varied, reopened or set aside by the court that delivered it or any other court of co-ordinate jurisdiction, although it may be subject to appeal to a court of higher jurisdiction: *DSV Silo- und Verwaltungsgesellschaft MbH* v. *Owners of the Sennar, The Sennar (No.2)*.[27] In other words, the decision relied on as estoppel must itself be *res judicata* in the country in which it is made. The Order meets this test.[28]

(b) Decision on the merits. It is necessary that the decision be final "on the merits". Arguably this poses a problem in that the Order will be on the merits of the *settlement* rather than on the merits of the causes of action. In *The Sennar (No.2)* Lord Brandon held that "a decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned".[29] However, in the same case Lord Diplock preferred the view that the requirement that the decision be on the merits added nothing to the condition that the judgment must be final and conclusive of the rights of the parties, i.e. that it must have *res judicata* effect.[30]

Certainly, there is authority for the proposition that a settlement operates as *res judicata*. At first instance in *In re South American and Mexican Co., ex parte Bank of England*[31] Vaughan Williams J held:

> It has always been the law that a judgment by consent or by default raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter. The basis of the estoppel is that, when parties have once litigated a matter, it is in the interest of the estate that litigation should come to an end; and if they agree upon a result, or upon a verdict, or upon a judgment, or upon a verdict and judgment, as the case may be, an estoppel is raised as to all the matters in respect of which an estoppel would have been raised by judgment if the case had been fought out to the bitter end.

Similar views were expressed by the Supreme Court of Canada in *Hardy Lumber Co.* v. *Pickerel River Improvement Co.*[32]

Although these cases would appear to be strong authority, there is a weaker line of cases which go the other way. In *Khan* v. *Goleccha Int'l Ltd.*[33] Brightman LJ, in an *obiter* comment, referred with approval to an excerpt from Spencer Bower and Turner, *Res Judicata*, to the effect:[34]

26. (1889) 15 App. Cas. 1.
27. [1985] 1 W.L.R. 490, 494 (HL).
28. *Plummer*, *supra* n.21, at p.660.
29. [1985] 1 W.L.R. 490, 499.
30. *Idem*, p.494.
31. [1895] 1 Ch. 37, 45. The judgment was affirmed by the Court of Appeal: *idem*, p.48.
32. (1898) 29 Can. S.C.R. 211.
33. [1980] 1 W.L.R. 1482 (CA).
34. 2nd edn, 1969, p.59.

> Where the so-called appellate "decision" is really nothing more than a mere registration and record by the appellate tribunal of an agreement or compromise between the parties, without the mind of the tribunal having been brought to bear on the questions so compromised, and without its having exercised any judicial function in the matter, there is nothing which can be deemed, or operate as, a *res judicata*.

The authority which was relied on in support of this suggestion was *Jenkins* v. *Robertson*.[35] *Jenkins* involved a particular type of action by which, according to the law of Scotland, one person is allowed, if he chooses, to represent the public; and apparently, according to the law of Scotland, the result of that action binds the public at large. The House of Lords decided that such result would not bind the public at large unless it was a result arrived at after judicial consideration, and that it would not bind the public if it was a result arrived at by consent.

There are, however, at least two ways to overcome this decision. First, in *Young* v. *Young's Trustee*[36] very serious doubts were cast upon the viability of the decision. Lord Mackintosh said:[37]

> I think that [*Jenkins*] must be considered in the light of the particular and very special subject matter with which it deals, namely, public rights of way ...
>
> ... what was decided by the Court of Appeal in [*In re South American and Mexican Co.*], namely, that a judgment by consent or default is as effective as an estoppel between the parties as a judgment whereby the Court exercises its mind on a contested case is ... a correct statement of the law of Scotland on this matter.

Second, even if one were to accept that the law was as stated in the excerpt from Spencer Bower, the judgment of the US court would survive because the judge is obliged to, and would have, examined the issues and thus exercised a "judicial function" in relation to the decision. It cannot just be a rubber stamping of the parties' agreement. Indeed, the US court is under a positive obligation to protect the absent class members and to evaluate the settlement on its terms independently of the parties' agreement. In so doing, the US judge is required to consider the strength of each party's case (albeit without the benefit of a trial, but with circumstantial guarantees of the independence and expertise of counsel's judgment).

The Order would also appear to be "on the merits" in the sense that one could say that inherent within the judge's decision is an assessment of the merits of the causes of action. This is particularly so given the obligation of the judge to protect absent class members. In addition, it could be suggested, in accordance with the sentiments of Lord Diplock, that this is a judgment on the merits because it finally disposes of the legal rights which arise out of the claim.

(c) Same parties. Assuming that the hypothetical plaintiff in a potential English action fell within the definition of "class member", as that term was used in the US action, then this requirement would appear, *prima facie*, to be satisfied. However, there may be some question as to whether the class members are strictly *parties* to the US judgment. Under US law, they are for all purposes relevant to this enquiry.

35. (1867) L.R. 1 Sc. & Div. 117 (HL (Scot.)).
36. 1957 S.L.T. 205 (HL (Scot.)).
37. *Idem*, p.207.

The US Supreme Court, in *American Pipe & Construction Co.* v. *Utah*,[38] stated: "under the circumstances of this case, ... the claimed members of the class stood as parties to the suit until and unless they received notice thereof and chose not to continue." Similarly, in *In re Agent Orange Product Liability Litigation*[39] the Court found that:

> The prevailing view appears to be that class members are not parties, at least for such purposes as discovery and liability for sanctions. They are considered parties, however, for purposes of being bound by the judgment in the class action, receiving the benefit of the statutes of limitations toll, and having standing to appeal from decisions and object to settlements.

Although under English law there is no authority in relation to a US class action, English courts have held in relation to the English representative action provision, Order 15, rule 12 of the Rules of the Supreme Court ("English rule 12") (which is the English equivalent of a class action), that every person represented though not named on the record is a party to the action and is bound by the result.[40]

Thus, it would seem that the class members are all parties for *res judicata* purposes.

(d) Same subject matter of the litigation. It is necessary that the subject matter of the second proceedings be the same as the subject matter of the first. This becomes an enquiry into whether the cause or causes of action are identical, which can set substance against form. On the one hand, potential plaintiffs could argue in most cases that English law is different from US law on the issues which form the subject of dispute, i.e. that the cause of action is not the same. On the other hand, the defendant would argue that the substance and subject matter of the claim in the United States are the same as they would be in England. The recoverability under such claims may differ, but the claims flow from the same underlying facts.

The issue is whether "the same cause of action" means a right alleged to flow from the facts pleaded, or whether it means the facts themselves and not the right. In *Black* v. *Yates*[41] Potter J held:

> The words "cause of action" comprise every fact, though not every piece of evidence, which it would be necessary for the plaintiff to prove, if traversed, to support his right to judgment of the court ... It has been elsewhere defined as: "Simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person"—see the judgment of Diplock LJ in *Letang* v. *Cooper* [1965] 1 Q.B. 232, 242.

In *Black-Clawson Int'l Ltd* v. *Papierwerke Waldhof-Aschaffenburg AG*[42] the House of Lords was called upon to interpret section 8 of the Foreign Judgments (Reciprocal Enforcement) Act 1933. Section 8, which was intended to be consistent with the common law, provides in the relevant part (emphasis added):

> (1) [A judgment to which the Act applies ...] shall be recognized in any court in the United Kingdom as conclusive between the parties thereto in all proceedings

38. 414 U.S. 538, 550–551 (1974).
39. 104 F.R.D. 559, n.1 (E.D.N.Y. 1985) (citations omitted).
40. *Moon* v. *Atherton* [1972] 2 Q.B. 435, 441 (CA).
41. [1992] 1 Q.B. 526, 543.
42. [1975] A.C. 591 (HL).

> founded on *the same cause of action* and may be relied on by way of defence or counterclaim in such proceedings.
>
> ...
>
> (3) Nothing in this section shall be taken to prevent any court in the United Kingdom recognizing any judgment as conclusive of any matter of law or fact decided therein if that judgment would have been so recognized before the passing of this Act.

Lord Reid interpreted the phrase "cause of action" as contained in section 8(1) as applying only to the facts and not the right. Although this interpretation applies to the statute, it seems likely that the court would adopt a similar interpretation of the phrase when it is used at common law.

The *Black-Clawson* case involved a suit first brought in West Germany. That suit was dismissed on the ground that it was time-barred. Expert evidence showed that in German law that decision did not affect the existence of the plaintiff's right, but merely barred the remedy. The plaintiff subsequently brought suit in England, and the defendants applied for the proceedings to be dismissed on the basis that under section 8(1) the judgment of the German court was to be recognised as conclusive between the parties.

The House of Lords held that under section 8(1) the foreign judgment was conclusive only as to the matter adjudicated upon, and that in the German court the matter adjudicated upon was the question whether the German period of limitation applied. The German court had not adjudicated on the question whether the plaintiffs had a right of action or whether that had been extinguished. Their Lordships relied on *Harris* v. *Quine*,[43] where it was held that dismissal of an action in the Isle of Man, because of a short period of limitation which did not destroy the plaintiff's right but merely made it unenforceable, was not a bar to subsequent proceedings in England on the same cause of action.

Although both of these cases have since been abrogated by statute,[44] they are important to this analysis for what they imply as to the situation where, as in the hypothetical case being examined here, the foreign judgment operates so as to extinguish the right of the plaintiff, not just to make it unenforceable. Indeed, in *Harris* Blackburn J said:[45]

> All that the Manx court decided was, that in the courts of the Isle of Man the plaintiffs could not recover. If the plaintiffs could have shown, as was attempted in *Huber* v. *Steiner* [(1835) Bing N.C. 202], that the law of the Isle of Man extinguished the right as well as the remedy, and this had been the issue determined by the Manx court, that would have been a different matter.

To similar effect, Lush J (with whom Hayes J concurred) held that: "Had the Manx statute of limitations ... extinguished the right after the limited time and not merely barred the remedy, there would have been good ground for defence in this court."[46]

On the basis of this line of authority, the Order of the US court would appear to be on the merits of the cause of action.[47]

43. (1869) L.R. 4 Q.B. 653 (CA).
44. The Foreign Limitation Periods Act 1984 provides that a foreign judgment determining any matter by reference to limitation is deemed to be on the merits.
45. *Supra* n.43, at p.658.
46. *Ibid.*
47. As an aside, it is worth noting that the US Supreme Court in *Matsushita Elec. Indus.*

(c) Court of competent jurisdiction. There are two elements to this. First, the court which reached the decision must have had jurisdiction over the subject matter of the litigation. In *A-G for Trinidad and Tobago* v. *Eriche*[48] the Privy Council said: "It is hardly necessary to refer at length to authorities for the elementary principle that in order to establish the plea of res judicata the judgment relied on must have been pronounced by a Court having concurrent or exclusive jurisdiction directly upon the point." For the purposes of this article I shall assume that the US court has jurisdiction over the litigation.

Second, the court must have jurisdiction over the parties. Again, for the purposes of this article I assume that this is the case under US law. However, the assessment of whether the court had jurisdiction over the parties is determined by English rules of conflicts of laws, not just on the local law of the jurisdiction in which the judgment is rendered. The difficulty here is that these rules, which stem from the 1800s, seem to deal exclusively with jurisdiction over the defendant; as stated earlier in this article, jurisdiction over plaintiffs is not usually an issue. Although it may be possible to rework the statements of law in relation to defendants in an effort to determine whether the plaintiffs fit within one of the categories by which defendants are held to be within the jurisdiction of the foreign court, perhaps the better view is to look to English law on representative actions and determine whether an English court, under similar circumstances, would allow the Order to be binding.

The question, therefore, is whether the English court would consider that the US court had jurisdiction to proceed and make a ruling which would bind a person represented by another, when that person did not commence or join the proceedings but had notice of them, and the opportunity to intervene or withdraw. The short answer would appear to be that the English court would say that the US court would have jurisdiction over that plaintiff. This conclusion is derived from the case law interpreting English rule 12. In *Markt & Co.* v. *Knight Steamship Co.*[49] Fletcher Moulton LJ stated: "The plaintiff is the self-elected representative of the others. *He has not to obtain their consent.* It is true that consequently they are not liable for costs, but they will be bound by the estoppel created by the decision." Thus, in his view, a party who did not even have notice of the action would be subject to the jurisdiction of the court. This rule applies even to parties who are not resident in the jurisdiction: in another leading case, *Irish Shipping Ltd* v. *Commercial Union Assurance Co. plc*,[50] a claim was brought against an insurer as representative of a syndicate. The representative action was permitted even though some of the represented defendants were resident outside the jurisdiction and could not have been served except with the leave of the court.[51]

Co. v. *Epstein* 134 L.Ed 2d 6, 116 S.Ct. 873 (1996) held that, as Delaware law permitted even exclusively federal claims to be compromised in a class action settlement in State court, the parties to class action litigation in Delaware could fashion a settlement that releases all claims—State and federal—related to the transaction at issue, regardless of whether the claims could have actually been asserted in the Delaware proceedings.

48. [1893] A.C. 518, 522–523 (PC).
49. [1910] 2 K.B. 1021, 1039 (CA) (emphasis added).
50. [1990] 2 W.L.R. 117 (CA).
51. *Idem*, p.132.

These cases would probably be sufficient to satisfy this question, were it not for the additional finding in *Markt* that a representative action could not lie in cases dealing with separate and individual contracts. The *Markt* case involved a steamship that was sunk by the Russian navy during the course of the Sino-Russian war because it was carrying contraband. A representative action was brought on behalf of the owners of the cargo for damages for breach of contract and duty in and about the carriage of goods by sea. The court (Buckley LJ dissenting) found that the plaintiffs and those whom they purported to represent were not "persons having the same interest in one cause or matter", which was the wording of English rule 12 at the time, and which is, with no significant change, its current wording. The primary basis for this conclusion was that each of the owners of the cargo had a separate contract with the shippers and the court was willing to assume, without evidence, the likelihood of separate defences being raised were each claim to be prosecuted individually.[52] This finding would certainly pose a problem under some, but clearly not all, circumstances. More troubling was the opinion of Fletcher Moulton LJ, which went further and extended this principle to any case where damages were claimed: "damages are personal only ... no representative action can lie where the sole relief sought is damages, because they have to be proved separately in the case of each plaintiff, and therefore the possibility of representation ceases".[53]

The difficulty that this case poses is that it provides the English plaintiff with the opportunity to suggest that the US class action is unknown to the English courts and that representative actions of this nature have been rejected by English courts; thereby presenting the argument that the English court ought to reject the ability of the foreign court to bind the absent class members.

However, since the *Markt* decision, there have been a number of cases throughout the Commonwealth that have chipped away at the severity of its finding. Many of the cases have relied on earlier authority, particularly the less restrictive approach advocated by Lord Lindley in *Taff Vale Ry.* v. *Amalgamated Soc. of Railway Servants*,[54] that: "The principle on which the [representative action] rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. The principle is as applicable to new cases as to old, and ought to be applied to the exigencies of modern life as occasion requires."

In *Prudential Assurance Co.* v. *Newman Industries Ltd*,[55] Vinelott J distinguished *Markt* on its facts and held:

> It is clear on authority and principle that a representative action can be brought by a plaintiff, suing on behalf of himself and all other members of a class, each member of which, including the plaintiff, is alleged to have a separate cause of action in tort, provided three conditions are satisfied.

The three conditions were:

(1) that no order could be made which would confer a right on a represented class member that he or she did not already have;

52. *Supra* n.50, at pp.1026, 1031–1032.
53. *Idem*, pp.1040–1041.
54. [1901] A.C 424, 443 (HL).
55. [1981] Ch. 229, 254.

(2) that the common interest requirement, where there are separate causes of action in tort, is a requirement that there be a *common ingredient* in the cause of action of each member of the class; and
(3) that it must be for the benefit of the class that the plaintiff is permitted to sue in a representative capacity.

Thus, at least in relation to tort claims, there would appear to be authority that English courts will accept judgments against absent plaintiffs.

In *R. J. Flowers Ltd* v. *Burns*[56] McGechan J held that the fact that claims arose under separate contracts was not an objection to the use of a representative action. The court felt that at the interlocutory stage of a striking-out application, it was not prepared to elevate the pleading by the defendant of potential defences (which, if proved, would remove any common interest) into an automatic barrier to a representative action. McGechan J stated: "The traditional concern to ensure that representative actions are not to be allowed to work injustice must be kept in mind. Subject to those restraints however the rule should be applied and developed to meet modern requirements."[57]

In *Irish Shipping* Staughton LJ considered that the law had been reformed by decisions since *Markt*, to the extent that the rule was no longer applicable. However, the comment was *obiter* because there was a finding in the case that each of the contracts in question had the same provision in relation to the point in question, so that there was, in effect, only one contract, and therefore the "same interest". Although it is unfortunate that Staughton LJ's comment lacks proper authority, nevertheless the finding of a common provision in the contracts may offer assistance in some cases—depending on similarities between each of the contracts in issue.

Finally, in *Carnie* v. *Esanda Finance Corp.*[58] the High Court of Australia analysed the relevant authorities and concluded:

> The fact that claims arise under separate contracts does not mean that the requirement for the same interest is defeated ...
>
> ...
>
> Although each contract will be different in the details of the amounts involved, this will not eliminate the convenience of finding a right to a release which is common to all of them.

Thus, on the basis of these cases, each of which would have at least persuasive effect on the English court, it appears likely that an English court would agree that a representative action could lie in England for damages for breach of contract and of a duty of care. Accordingly, because English law allows absent represented parties to be bound, it is likely that an English court would hold that a US court was a court of competent jurisdiction over the parties. This element of the plea of *res judicata* is thus satisfied.

56. [1987] 1 N.Z.L.R. 260 (HC).
57. *Idem*, p.271.
58. F.C. 95/0004 (H.Ct. 23 Feb. 1995).

4. Satisfaction of each of the elements

Thus, although the matter is not free from doubt, there is a case to be made that the Order of the US court is a final one on the merits, made by a court of competent jurisdiction over the parties and the subject matter. It is, therefore, entitled to be accorded *res judicata* effect. In the next section I analyse whether there are arguments against such a finding.

5. Counter-arguments to a plea of res judicata

Although there are many arguments that can be raised against a plea of *res judicata*, in this case they boil down essentially to the contention that the US judgment ought not to be enforced as a matter of public policy because it was obtained in circumstances opposed to natural justice.

The fundamental criterion for a successful natural justice objection to the enforcement of a foreign judgment can be found in the judgment of Lindley MR in *Pemberton* v. *Hughes*,[59] where his Lordship said that English courts will investigate the propriety of the foreign proceedings only if "they offend against English views of substantial justice".

As might be expected, the case law in this area traverses a considerable variety of sins. However, the key elements were set forth in *Jacobson* v. *Frachon*,[60] where Atkin LJ, after referring to the use of the expression "principles of natural justice", said:[61]

> Those principles seem to me to involve this, first of all the court being a court of competent jurisdiction, has given notice to the litigant that they are about to proceed to determine the rights between him and the other litigant; the other is that having given him that notice, it does afford him an opportunity of substantially presenting his case before the court.

Similarly, Lord Hanworth MR said:[62]

> I am inclined to agree with the view [...] that the question of natural justice is almost, if not entirely, comprised in considering whether there has been an opportunity of having had a hearing, and whether the procedure of the court has been in accordance with the instincts of justice whereby both parties are to be given a full opportunity of being heard.[63]

These sentiments would appear extremely helpful to defendants. They imply that the giving of notice to class members, coupled with the opportunity to opt out or to object, meets the requirements of natural justice. This case could usefully be set up as a counter to the suggestion of McNair J in *Campos* that service of process would be required.[64]

Certainly, in the United States the notice and opt-out provisions are accepted as sufficient due process. In *Phillips Petroleum Co.* v. *Shutts*,[65] for example, it was held that reasonable notice and the opportunity to opt out provide at a minimum

59. [1899] 1 Ch. 871, 790 (CA).
60. (1927) 138 L.T. 386 (CA).
61. *Idem*, p.392.
62. *Idem*, p.390.
63. US courts apply a similar standard when considering the enforcement of foreign judgments.
64. See Part C.2 of this article.
65. 472 U.S. 797 (1985).

sufficient due process for the judgment of one State to be given full faith and credit by the courts of other States.

However, *Jacobson* must be read in the light of the Court of Appeal's decision in *Adams* v. *Cape Industries plc.*[66] *Cape Industries* is the best modern authority in which the defence of breach of natural justice was established to defeat a plea of *res judicata*. It offers both support and hindrance to a defendant's position.

An action against the defendants, an English company and some of its subsidiaries ("Cape"), was initiated in Texas. The action related to alleged asbestos-related diseases suffered by a large group of plaintiffs. Cape refused to take any part in the action against them, maintaining that the court lacked jurisdiction over them. They were prepared to let default judgments be entered against them, but to resist their enforcement in England. The plaintiffs sought to obtain default judgments in Texas and gave notice to Cape that there would be a hearing to determine their application. Cape ignored the notice.

The facts surrounding the awarding of damages against Cape are complicated. Essentially it appears that, as part of the settlement of claims by the plaintiffs against other defendants, calculations of average damage awards were made for groupings of plaintiffs (depending on the type of asbestos-related disease from which they were suffering). The determination of these groupings of plaintiffs was made by attorneys for the plaintiffs and the other defendants, including the United States, when arranging their settlement. As part of the settlement between the plaintiffs and the United States, the United States agreed to bear the costs of enforcement of default judgments against Cape.

Average awards against Cape were submitted to the judge by the plaintiffs' lawyers in their application for entry of a default judgment. The judge, via his clerk, told the plaintiffs' lawyers that the average claim was too high. The application with a lower average was then resubmitted to the judge and a default judgment was entered.

When *Cape Industries* was examined at first instance, Scott J referred to each of the excerpts from *Pemberton* and *Jacobson* noted above. He expressed a preference for the broader view espoused in *Pemberton*: "Despite Atkin LJ's particular reference to notice of the hearing being given to the litigant and to an opportunity for the litigant to present his case, he was not, in my view, purporting to limit natural justice objections to objections based on the absence of one or other of those features."[67] The Court of Appeal agreed and expressly rejected the contention that *Jacobson* restricted the defence of breach of procedural natural justice to the requirements of due notice and opportunity to present a case. The Court of Appeal found that the broad test as stated in *Pemberton*, i.e. "offend against English views of substantial justice", was the correct one.[68] This detracts from the strength of the inference that might have been drawn from *Jacobson* that the

66. [1990] Ch. 433. On 24 Oct. 1989 the Appeal Committee of the House of Lords dismissed a petition by the plaintiffs for leave to appeal.

67. *Idem*, p.498.

68. *Idem*, p.564.

Order accorded with natural justice because the plaintiffs were provided with notice and the opportunity to opt out or object. Rather, it invites the court to take a more wide-ranging look at the nature of the prior proceedings.

The judgment in *Cape Industries* was found by the Court of Appeal to offend English notions of substantial justice because of the method by which the judge came to a decision as to the amount of the default judgment. The judge entered the default judgment without holding a hearing, as the English court held he was required to do by the US federal rules of procedure, and the judgment that was made was "not in any real sense based upon an objective assessment by the judge upon evidence as to the condition of these plaintiffs".[69] In other words, the judge had not acted judicially.[70]

> When the claim is for unliquidated damages for a tortious wrong, such as personal injury, both our system and the federal system of the United States require, *if there is no agreement between the parties*, judicial assessment. That means that the extent of the defendant's obligation is to be assessed objectively by the independent judge upon proof by the plaintiff of the relevant facts.

The finding of breach of natural justice in *Cape Industries* is thus inapplicable to the manner in which the Order in our example was obtained (as it included both a hearing and time for reflection). Moreover, the emphasised portion of the excerpt above is of assistance to a plea of *res judicata* because the court in *Cape Industries* found that the method adopted by the judge was more "appropriate to a settlement negotiated between both the plaintiffs and defendants with the intervention of the judge".[71]

Accordingly, a defendant should be able to maintain in any English litigation that as the manner in which the judgment was obtained does not offend English concepts of substantial justice or, more positively, that as the US Order comports with natural justice, it ought to be upheld, notwithstanding the doubts raised in earlier sections of this article. This is particularly true because, in the US class action context, irrespective of the ability of a class member with notice of the action to take steps to protect his or her own interests, as discussed earlier, the judge is under an obligation to protect the interests of the absent class members. Thus, there is an additional element in favour of allowing the plea of *res judicata*.

D. Conclusion

The law in this area is difficult to analyse as there is no case that has really come close to considering this issue. Rather, there are a number of cases that deal with aspects of the issue.

After assessing the principles inherent in those cases, I have come to the conclusion that the US judgment approving the settlement of the class action has a good chance of being upheld in England. It is a final judgment of a court of competent jurisdiction which disposes of the rights of the parties. It is quite crucial that plaintiffs be given notice of the action and the chance to withdraw or object. In addition, a US judge, acting under an obligation to protect the absent class

69. *Idem*, p.565.
70. *Idem*, pp.566–567 (emphasis added).
71. *Idem*, p.565.

members, ought to hold a hearing, consider the evidence and make a ruling on that basis. Such a ruling is entitled to be upheld by the English court, and is unlikely to be rejected on the grounds of breach of natural justice.

JOHN C. L. DIXON*

PROOF OF FOREIGN LAW: THE IMPACT OF THE LONDON CONVENTION

A. Introduction

This article aims to examine the implementation of the European Convention on Information on Foreign Law, more commonly known as the London Convention, and assess its impact on the application of foreign law under the rules of private international law which prevail in the signatory States. Basically, the Convention provides a system to assist national courts in determining the application of a foreign law in a case involving the rules of private international law. This analysis is divided into three sections.

To be in a position to understand the significance of the Convention and assess its impact properly, one has to be aware of the framework within which the Convention operates. Accordingly, Section B consists of an appraisal of the appropriate method(s) of applying foreign law in a case in which the rules of private international law are applied/invoked. This assesses the importance of the procedural rules resorted to in the implementation of foreign law and the link between procedural and substantive rules. More importantly, the theoretical framework outlined in Section B will facilitate a broad comparison of systems employing substantially different methods of application of foreign law and will, hopefully, help to provide insights into differing approaches to the implementation of the London Convention.

The main provisions of the London Convention are outlined in Section C. This should provide sufficient information to enable those unaware of the existence of the Convention to be apprised of the scheme introduced by it and should assist in understanding the information collected in the table in the Appendix and outlined in Section D.

Section D discusses the statistics and information received concerning the operation of the Convention which are reproduced in the table. Reference is also made to the updated chart of signatures and ratifications produced by the Council of Europe pertaining to the London Convention. The method of collation of the information is detailed together with a qualitative assessment of the research results and any points of interest arising therefrom.

Conclusions will be drawn from this study of the implementation of the Convention which should be of benefit to those interested in the operation of the rules of private international law. The experience to date in the various countries should also inform national administrations of the practices prevalent in other States and

* I wish to thank Nicola J. Ryan and Bruce E. Clark for comments on an earlier draft of this article.

EXHIBIT 3

***302 Emanuel and Others v Symon**

In the Court of Appeal

C.J. Lord Alverstone, Buckley, and Kennedy

1907 Nov. 14

Foreign Judgment—Jurisdiction of Foreign Court—Ownership of Property Abroad—Contract of Partnership Abroad—Partner resident in England—Agreement to submit to Foreign Jurisdiction.

Neither the fact of possessing property situate in a foreign country nor the fact of entering into a contract of partnership in that country to deal with that property is sufficient to give the Courts of the foreign country jurisdiction in an action in personam over a British subject not resident in the foreign country at the date of the action, who has neither appeared to the process nor expressly agreed to submit to the jurisdiction of the foreign Court.

In 1895 the defendant, who was then residing and carrying on business in Western Australia, entered into a partnership for the working of a gold mine situate in the Colony and owned by the partnership. The defendant ceased to carry on business in Western Australia, and in 1899 he left the Colony permanently and came to live in England. In 1901 the plaintiffs, being partners other than the defendant, brought an action in the Supreme Court of Western Australia claiming a decree for dissolution of the partnership, sale of the mine, and the taking of the partnership accounts. The writ was served on the defendant in England, but he entered no appearance, and took no step to defend the action. The Court decreed a dissolution of the partnership and the sale of the mine, and on taking the accounts found a sum to be due from the partnership. The plaintiffs paid the sum, and brought an action in England to recover the share which they alleged to be due from the defendant:—

that the defendant, not being domiciled in Western Australia, nor resident there at the date of the action in the Supreme Court of that ***303** Colony, and not having appeared to the process or expressly agreed to submit to the jurisdiction of that Court, was not bound by its finding or decree; and that the action in this country, which was based on that finding and decree, could not be maintained.Becquet v. MacCarthy, (1831) 2 B. & Ad. 951, commented on.Sirdar Gurdyal Singh v. Rajah of Faridkote, [1894] A. C. 670, followed.Judgment of Channell J., [1907] 1 K. B. 235, reversed.

APPEAL from the judgment of Channell J. 1

In 1895 the defendant, who was then residing and carrying on business in Western Australia, entered into partnership with five other persons, whose interests were now represented by the plaintiffs, for the purpose of working and developing a gold mine situate in that Colony and owned by the partnership. The defendant subsequently gave up his business in Western Australia, and in 1899 he left the Colony permanently and came to live in England. In 1899 two of the partners assigned their shares to a third partner, who died in 1901.

In November, 1901, a writ was issued by the plaintiffs, who were the two continuing partners who had not assigned their shares and the executors of the deceased partner, against the defendant in the Supreme Court of Western Australia, claiming a dissolution of partnership, a sale of the mine, accounts and inquiries, and other relief as in an ordinary partnership action. On November 13, 1901, that writ was served on the defendant in England, but he did not enter an appearance, or take any other step to defend the action. He was, however, kept informed from time to time of the proceedings in the action.

On July 25, 1902, the Supreme Court of Western Australia, in default of appearance by the defendant, pronounced a decree for the dissolution of the partnership as from that date, and ordered the mine to be sold and the usual accounts to be taken by the taxing officer. The sale was carried out and the accounts were taken, and the taxing officer issued his certificate shewing liabilities of the partnership amounting to a sum of 7687l. 9s. 9d. In May, 1903, the final order of the Court was pronounced, under which the plaintiffs paid the sum found to be due from the part-

nership. They subsequently issued the writ in this action ***304** to recover from the defendant the sum of 1281l. 4s. 11d. as his share of the sum of 7687l. 9s. 9d. paid by them as aforesaid.

The defendant denied that he was bound by the finding or order of the Colonial Court, on the ground that he was a British subject resident and domiciled in England; that neither at the commencement nor during the continuance of the action was he resident or domiciled in Western Australia, or subject to the jurisdiction of the Courts of that Colony; and that he had neither appeared to the process nor agreed to submit himself to the jurisdiction of those Courts.

Channell J. held that by entering into a partnership in Western Australia relating to real estate in that Colony the defendant had impliedly agreed to submit to the jurisdiction of the Colonial Court as to disputes arising during the continuance and on the termination of the partnership, and was therefore bound by the finding of that Court. He accordingly gave judgment for the plaintiffs.

The defendant appealed.

McCall, K.C. (*Groser* with him), for the defendant. The judgment of Channell J. rests upon this foundation, that the defendant, by joining this partnership for working a mine in Western Australia, must be taken to have contracted that all partnership disputes should be determined by the Courts of that Colony. But this ground is insufficient to support the judgment; because, firstly, the possession of property in a foreign country does not give the Courts of that country a general jurisdiction in personam over the possessor: Schibsby v. Westenholz. 2 The case of Becquet v. MacCarthy3 is relied on by the plaintiffs as an authority in support of the foreign jurisdiction, but the weight of that decision upon this point has been doubted by Fry J. in Rousillon v. Rousillon4 ; and in Sirdar Gurdyal Singh v. Rajah of Faridkote5 Lord Selborne, delivering the opinion of the Privy Council, expressed the view that the decision could be supported only on the ground that the defendant at the time of action brought held a public office and must be taken to be ***305** constructively present in the foreign country. The decision in Becquet v. MacCarthy6 has also been questioned in Dicey's Conflict of Laws, p. 373, as an authority in favour of the plaintiffs.

Secondly, the mere fact that a contract is made in a foreign country, or to be performed in a foreign country, is not sufficient to give the Courts of the foreign country jurisdiction over the parties to the contract: Sirdar Gurdyal Singh v. Rajah of Faridkote7 ; and it matters not for this purpose whether the contract is one of partnership or of any other description.

Holman Gregory, for the plaintiffs. The parties to a contract may agree that the Courts of a foreign country shall have jurisdiction to decide questions arising between them, and such an agreement confers jurisdiction upon the foreign Courts: Copin v. Adamson. 8 That jurisdiction is not taken from the foreign Courts by the mere fact that one of the parties has ceased to reside in the country: Schibsby v. Westenholz9 , per Blackburn J.; and see Sirdar Gurdyal Singh v. Rajah of Faridkote. 10 The question in this case is whether the parties to this contract of partnership have agreed that the Courts of Western Australia shall have jurisdiction. When persons agree to become partners in a business or transaction which can only be carried on or effected in a foreign country, there is necessarily implied an agreement to submit to the jurisdiction of the foreign Courts.

[KENNEDY L.J. Such an agreement, in order to be binding, must be express. It is not to be implied: Sirdar Gurdyal Singh v. Rajah of Faridkote. 11]

Counsel for the defendant were not called upon in reply.

LORD ALVERSTONE C.J.

I am unable to agree with the judgment of Channell J. I should have felt inclined, out of respect for that learned judge, to take time to consider my judgment, if I had thought that further consideration would have enabled me to come to a conclusion clearer than that at which I have arrived; but this is a point which has been before the ***306** Courts on many former occasions, and I do not think that anything is to be gained by further perusal of the authorities.

The judgment of Channell J. is based upon this sentence: "The defendant," said the learned judge 12 , "by joining this partnership for the working of the mine in Western Australia, must, I think, be taken to have contracted that all partnership disputes, if any, should be determined by the Courts of that country,

and thereby subjected himself to the jurisdiction of those Courts, just as in Copin v. Adamson13 it was held that a man who took shares in a French company and expressly agreed that disputes as to shares should be settled in the manner provided by the company's articles, that is, in the Courts of France, so subjected himself." If that position is sound, the judgment must be affirmed; but in my view it cannot be maintained in view of considered opinions of such weight that, though perhaps not technically binding upon us, they cannot be disregarded.

The sentence I have cited really contains two grounds for the conclusion that the defendant had submitted himself to the jurisdiction of the foreign Court: first, that he was the owner of real property in the foreign country; and, secondly, that for the purpose of managing and dealing with that property he had entered into a contract of partnership in the foreign country. Now it cannot be disputed that the ownership of real estate in a foreign country does give the Courts of that country jurisdiction to deal with the property itself. That was recognized in Douglas v. Forrest14 and in London and North Western Ry. Co. v. Lindsay. 15 It has been suggested that it does more, and the case of Becquet v. MacCarthy16 has been cited as an authority for the wider proposition, that the possession of real property in a foreign country may give the Courts of that country jurisdiction in personam over the possessor, at any rate in regard to obligations connected with that property: see Dicey on the Conflict of Laws, p. 54; but it seems better to support the decision in that case upon the ground that the defendant held a public office in the country in which he was sued. I would refer to Don v. Lippmann17 , per ***307** Lord Brougham, and to a passage in Sirdar Gurdyal Singh v. Rajah of Faridkote18 , in which Lord Selborne disposes of the contention that Becquet v. MacCarthy19 can be relied on as an authority that the mere possession of property in a foreign country is enough to give a general jurisdiction in personam to the Courts of the foreign country. It seems better to regard Becquet v. MacCarthy20 as an authority thus far only, that a person, although a foreigner, holding a public office in the country in which he is sued, may be deemed to be constructively present in that country, but not to regard that case as any authority that the mere possession of property locally situate in a foreign country and protected by its laws affords sufficient ground for holding a person bound by the judgment of the tribunals of that country.

The second ground of the decision under appeal, and that on which counsel for the plaintiffs mainly relied, was that the fact of entering into a contract of partnership in a foreign country involves an irrevocable agreement that all matters and disputes arising in connection with the partnership shall be submitted to, and therefore lie within, the jurisdiction of the Courts of that country. In my opinion this question also has been concluded by authority of great weight which this Court cannot disregard.

In Schibsby v. Westenholz21 Blackburn J. said: "If at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them; though before finally deciding this we should like to hear the question argued." That passage was commented upon by Lord Selborne in these words 22 : "Beyond doubt in such a case the laws of the country in which an obligation was contracted might bind the parties, so far as the interpretation and effect of the obligation was concerned, in whatever forum the remedy might be sought. The learned judge had not to consider whether it was a legitimate consequence from this, that they would be bound to submit, on the footing of contract or otherwise, to any assumption of any jurisdiction over them in respect of such ***308** a contract, by the tribunals of the country in which the contract was made, at any subsequent time, although they might be foreigners resident abroad." His Lordship then proceeds to express the opinion that that would not be a legitimate consequence; and in my view it is too broad a proposition to lay down that, given a contract of partnership in a foreign country, it follows that all matters arising between the partners have been submitted to the jurisdiction of the Courts of that country, although one of the partners is not a subject of, nor domiciled nor resident in, that country. Indirectly the case of Copin v. Adamson23 is an authority to the contrary. The judgment in that case went in favour of the plaintiff because the defendant had expressly agreed to submit to the jurisdiction of the foreign Court. And in the Court of Appeal the judgment of Lord Cairns proceeded on that footing, and he refrained from deciding the question whether the mere fact of becoming a shareholder in a French company conferred jurisdiction upon the Courts of France. But in the Court of Exchequer the plaintiff had pleaded that by becoming a shareholder in a for-

eign company the defendant had submitted himself to the jurisdiction of the foreign country. Upon that point Amphlett B. said 24 : "I now proceed to consider the second replication, which is silent as to the statutes or articles of association, but simply alleges that according to French law the members of the company were bound to elect a domicile; and that, according to French law, upon default a domicile would be elected for them at a public office, where process might be served, and that they would be bound thereby. I confess I cannot find a case which has gone so far as to hold a defendant liable, under such circumstances, upon a foreign judgment obtained as this was, without any knowledge on his part of the proceedings. Can it be said that an Englishman, for example, who buys a share in a foreign company on the London Stock Exchange, thereby becomes necessarily bound by any decision to which the foreign tribunal may come upon a matter affecting his interests?" I do not cite this passage as an express authority upon the point in this case, but as shewing that judges of high authority were not prepared to adopt the view that the mere ***309** ownership of property, or the mere entering into a contract to take shares in a foreign company, was enough to make a person amenable for all purposes to the jurisdiction of the foreign country. When Copin v. Adamson25 was heard on appeal in the Court of Appeal 26 Lord Cairns decided the case upon the first point, namely, that there had been an express contract to submit to the foreign jurisdiction, and declined to decide the second point; and I think the conclusion from these authorities is that, to make a person who is not a subject of, nor domiciled nor resident in, a foreign country amenable to the jurisdiction of that country, there must be something more than a mere contract made or the mere possession of property in the foreign country. In my opinion, therefore, this appeal must be allowed.

BUCKLEY L.J.

I am of the same opinion. In actions in personam there are five cases in which the Courts of this country will enforce a foreign judgment: (1.) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2.) where he was resident in the foreign country when the action began; (3.) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4.) where he has voluntarily appeared; and (5.) where he has contracted to submit himself to the forum in which the judgment was obtained. The question in the present case is whether there is yet another and a sixth case. In Rousillon v. Rousillon27 Fry J., after enumerating the five cases above mentioned, added these words, "and, possibly, if Becquet v. MacCarthy28 be right, where the defendant has real estate within the foreign jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction." The principle upon which this Court proceeds in enforcing foreign judgments is stated by Blackburn J. in Schibsby v. Westenholz29 in these words: "We think that for the reasons there"—i.e., in the case of Godard v. Gray30 — "given, the true principle on which the judgments of foreign tribunals are enforced in England is that stated by ***310** Parke B. in Russell v. Smyth31 , and again repeated by him in Williams v. Jones32 , that the judgment of a Court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the Courts of this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action." In other words, the Courts of this country enforce foreign judgments because those judgments impose a duty or obligation which is recognized in this country and leads to judgment here also. Referring to Becquet v. MacCarthy33 , Mr. Dicey in his work on the Conflict of Laws has, at p. 373, the following comment: "But whether this case has reference to the possession of real property by the defendant as a ground of jurisdiction?" That comment is justified, and the doubt there expressed recognized, if indeed a negative answer to the question was not given in a substantive form, and without any doubt, by Lord Selborne in Sirdar Gurdyal Singh v. Rajah of Faridkote. 34 Becquet v. MacCarthy35 has been the subject of adverse comment—first, in Schibsby v. Westenholz36 , where Blackburn J. said: "Whilst we think that there may be other grounds for holding a person bound by the judgment of the tribunal of a foreign country than those enumerated in Douglas v. Forrest37 , we doubt very much whether the possession of property, locally situated in that country and protected by its laws, does afford such a ground"; secondly, by Fry J. in Rousillon v. Rousillon38 , where that learned judge said, "and possibly, if Becquet v. MacCarthy39 be right, where the defendant has real estate within the foreign jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction";

and, thirdly, by Lord Selborne in Sirdar Gurdyal Singh v. Rajah of Faridkote40 , where he said: "Of Becquet v. MacCarthy41 it was said by great authority in Don v. Lippmann42 , that it 'had been supposed to go to the verge of the law'; and it was explained (as their Lordships think correctly) on the ground that 'the defendant held a public office in the very Colony in which he was originally sued.' He still held that office at the time when he was sued; the cause of action arose out of, or was connected with it; and, though he was in fact temporarily absent, he might, as the holder of such an office, be regarded as constructively present in the place where his duties required his presence, and therefore amenable to the Colonial jurisdiction. If the case could not be distinguished on that ground from that of any absent foreigner who, at some previous time, might have been in the employment of a Colonial Government, it would, in their Lordships' opinion, have been wrongly decided; and it is evident that Fry L.J. in Rousillon v. Rousillon43 took that view." Lord Selborne then goes on to discuss the question whether it makes any difference that the defendant, at the time when the obligation was contracted, was resident in the foreign country, but left it before the suit was instituted; and, after observing that Blackburn J., delivering the opinion of the Court of Queen's Bench in Schibsby v. Westenholz44 , inclined to the view that the laws of the foreign country would bind the defendant, though he declined to decide that point without further argument, Lord Selborne said 45 : "Their Lordships do not doubt that, if he"—i.e., Blackburn J.—"had heard argument upon the question, whether an obligation to accept the forum loci contractus, as having, by reason of the contract, a conventional jurisdiction against the parties in a suit founded upon that contract for all future time, wherever they might be domiciled or resident, was generally to be implied, he would have come (as their Lordships do) to the conclusion, that such obligation, unless expressed, could not be implied." Having regard to these passages, Becquet v. MacCarthy46 , if and in so far as it decides that a person, who merely possesses property or enters into a contract in a foreign country, binds himself to submit to the jurisdiction of the foreign country, ***312** can, I think, no longer be sustained; and the proposition on which Channell J. based his judgment, namely, that inasmuch as the defendant had become a party to a contract of partnership in Western Australia he must be taken to have bound himself to submit to the jurisdiction of the Courts of that Colony, is not sound. This appeal must therefore be allowed.

KENNEDY L.J.

I am of the same opinion.

In Rousillon v. Rousillon47 Fry J. laid down what may be called a table of the classes of cases in which the Courts of this country consider a defendant bound by a decision of a foreign Court. Concerning the first four classes mentioned, no subsequent judgment has expressed any disagreement or doubt. But the fifth and sixth—the last at any rate (and this is only stated as "possibly" correct) in the light of later decisions, cannot be accepted absolutely. Of those two classes the first is, "Where he"—i.e., the defendant—"has contracted to submit himself to the forum in which the judgment was obtained." The other is stated in these words, "and, possibly, if Becquet v. MacCarthy48 be right, where the defendant has real estate within the foreign jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction." Now Becquet v. MacCarthy49 has practically been treated as an authority to this extent, that where the defendant, at the time of the action in which judgment was given against him in the foreign country, was the holder of a public office in that country, and where the cause of action arose out of or in connection with the tenure of the office, he is bound by the judgment; but the doctrine suggested as possibly right by the learned judge, namely, that the defendant may be bound where he is the owner of real estate within the foreign jurisdiction, is a doctrine which has been disapproved by the Privy Council in Sirdar Gurdyal Singh v. Rajah of Faridkote. 50 Now if that doctrine be disposed of, the subsidiary ground on which Channell J. has based his judgment in the present case gives way. That subsidiary ground was the ownership of real property in ***313** the Colony of Western Australia. If the possession of real property cannot be relied on in support of his judgment, the only remaining point is whether by the mere fact of entering into a contract in a foreign country a person binds himself to submit to the jurisdiction of the Courts of that country, even though at the time when the action is commenced he has ceased to reside in the foreign country. That point also has been disposed of by the Privy Council in Sirdar Gurdyal Singh v. Rajah of Faridkote. 51 The doctrine was propounded in the passage relied upon by Mr. Holman Gregory for the plaintiffs, from the judgment

of Sir Meredyth Plowden in the Chief Court of the Punjaub 52 , and is as follows: "On the whole, I think it may be said, that a State assuming to exercise jurisdiction over an absent foreigner, in respect of an obligation arising out of a contract made by the foreigner while resident in the State and to be fulfilled there, is not acting in contravention of the general practice or principles of international law, so that its judgment should not be binding merely on the ground of the absence of the defendant." As the Privy Council point out, if this doctrine were accepted, its operation, in the enlargement of territorial jurisdiction, would be very important. It would follow from the proposed doctrine that a British subject domiciled here, who, while temporarily in a foreign country, made a contract for a sale of goods there, must be taken to be bound by the decision of the Courts of that country in an action on the contract given merely ex parte, though he entered no appearance, and took no part in the proceedings, and had not resided in the country since the day on which he made the contract. That question is dealt with in Sirdar Gurdyal Singh v. Rajah of Faridkote53 , not only with reference to the opinion of the Chief Court of the Punjaub, but also with reference to a view expressed by Blackburn J. in Schibsby v. Westenholz54 ; and the decision of the Privy Council is clear that there is no implied obligation on a foreigner to the country of that forum to accept the forum loci contractus, as having, by reason of the contract, acquired a conventional jurisdiction over him in a suit founded upon that contract for all ***314** future time, wherever the foreigner may be domiciled or resident at the time of the institution of the suit. Such an obligation may exist by express agreement, as in the case of Copin v. Adamson55 , and as in many cases of foreign contracts where the parties by articles of agreement bind themselves to accept the jurisdiction of foreign tribunals; but such an obligation, as is pointed out in the decision of the Privy Council 56 , is not to be implied from the mere fact of entering into a contract in a foreign country. It is contended that there may be some difference between a contract to be fulfilled for the immediate benefit of the promisee, e.g., a contract for the sale of goods, and the contract contained in articles of partnership; but I can see no true line of distinction between the two cases. Something has to be performed by the promisor in either case. The only question is whether there is any convention which binds the promisor to submit to the foreign jurisdiction. If no such convention exists in the case of a contract for the sale of goods, none such exists in the case of a contract of partnership. Nor can I see any difference in this respect between a partnership and a company. In Copin v. Adamson57 there is an express decision that a subject of this country does not by the mere fact of becoming a shareholder in a foreign company submit himself necessarily to the jurisdiction of the foreign Courts, and it seems to me that what applies to a company applies equally to a partnership.

I therefore agree that this appeal should be allowed.Appeal allowed. (W. H. G.)

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1. [1907] 1 K. B. 235.

2. (1870) L. R. 6 Q. B. 155.

3. 2 B. & Ad. 951.

4. (1880) 14 Ch. D. 351.

5. [1894] A. C. 670.

6. 2 B. & Ad. 951.

7. [1894] A. C. 670.

8. (1874) L. R. 9 Ex. 345.

9. L. R. 6 Q. B. 155, at p. 161.

10. [1894] A. C. 670, at p. 684.

11. *Ibid.* at p. 686.

12. [1907] 1 K. B. 235, at p. 240.

13. L. R. 9 Ex. 345; 1 Ex. D. 17.

14. (1828) 4 Bing. 686.

15. (1858) 3 Macq. 99.

16. 2 B. & Ad. 951.

17. (1837) 5 Cl. & F. 1, at p. 21.

18. [1894] A. C. 670, at p. 685.

19. 2 B. & Ad. 951.

20. 2 B. & Ad. 951.

21. L. R. 6 Q. B. 155, at p. 161.

22. [1894] A. C. 670, at p. 685.

23. L. R. 9 Ex. 345; 1 Ex. D. 17.

24. L. R. 9 Ex. 345, at p. 355.

25. L. R. 9 Ex. 345; 1 Ex. D. 17.

26. 1 Ex. D. 17.

27. 14 Ch. D. 351, at p. 371.

28. 2 B. & Ad. 951.

29. L. R. 6 Q. B. 155, at p 159.

30. (1870) L. R. 6 Q. B. 139.

31. (1842) 9 M. & W. 810, at p. 819.

32. (1845) 13 M. & W. 628, at p. 633.

33. 2 B. & Ad. 951.

34. [1894] A. C. 670.

35. 2 B. & Ad. 951.

36. L. R. 6 Q. B. 155, at p. 163.

37. 4 Bing. 686, at p. 703.

38. 14 Ch. D. 351, at p. 371.

39. 2 B. & Ad. 951.

40. [1894] A. C. 670, at p. 685.

41. 2 B. & Ad. 951.

42. 5 Cl. & F. 1.

43. 14 Ch. D. 351.

44. L. R. 6 Q. B. 155.

45. [1894] A. C. 670, at p. 686.

46. 2 B. & Ad. 951.

47. 14 Ch. D. 351, at p. 371.

48. 2 B. & Ad. 951.

49. 2 B. & Ad. 951.

50. [1894] A. C. 670.

51. [1894] A. C. 670.

52. *Ibid.* at p. 684.

53. *Ibid.* at pp. 685, 686.

54. L. R. 6 Q. B. 155, at p. 161.

55. L. R. 9 Ex. 345; 1 Ex. D. 17.

56. [1894] A. C. 670, at p. 686.

57. L. R. 9 Ex. 345; 1 Ex. D. 17.

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