EXHIBIT 82

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PATRICK RUSSELL RAINFORD, GEORGE HERBERT BOSTON, AND WILLIAM EWING GRAHAM, PLAINTIFFS, *v.* FREDERICK NORMAN NEWELL-ROBERTS, DEFENDANT.

Private International Law—Foreign judgment—Action in personam *in England—Defendant a British subject—Proceedings served outside the jurisdiction of the English Court—Judgment entered in default of appearance—Action brought in Irish jurisdiction on foot of the English judgment—Fact that defendant was a British subject did not amount to submission to jurisdiction of English Court.*

On the 10th July, 1957, the plaintiffs were given liberty in England to institute proceedings *in personam* against the defendant and to serve them outside the jurisdiction of the English Court. The defendant was a British subject who, at that date, and at all times since then, was resident in Ireland. On the 12th July, 1957, the proceedings in the English Court were issued and service of such proceedings was subsequently effected on the defendant in this jurisdiction. The defendant did not appear to the proceedings, in which final judgment was entered for the plaintiffs for the sum of £815 8s. 6d. and £155 18s. 3d. costs, making a total of £971 6s. 9d. The present proceedings were instituted to recover that sum on foot of that judgment. The defendant contended that it could not be enforced as he had not submitted to the jurisdiction of the English Court; the plaintiffs contended that as a British subject he was amenable to that jurisdiction.

Held by Davitt P. that being a British subject did not amount *per se* to a submission to the jurisdiction of the English Courts, and that as the defendant had not submitted to the jurisdiction of the English Court in the particular proceedings, he could not be sued on foot of the judgment of the English Court in such proceedings.

SUMMARY SUMMONS.

The plaintiffs, Patrick R. Rainford, George H. Boston and William E. Graham, brought proceedings in the High Court (Davitt P.), claiming the sum of £971 6s. 9d. on foot of a judgment for the sum of £815 8s. 6d. and £155 18s. 3d., costs, obtained by them against the defendant, Frederick N. Newell-Roberts, in the High Court of Justice in England. The defendant was a British subject resident in Ireland, and the English proceedings had been served on him in the Irish jurisdiction; he did not enter an appearance or take any step in relation to those proceedings.

R. McGonigal, Senior Counsel, and *W. I. Hamill* for the plaintiffs.

C. B. McKenna, Senior Counsel, and *W. R. C. Parke* for the defendant.

Cur. adv. vult.

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DAVITT P.:—

The facts of the case are not really in controversy and may be briefly summarised as follows: all four parties

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are medical doctors. Prior to 1948 Dr. Roberts and Dr. Rainford were in practice as partners in or near Birmingham. When the National Health Service came into operation they took Dr. Boston and Dr. Graham into the partnership. The four continued practising in partnership until the 30th September, 1951, when Dr. Roberts left the partnership and came to reside in Oughterard, Co. Galway, where he carries on the Corrib Hotel. The accounts of the partnership for income tax purposes were prepared annually by Mr. Thomas Cotterell who is a Chartered Accountant. He handled the partnership's income tax affairs, settled its liability with the Revenue authorities, and worked out what each partner was liable to pay. The partners themselves settled accounts quarterly when profits were shared subject to adjustment, if necessary, at the end of the year. Such a settlement took place at the end of September when Dr. Roberts was leaving.

Some time prior to 1953 the remuneration of doctors under the National Health Service was increased as a result of what became known as the Danckwerts Award. This had retrospective effect and covered the period from the 1st July, 1948, to the 30th June, 1952. As a result considerable sums became payable to the partners and were paid to them individually by the health authorities concerned. Dr. Roberts' cheques were sent on to him to his Galway address. As a result of these payments the Revenue authorities raised additional "protective" assessments upon the partnership amounting in all to £12,000 with a tax liability of £5,390 odd. Mr. Cotterell dealt with the matter on behalf of the partnership (as it then was) and secured certain adjustments. The amount of tax was eventually agreed between him and the Revenue authorities and he worked out what tax each partner was liable for. Dr. Roberts' share of the tax liability came to £816.

On the 24th November, 1955, Dr. Rainford wrote to Dr. Roberts, informing him that the Revenue authorities were seeking completion of payment of tax on the Danckwerts Award; that Dr. Boston, Dr. Graham and himself, together with a new partner, Dr. Bose, who had replaced Dr. Roberts, had paid £2,800 on account; that Mr. Cotterell had worked out their individual shares; and that Dr. Roberts' share of the liability amounted to £816. He requested Dr. Roberts to send him a cheque for that amount made out to the Commissioners of Inland Revenue. He added that if he received no reply by the 8th December he would assume that Dr. Roberts wished to deal separately with the Commissioners. Dr. Roberts made no reply.

The plaintiffs were pressed by the Revenue Solicitor for payment of the whole balance of tax due, and were advised that the partnership was liable for the tax and would have to pay. They paid and on the 12th October, 1956, Dr. Rainford again wrote to Dr. Roberts, informing him that they had paid, and requesting payment to them of his share, namely, £816. This time Dr. Roberts replied, questioning their authority to pay any income tax on his behalf, and inquiring on whose authority the amount said to be due by him was assessed. He ended by suggesting that they should apply to the Collector of Taxes for a refund of any tax paid on his behalf.

On the 12th July, 1957, the plaintiffs commenced proceedings in the Chancery Division of the High Court of Justice in England by issuing a writ against the defendant, claiming an account of all partnership dealings since the 30th September, 1951, and payment of the amount found due. Liberty to issue and serve this writ out of the jurisdiction on the defendant was granted on the 10th July. The defendant entered no appearance and on the 14th January, 1958, Mr. Justice Danckwerts ordered the account claimed to be taken and that the defendant pay to the plaintiffs their costs of action down to and including his order. The account was accordingly taken in the absence of the defendant. On the 20th June the Master certified that he had taken the account and found that there was due to the partnership from the defendant the sum of £815 8s. 6d. and that nothing was due from the plaintiffs. On the 12th November Mr. Justice Danckwerts by order directed the Taxing Master to tax the plaintiffs' costs of action from the foot of the taxation directed by the order of the 14th January, 1958; and ordered that the defendant pay to the plaintiffs (*a*) the sum of £815 8s. 6d. and (*b*) the costs of the plaintiffs directed to be taxed by that order and the order of the 14th January, 1958. These were taxed and certified at £119 3s. 9d. and £36 14s. 6d. respectively. The present proceedings are brought to recover these amounts, totalling £971 6s. 9d., from the defendant.

This is an action based upon a foreign judgment *in personam*. Generally a valid foreign judgment *in personam* may be enforced by an action here for the amount of the judgment debt, provided that the judgment is for a definite sum of money and is final and conclusive. The judgment sued on fulfils these two conditions; but the defendant queries its validity on the grounds that he was not at any time, in the course of the proceedings resulting in the judgment, resident, present or domiciled in England; was

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not subject to the jurisdiction of the Court; and did not appear in the action or otherwise submit to the jurisdiction. To this the plaintiffs reply that he was at all material times a British subject and amenable to the jurisdiction. The defendant was not in fact at any material time resident or present in England; nor did he appear or otherwise submit to the jurisdiction. He was, however, at all material times a British subject and the only question to decide on this branch of the case is whether this is sufficient to render him amenable to the jurisdiction.

Dicey, in his Conflict of Laws (1st. ed., 1896, Rule 80, at p. 369), states:—

"In an action *in personam* in respect of any cause of action, the Courts of a foreign country have jurisdiction in the following cases:—

"1. Where at the commencement of the action the defendant was resident or present in such country, so as to have the benefit, and be under the protection, of the laws thereof.

"2. Where the defendant is, at the time of the judgment in the action, a subject of the sovereign of such country.

"3. Where the party objecting to the jurisdiction of the Courts of such country has, by his conduct, precluded himself from objecting thereto (*a*) by appearing as plaintiff in the action; or (*b*) by voluntarily appearing as defendant in such action without protest; or (*c*) by having expressly or impliedly contracted to submit to the jurisdiction of such Courts".

These propositions were adumbrated in the case of the *General Steam Navigation Co.* v. *Guillou* (1). There Parke B., considering the sufficiency of certain pleas (that the matters in issue had already been determined by a French Court) to which the plaintiffs had demurred, said (at p. 894):—"They do not state that the plaintiffs were French subjects, or resident, or even present in France, when the suit began, so as to be bound by reason of allegiance, or domicile, or temporary presence, by a decision of a French Court; and they did not select the tribunal and sue as plaintiffs; in any of which cases the determination might have possibly bound them." The substance of the first and second propositions was also referred to in *Schibsby* v. *Westenholz* (2), Mr. Justice Blackburn, delivering the judgment of the Court, consisting of Mellor, Lush and Hannen JJ. as well as himself, at p. 161, said:—"Now . . . we think some things are quite clear on principle. If the defendants had been at the time of the judgment subjects of the country,

(1) 11 M. & W. 877. (2) L. R. 6 Q. B. 155.

whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that the laws would have bound them." The propositions contained in Dicey's Rule 80 had been, in 1880, enunciated by Fry J. in *Roussillon* v. *Roussillon* (1), were expressly approved of by Buckley and Kennedy L.JJ. in *Emanuel* v. *Symon* (2); by Bankes L.J. in *Harris* v. *Taylor* (3); by Atkin J. in *Gavin Gibson & Co., Ltd.* v. *Gibson* (4); and impliedly by Scrutton J. in *Phillips* v. *Batho* (5).

The second of Dicey's propositions was repeated without qualification in every edition edited by the author. In Halsbury's Laws of England (1st. ed., 1909), vol. 6, at p. 284, paras. 421 and 422, it is stated that one country cannot lay down rules for the rest of the world; "and other countries are not compelled to recognise its judgments as creating obligations which their own courts must enforce, unless such judgments fulfil the conditions which the comity of nations demands before an international validity can be asserted." The propositions already quoted from Dicey are then in substance set out as these conditions. "First, that the defendant should be a subject of the foreign country; for every person owes allegiance to the country of which he is a subject, and is therefore under an obligation to comply with the judgments of the courts of that country." This passage is repeated in the Hailsham edition, vol. 6, and again in the Simonds edition, vol. 7, at p. 144, paras. 256–7. The proposition is stated also in Westlake's Private International Law (1922 ed.), at p. 384; in Foote's Private International Law (1925 ed.), at p. 598; and in Graveson's Conflict of Laws (1952 ed.), at p. 432, where the author notes that it is accepted by Westlake, Dicey, Foote and Schmitthoff.

In the 6th edition (1949) of Dicey, edited by J. H. C. Morris, the proposition is stated with some doubt; and the editor notes, at p. 356, that the doctrine that allegiance is sufficient to give jurisdiction, though supported by judicial *dicta*, cannot be established by any reported decision. At page 357 he notes that Dicey's view was that

(1) 14 Ch. Div. 351, at p. 371.
(2) [1908] 1 K. B. 302 at pp. 309 and 312.
(3) [1915]2 K. B. 580, at p. 591.
(4) [1913] 3 K. B. 379, at p. 388.
(5) [1913] 3 K. B. 25, at p. 29.

nationality as a ground of jurisdiction could be justified on the ground that " a subject is bound to obey the commands of his sovereign, and therefore the judgments of his sovereign's courts," and adds, " but this has been criticised as smacking of unreality in modern times," giving, as references, Read's Recognition and Enforcement of Foreign Judgments in the Common Law Courts of the British Commonwealth, at p. 155, and Cheshire, Private International Law, at p. 780. Martin Wollff (Private International Law, Oxford University Press, 1945), at p. 262, says that the proposition is open to doubt. Cheshire, Private International Law (3rd ed., 1947), is not content with merely expressing doubt. At page 779 he says :—" Since a foreign judgment is actionable only because it imposes an obligation upon the defendant, it follows that any fact which negatives the existence of that obligation is a bar to the action. One of the negativing facts must necessarily be that the defendant owes no duty to obey the command of the tribunal which has purported to create the obligation. There must be a correlation between the legal obligation of the defendant and the right of the tribunal to issue its command. Now, our law has never shown uncertainty as to the circumstances in which an English Court may assume power to decide a claim *in personam*, and it is legitimate to infer that the criterion by which the competence of an English Court is tested must also be adopted when the inquiry relates to the competence of a foreign Court. Personal jurisdiction in this country depends upon the right of a Court to summon the defendant. Apart from special powers conferred by statute it is obvious that, since the right to summon depends upon the power to summon, jurisdiction is in general exercisable only against those persons who are present in England. If the defendant is absent from a country and has no place of business there, then, whether he be a citizen or an alien, he would appear to be immune from the jurisdiction, unless he has voluntarily submitted to the jurisdiction of the Court. These considerations would seem to show that jurisdiction depends, either upon presence in a country at the time of the suit (with which may be classed the possession of a place of business there), or upon submission."

To quote Cheshire, again at some length, at p. 787 he says :—" The result so far of our inquiry into the international competence of foreign Courts is that jurisdiction sufficient to render a judgment actionable in England exists in two cases, namely, where the defendant was present in the country of the *forum* at the time of the action, or where

he submitted to the jurisdiction. The question now is whether there are any other grounds of competency."

He then quotes the passage from the judgment of Buckley L.J. in *Emanuel* v. *Symon* (1), in which the enunciation by Fry J. in *Roussillon* v. *Roussillon* (2) of the propositions contained in Dicey's Rule 80 is expressly approved, and continues :—" The last four cases given by the learned judge are covered by the two elements of presence and submission. It remains to consider the first case and to ascertain whether the fact that the defendant is a national of the foreign country where the judgment has been obtained is sufficient to render him amenable to the jurisdiction of the local Courts. There is no English authority which contains an actual decision to this effect, but the truth of the proposition has been affirmed *obiter* in several cases. It is also adopted by text-book writers. Nevertheless it is submitted with some confidence that nationality *per se* is not a reason which, on any principle recognised by Private International Law, can justify the exercise of jurisdiction. The argument usually advanced in its favour, namely, that 'a subject is bound to obey the commands of his Sovereign, and, therefore, the judgments of his sovereign's Courts,' is surely out of touch with the known facts of modern life. Allegiance is all-important in Public International Law, but in itself has not been a contributing element to the formation of Private International Law. If a Romanian Court were to give judgment *in personam* against a person who, though born in Romania, had left that country in his infancy and acquired a domicil in England without taking out letters of nationalisation, it is difficult to appreciate the justification for holding the judgment actionable in England."

In Nussbaum's Principles of Private International Law (Oxford University Press, New York, Inc., 1943), the author says, at p. 201 :—" Nationality of a party has never been considered by English or American courts as a basis of their own jurisdiction. But it should be noted that even on the Continent, nationality has not the same significance in jurisdiction as it has in the choice-of-laws. In Central-European countries, jurisdiction rests on domicile rather than on nationality, and the few exceptions are not dictated by strong nationalistic views. Latin codes, to a certain extent, take a different attitude. Under the French Civil Code, art. 14, each French citizen enjoys the prerogative of bringing a suit in France against any foreigner with whom he has entered into a contract, no matter where,

(1) [1908] 1 K. B. 302, at p. 309. (2) 14 Ch. Div. 351, at p. 371.

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and this rule has been extended to other situations. On the other hand, each French citizen may (and must) be sued in France, in all cases, according to art. 15, a rule greatly narrowing French recognition of non-French judgments. The Italian code of Civil Procedure contains provisions similarly nationalistic."

At page 231 he says :—" In this country " [that is, the United States of America] " the Supreme Court requires reciprocity as a prerequisite of the recognition of foreign judgments, thereby rejecting the vested-right conception, and the civil-law countries take the same stand or are even more exigent."

Again, at p. 237 :—" Heated argument has been aroused by the controversy whether recognition of foreign judgments should depend on reciprocity. Civil-law legislatures—unless they are even more exacting—have nearly all decided in the affirmative, and England has adopted the same solution."

The " solution " referred to is the Foreign Judgments (Reciprocal Enforcement) Act of 1933, which relates only to judgments of the Courts of countries which afford substantial reciprocity of treatment to the judgments of English Courts.

The matter is completely *res integra* as far as the Courts of this country are concerned ; and indeed it would appear, as far as the Courts in England are concerned. Having regard to the similarity of our legal systems the line of approach to the problem would normally be the same in both jurisdictions ; and the opinions expressed in the cases and text-books to which I have made reference are of great assistance. There is no doubt that judicial opinion, in so far as it has been expressed in the cases referred to, is all the one way, and more text-book writers can possibly be cited in favour of nationality as the basis of jurisdiction than can be cited against it. Very little, if indeed anything, in the way of reasoned argument appears, however, to have been mustered in its favour, while arguments of substance have been adduced against it. Dicey says, at p. 375 of the first edition, that the reason for the rule is that a subject is bound to obey the commands of his sovereign, and, therefore, the judgments of his sovereign's courts. English Courts do not, however, in the case of actions *in personam* base their jurisdiction on the allegiance of British subjects. They rest it upon the presence of the defendant within the territorial jurisdiction so as to be available for service of the writ of summons. Dicey, at p. 237, states as Rule 46 :—" When the defendant in an action *in personam* is

at the time for the service of the writ, not in England, the Court has (subject to the exceptions hereinafter mentioned) no jurisdiction to entertain the action." The exceptions are those, contained in Orders XI and XLVIII of the Rules of Court, providing for service out of the jurisdiction. At common law a writ could not be served on a defendant when out of England. It seems strange that nationality should be accepted as a basis of jurisdiction in the case of a foreign judgment, when it is clearly not so in the case of the Courts in England itself, and when it does not appear to be generally accepted by foreign courts as the basis of their jurisdiction. Moreover, the proposition that allegiance is the basis of jurisdiction failed to stand the test of application in the case of nations within the British Commonwealth. In *Emanuel* v. *Symon* (1) it was not even raised in argument ; in *Gavin Gibson & Co., Ltd.* v. *Gibson* (2) it was mentioned in the judgment only to be discounted ; and in *Phillips* v. *Batho* (3) it was definitely rejected. In the first two cases the defendant was a British subject and in each case it was sought to enforce a judgment obtained in an Australian Court. If the theory of allegiance were to be accepted it would seem that the defendant in each case was bound to obey the commands of his sovereign whether uttered in the Courts in England or in the Courts in Australia. In neither case, however, was an argument put forward on this basis. In *Gavin Gibson & Co., Ltd.* v. *Gibson* (2) Atkin J., as he then was, said, at p. 394 :— "It was not argued before me that the judgment was binding in this Court because the judgment would be binding in Victoria (see *Ashbury* v. *Ellis* (4), or because the defendant was a British subject. These points would, in my view, in no case have availed the defendant, and are disposed of by the reasoning in the first part of the judgment of Scrutton J. in the recent case of *Phillips* v. *Batho* (3), with which I respectfully agree." In that case Scrutton J., at p. 29, said, having quoted the passage from the judgment of Buckley L.J. in *Emanuel* v. *Symon* (1) to which I have made reference :—" The judgment in this case cannot be brought within any of the five classes mentioned by Buckley L.J. It was suggested that it came within the first class, for the defendant was a subject of the Sovereign of India and England, but so was the defendant Symon a subject of the Sovereign of Western Australia and England, and it never occurred to anyone to argue that this brought the case within the first class, nor, though the fact was obvious,

(1) [1908] 1 K. B. 302.
(2) [1913] 3 K. B. 379.
(3) [1913] 3 K. B. 25.
(4) [1893] A. C. 339.

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did the Court of Appeal treat it as supporting the judgment that they declined to enforce. *Emanuel* v. *Symon* (1) clearly binds me to decide this point against the plaintiff."

With considerable diffidence I must say that I prefer the views expressed by Cheshire to the contrary opinions expressed by other text-book writers, and, with all respect, to the judicial opinions expressed *obiter* in the cases to which I have made reference. For a time I thought that since we have, and regularly operate, a rule of Court which is similar in all respects to the English Order XI, under which it was sought to make the defendant amenable to the jurisdiction of the English Court in this case by serving him here out of the jurisdiction with the writ of summons, the principle of the comity of Courts would oblige me to recognise the English judgment in this case. If the Courts here acted on that view it would seem, however, that there would be no reciprocity. In *Phillips* v. *Batho* (2) Scrutton J., still referring to the case of *Emanuel* v. *Symon* (1) says, at p. 29 :— "I think it also binds me to hold that the fact that the procedure of service out of the Indian jurisdiction is authorised by the Indian statute does not avail the plaintiff. It is difficult to explain the position and practice of the English Courts. Under our Order XI we constantly serve out of the jurisdiction, give judgment against absent foreigners, and enforce that judgment against their property within the jurisdiction. But, when we are asked to enforce the judgment of a foreign Court against an Englishman served in the same way, we decline to do so on the ground that such procedure is contrary to the principles of international law. The reason may be that our English procedure is imposed on us by statute, the justice of which it is useless to question, while the foreign procedure is not so imposed and is open to question." Mr. Justice Scrutton appears here to be following the decision of the Queen's Bench in *Schibsby* v. *Westenholtz* (3), in which an argument of this nature based upon the principle of the comity of Courts was rejected, and to have in mind the observations in this regard of Blackburn J. at pp. 159 and 160 of the report. Apart from any question of reciprocity I am satisfied that the principle of the comity of Courts is not the one to apply in this matter.

The plaintiffs have not succeeded in persuading me that the defendant is under any duty or obligation to comply with the judgment upon which this action is brought;

(1) [1908] 1 K. B. 302. (2) [1913] 3 K. B. 25.

(3) L. R. 6 Q. B. 155.

and the defendant is, accordingly, in my opinion, entitled to judgment.

Solicitors for the plaintiffs: *Porter Morris & Co.*

Solicitors for the defendant: *McCracken & Son.*

H. D. B.