EXHIBIT 12

[1897 P. 1701.]

***781 Pemberton v Hughes.**

Court of Appeal

M.R. Lindley, Rigby, and Vaughan Williams

1899 Jan. 24, 26, 27; Feb. 16.

International Law—Conflict of Laws—Foreign Judgment—Divorce—Procedure—Irregularity—English Court, Recognition by.

A judgment or decree pronounced by the Court of a foreign country will be treated and acted upon here as final, notwithstanding any irregularity of procedure under the local law, provided the foreign Court had jurisdiction over the subject-matter and over the persons brought before it, and the proceedings do not offend against English views of substantial justice.

Thus, where a decree for divorce had been pronounced by the proper Court in Florida in an undefended action by the husband against the wife on the ground of her violent and ungovernable temper, both the parties being domiciled and resident in Florida, an alleged irregularity in service of process was held not to be a ground for questioning the validity of that decree in an action brought by the wife in the English Courts to enforce a claim arising out of her alleged second marriage to a British subject.

Decision of Kekewich J. reversed.

THIS was an action brought by Mrs. "Sarah Elizabeth Pemberton," who claimed to be the widow of Francis Alexander Richard Pemberton, deceased, asking for a declaration that under a deed-poll executed by him on April 15, 1891, she was entitled to a jointure or rent-charge of 200l. per annum issuing out of certain estates in Cambridgeshire devised by the will of one Christopher Pemberton, who died in 1850, to Francis A. R. Pemberton for life with remainder to his first and other sons in tail. On December 20, 1890, the plaintiff went through the ceremony of marriage with F. A. R. Pemberton, then the tenant for life in possession of the devised estates, and the above-mentioned deed-poll was subsequently executed by him in assumed exercise of a power given to him by a second codicil of the testator, whereby, after settling some further estates, the testator empowered every tenant for life who might be in possession of the settled estates under the limitations in his will and second codicil, either in contemplation of or after marriage, by deed "to appoint to or in favour of any woman whom he should marry or have married a yearly***782** rent-charge of 200l. or not exceeding that sum, to be issuing out of his said estates or any part thereof, and to commence from the decease of such tenant for life," to be payable half-yearly during the life of such woman for her jointure and in bar of dower.

Francis A. R. Pemberton died on August 2, 1892, without issue, whereupon the plaintiff claimed to be entitled to her jointure under the deed-poll. Her claim was however disputed by the defendants, persons who on F. A. R. Pemberton's death became entitled in possession to the settled estates. The dispute arose under the following circumstances.

In February, 1884, the plaintiff and one Holmes Erwin, who were both domiciled and resident in the State of Florida, were married in that country according to the laws thereof. On January 18, 1888, Erwin - he and the plaintiff being then in Florida - obtained from the Florida Court a decree against the plaintiff for divorce on the ground of her violent and ungovernable temper. The plaintiff did not appear to the proceedings, so that they were unopposed.

At the date of the plaintiff's alleged marriage with Francis A. R. Pemberton, which took place in Florida, Erwin was still living, and he had, since the divorce, married again; and what the defendants now contended was that the Florida divorce was invalid, because the rules of the Florida Court required that "ten days" should "intervene" between the day on which process was issued, by writ of subpoena against the defendant, and the day on which it was "returnable" - called "terminal" days - and that in the present case only nine clear days, in fact, intervened between the day on which the writ of subppena was issued and the day on which it was returnable. The

defendants therefore alleged that at the time when the plaintiff went through the form of marriage with Pemberton she was still the wife of Erwin, and that consequently she was not the widow of Pemberton and not entitled to the jointure as such. Hence the present action. On the plaintiff's behalf it was contended that, taking the above rule in connection with another rule, which required "ten days' service" of notice, the "terminal" days might be included for the purpose of effective***783** process, and that therefore the Florida decree was valid. At the trial of the action before Kekewich J. on July 12, 1898, American lawyers were called on both sides to prove the law and practice of divorce in the Court of Florida, and from their evidence it appeared that the following is the procedure in divorce suits under the law of Florida.

A suit for divorce is commenced by a bill (i.e., a petition) presented to a judge of a circuit Court sitting in Chancery. The statements are verified by a short affidavit by the plaintiff made before a notary of the Court. The bill and affidavit are then filed in the office of the clerk of the Court. A subpoena to appear, addressed to the defendant, is then issued under the seal of the Court. The time for appearance must not be less than ten clear days from the issue of the subpoena. The subpoena is sent to the sheriff for service, and it must be served ten days before the time for appearance. When served, the subpoena is returned and filed in the office of the clerk of the Court which issued it. If the defendant does not appear, a præcipe for a decree pro confesso is obtained by the plaintiff and filed with the clerk of the Court, and after a certain time a decree pro confesso under the seal of the Court is entered by him. This, however, is not the final decree. Before that is obtained evidence in support of the plaintiff's case is taken before the master. He certifies it to the Court, and the evidence and his certificate are then filed in the proper office. Before the case is brought before the Court for final decision a short summary of the proceedings with their dates (called "step notes") is prepared, and is signed by the clerk of the Court and is filed. The papers and proofs are then laid before the judge, and if he is satisfied with them a decree for divorce is pronounced and is drawn up and signed by him and filed. The above procedure was followed by Erwin, and, save in one alleged respect, everything was perfectly regular. His bill was duly presented and filed in the proper Court on November 25, 1887; a writ of subpoena was issued and duly served on the wife (therein called "Catherine Erwin") by the sheriff on the same day. She however never appeared to the bill; and on January 2, 1888, the husband obtained a præcipe for a decree***784** pro confesso for her want of appearance, and this præcipe was filed the same day and entered on the next. On January 18, 1888, a final decree was pronounced against the wife in the following form:—

"In the Circuit Court, 5th Judicial Circuit of Florida, Putnam County.

"Upon an examination of the papers and proofs in this cause, the Court is satisfied that the allegations of the said Bill have been established, and it is therefore ordered, adjudged and decreed that the bonds of matrimony existing between Holmes Erwin, the complainant herein, and Catherine Erwin, the defendant herein, be and the same are hereby dissolved, because of the habitual indulgence in violent and ungovernable temper on the part of the defendant, Catherine Erwin, towards the complainant, Holmes Erwin."

This decree was duly filed and entered in the Chancery Order Book on January 28, 1888.

The alleged irregularity in the proceedings was, as already intimated, that the subpoena to appear did not leave - as, it was said, was required by the rules of the Court - ten clear days between the date of the writ, November 25, 1887, and the time thereby fixed for the wife's appearance, December 5, 1887, but only nine clear days.

This alleged irregularity was, it was now contended, sufficient to render the whole of the subsequent proceedings null and void, and the decree for divorce, therefore, of no effect whatever.

After considering the expert evidence - which was conflicting as to whether the day of service should be counted as one of the "ten" days - and the rules of the Florida Court, Kekewich J. came to the conclusion that the evidence adduced on behalf of the defendants must prevail, and that "intervening" days meant "clear" days, so that the "terminal" days must be excluded from the computation. He also came to the***785** conclusion that this defect in procedure went to the root of the jurisdiction of the Florida Court and was fatal to the validity of the divorce. He accordingly held that the plaintiff's case failed, and dismissed the action with costs.

The plaintiff appealed.

The appeal was heard on January 24, 26, 27, 1899.

During the arguments the expert evidence given in the Court below was read at length. Its effect, in addition to what has already been given above, will be found stated in the judgments of the Court of Appeal.

Jelf, Q.C., *Dicey, Q.C.*, and *John Henderson* , for the appellant. In this case there is no question as to the competence of the Florida Court to pronounce a decree of divorce, nor as to its jurisdiction over the parties to the proceedings in which the decree was made. There is no allegation that the lady was in ignorance of the proceedings, or was in any way taken by surprise, or had no opportunity of defending herself therein. On the contrary, the evidence shews that she wanted the divorce, and never intended to appear at all in the proceedings. She has herself never questioned the validity of the decree, but has always upheld it. The decree of the Florida tribunal is now in evidence before this Court. It is a final decree, in due form and correct upon the face of it, and no step has ever been taken by any one to set it aside.

It is said, however, that there was an irregularity or slip in the course of the proceedings leading up to the decree which rendered it absolutely void according to the law of Florida, and obliges the Courts of this country so to regard it. That one alleged slip or irregularity constitutes the whole of the respondents' case.

Now, the evidence does not establish that the decree was void even by the law of Florida; but, however this may be, an English Court cannot go behind the final decree of a foreign Court upon the ground that the foreign Court made a slip in its own procedure. According to the authorities upon international law and the comity of nations, the competence of a foreign Court does not depend upon the exact observance of***786** the rules of procedure which the foreign Court has itself framed. That Court is the master of its own process, and must be treated as capable of moulding and applying it to the particular case before it. If the foreign Court has jurisdiction over the parties and subject-matter, its decision cannot be impeached in this country, at all events, by third parties in collateral proceedings, for a mere technical flaw in the process which led up to the decision: Vanquelin v. Bouard1 ; Buchanan v. Rucker2 ; Reynolds v. Fenton3 ; Ferguson v. Mahon4 ; Schibsby v. Westenholz5 ; Castrique v. Imrie6 ; Godard v. Gray7 ; In re Trufort .8

[VAUGHAN WILLIAMS L.J. referred to Henderson v. Henderson. 9]

It is now well established that the Courts of this country will treat the final judgment of a foreign Court as valid, unless (1.) the foreign Court has assumed a territorial competence and jurisdiction which it did not possess; (2.) the judgment was obtained by fraud or collusion; or (3.) the decision is contrary to English views of natural justice. A foreign judgment cannot be impeached merely on its merits, nor upon the ground of a mistake in law: Castrique v. Imrie10 ; Vanquelin v. Bouard11 ; Green v. Green12 ; Foote on Private International Jurisprudence, 2nd ed. p. 547; Westlake on Private International Law, 3rd ed. § 328; Woolsey on International Law, 3rd ed. § 77. We challenge the respondents to produce any authority which shews that this decree for a divorce is invalid.

Warrington, Q.C., and *Ingpen*, for the respondents. We do not dispute that a valid existing judgment by a foreign Court of competent jurisdiction will be treated as valid by the Courts of this country unless it comes within the exceptions which have been mentioned by the appellant's counsel; but we say that there is no such judgment in this case, and that the parties***787** were not divorced in Florida. The Court of Florida pronounced a judgment when it had no properly initiated process before it.

[VAUGHAN WILLIAMS L.J. referred to Anlaby v. Praetorius. 13]

The judgment there was good till it was set aside; but in this case the Court had no jurisdiction, and there could be no judgment: Dicey's Conflict of Laws, pp. 402, 403; Story's Conflict of Laws, 8th ed. p. 829.

[RIGBY L.J. Doglioni v. Crispin14 seems to be a case like the present. There Sir Cresswell Cresswell said he could not inquire into the validity of a decree of the Portuguese Court; and the House of Lords agreed with him, saying that they must take the decree as they found it, and could not question it in any way. It seems that, if the foreign court has jurisdic-

tion over the subject-matter and the person, the validity of its decree cannot be questioned.]

In the case cited the Portuguese Court had come to a decision in accordance with its own procedure, and in such a case the decision must be taken as you find it - that is, assuming there has been a proper process. But if there has been no valid process in the foreign court, the decision is not really the decision of a court of justice at all, but merely the decision of persons purporting to act in the execution of their office. In cases where a foreign judgment has been held to be binding here, it was either assumed or proved that the judgment was a valid judgment according to the law of the particular country. The judgment is open to examination as to whether it has been pronounced in accordance with the law of that country.

Now, we contend here that this judgment or decree is not the judgment of a court of competent jurisdiction. The real question is whether this Florida Court was a court at all. We say it had no jurisdiction by reason of the irregularity. It is just as if the party summoned before that Court had never been summoned at all: in that case the matter would come before a person who had no jurisdiction as a judge; and we submit the evidence establishes that the Court had in fact no jurisdiction.***788**

[VAUGHAN WILLIAMS L.J. It is said in Story on the Conflict of Laws, 8th ed. § 607, p. 829, and by other writers, that it is open to the defendant to impeach the foreign judgment on the ground, amongst others, that "it is irregular and bad by the local law, fori rei judicatæ."]

That passage is referred to by Archibald J. in Meyer v. Ralli15 ; but that was a peculiar case, in which both parties agreed that the judgment was not in accordance with French law.

[RIGBY L.J. Since that passage in Story was written, has there been any decision touching the point?]

Certainly Castrique v. Imrie16 does not. The nearest is Vanquelin v. Bouard. 17

[LINDLEY M.R. That the judgment of a foreign Court may be impeached on the ground of want of jurisdiction is also stated in Smith's Leading Cases, 10th ed. vol. ii. p. 770.

RIGBY L.J. Suppose the judge made a mistake: what then?]

We agree, a mistake would not be enough to invalidate the jurisdiction. The only jurisdiction given to the foreign Court is a jurisdiction given by statutory enactment: if the Court does not conform to that enactment it has no jurisdiction. The defendants here are not bound by estoppel of record. Taking the analogy of proceedings in the English Courts, irregularity in process makes the whole subsequent proceedings void, so that they may be disregarded: Hawthorn v. Harris 18 ; Phillipson & Son v. Emanuel19 ; Maddock's Chancery Practice, 3rd ed. vol. ii. pp. 242-3, 391. In the present case the Florida Court had no jurisdiction to make a decree of divorce ex parte: the Florida statutes require divorce proceedings to be inter partes. Any omission to comply with the rules of procedure go to the very root of the jurisdiction, and therefore this case must be treated as if there had been no judgment at all.

Jelf, Q.C., in reply. A final judgment of a foreign Court having jurisdiction over the parties and the subject-matter of***789** the suit is conclusive: Bullen & Leake's Precedents of Pleadings, 5th ed. p. 748. It is therefore too late now to question this decree.

Cur. adv. vult.

Feb. 16. LINDLEY M.R.

after stating the facts, and pointing out that the decree for divorce had been made by a Court having jurisdiction in Florida to pronounce divorces between persons domiciled and resident in Florida, and had never been set aside or reversed, and now stood as a final and subsisting decree, proceeded:—

There are no grounds whatever for saying that the plaintiff did not know of the proceedings, nor that she had not time to enter an appearance on or before December 5, the time fixed for her appearance; nor that she had no opportunity of defending herself. Moreover, she is not herself questioning the validity of the decree of divorce; on the contrary, she maintains it was and is perfectly valid. The defendants, however, contend, and they have adduced expert evidence to

prove, that as the subpoena to appear did not give the wife ten clear days for appearance the subpoena was not irregular only, but absolutely void, so that all subsequent proceedings were void also, and that the Court had no jurisdiction to pronounce any decree against the wife. The defendants further contend that, the decree being wholly void by the law of Florida, it must be treated as wholly void by this and all other civilised countries. The evidence of the law of Florida is not to my mind so clear as to convince me that the decree, standing as it does unimpeached, could be treated in a collateral proceeding as wholly null and void even in Florida. Mr. Struntz, the plaintiff's expert, does not take that view of the law. It is true that in two passages of his cross-examination he says that if proper proceedings were not taken the Court would not have jurisdiction, but he insists that as the wife was served in time the defect in the subpoena was not fatal to the jurisdiction of the Court. The defendants' expert, Mr. Wurtz, unquestionably goes much further, and says that Mrs. Pemberton and Mr. Erwin, who also married after the divorce, could be both***790** convicted in Florida of bigamy, notwithstanding the decree. But even Mr. Wurtz says that the defect in the writ of subpoena would have been cured by the wife's appearance, which makes me hesitate in saying I am satisfied that the decree is void, even by the law of Florida, for want of jurisdiction. The Court which pronounced the decree ought to be credited with knowing what irregularities (if any) were fatal to its jurisdiction and what were not, and the Court had before it all the materials necessary for forming a judgment, and oversight or carelessness ought not to be presumed by us. Although, therefore, Kekewich J. considered Mr. Wurtz a more satisfactory witness than Mr. Struntz, I could not myself, without further information, come to the same conclusion as the learned judge as to the utter worthlessness, even in Florida, of the decree which the defendants impeach. Further information on this point could be procured, if necessary, under the provisions of 24 & 25 Vict. c. 11, but, in my opinion, it is not necessary to pursue this question further.

Assuming that the defendants are right, and that the decree of divorce is void by the law of Florida, it by no means follows that it ought to be so regarded in this country. It sounds paradoxical to say that a decree of a foreign Court should be regarded here as more efficacious or with more respect than it is entitled to in the country in which it was pronounced. But this paradox disappears when the principles on which English Courts act in regarding or disregarding foreign judgments are borne in mind. If a judgment is pronounced by a foreign Court over persons within its jurisdiction and in a matter with which it is competent to deal, English Courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice. Where no substantial justice, according to English notions, is offended, all that English Courts look to is the finality of the judgment and the jurisdiction of the Court, in this sense and to this extent - namely, its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it. If the Court had jurisdiction in this sense and to this extent, the Courts of this country never***791** inquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice, according to English notions, has been committed.

There is no doubt that the Courts of this country will not enforce the decisions of foreign Courts which have no jurisdiction in the sense above explained - i.e., over the subject-matter or over the persons brought before them: Schibsby v. Westenholz 20 ; Rousillon v. Rousillon21 ; Price v. Dewhurst22 ; Buchanan v. Rucker23 ; Sirdar Gurdyal Singh v. Rajah of Faridkote. 24 But the jurisdiction which alone is important in these matters is the competence of the Court in an international sense - i.e., its territorial competence over the subject-matter and over the defendant. Its competence or jurisdiction in any other sense is not regarded as material by the Courts of this country. This is pointed out by Mr. Westlake (International Law, 3rd ed. § 328) and by Foote (Private International Jurisprudence, 2nd ed. p. 547), and is illustrated by Vanquelin v. Bouard. 25 That was an action on a judgment obtained in France on a bill of exchange. The Court was competent to try such actions, and the defendant was within its jurisdiction. He let judgment go by default, and in the action in this country on the judgment he pleaded that by French law the French Court had no jurisdiction, because the defendant was not a trader and was not resident in a particular town where the cause of action arose. In other words, the defendant pleaded that the French action was brought in the wrong court (see the 13th plea). The Court of Common Pleas held the plea bad, and that the defence set up by it should have been raised in the French action. The French action in Vanquelin v. Bouard26 was an action in personam, and the parties to the action in France

were also the parties to the action brought in this country on the French judgment. The decision, therefore, does not exactly cover the present case, but it goes far to shew that the defendants' contention in this case cannot be supported.***792**

The defendants' contention entirely ignores the distinction between the jurisdiction of tribunals from an international and their jurisdiction from a purely municipal point of view. But that distinction rests on good sense, and is recognised by modern writers on private international law: see Westlake and Foote (ubi sup.) and Piggott on Foreign Judgments, 2nd ed. p. 129 et seq. He says (p. 130):

"The jurisdiction to pronounce judgment in a suit depends solely on the right to summon a person before the tribunal to defend the suit."

Wharton's Conflict of Laws, § 792 et seq., contains a careful review of the question by a learned American lawyer, and brings out the distinction very clearly: see §§ 801, 812. In § 812 he says: "The true test seems to be, competency according to the rules of international law": and it is plain that these do not include mere rules of procedure.

In Dicey's Conflict of Laws there are some valuable chapters - xi. p. 361, and xvi. p. 400 - on the jurisdiction of foreign courts; and in them will be found various meanings of the expression, "court of competent jurisdiction." These various meanings shew the danger of using that expression without taking care to avoid the confusion to which they otherwise give rise.

It may be safely said that, in the opinion of writers on international law, and for international purposes, the jurisdiction or the competency of a Court does not depend upon the exact observance of its own rules of procedure. The defendants' contention is based upon the assumption that an irregularity in procedure of a foreign Court of competent jurisdiction in the sense above explained is a matter which the Courts of this country are bound to recognise if such irregularity involves nullity of sentence. No authority can be found for any such proposition; and, although I am not aware of any English decision exactly to the contrary, there are many which are so inconsistent with it as to shew that it cannot be accepted.

A judgment of a foreign Court having jurisdiction over the parties and subject-matter - i.e., having jurisdiction to summon the defendants before it and to decide such matters as it has decided - cannot be impeached in this country on its merits:***793** Castrique v. Imrie27 (in rem); Godard v. Gray28 (in personam); Messina v. Petrococchino29 (in personam). It is quite inconsistent with those cases, and also with Vanquelin v. Bouard30 , to hold that such a judgment can be impeached here for a mere error in procedure. And in Castrique v. Imrie31 Lord Colonsay said 32 that no inquiry on such a matter should be made.

A decree for divorce, altering as it does the status of the parties and affecting, as it may do, the legitimacy of their after-born children, is much more like a judgment in rem than a judgment in personam: see Niboyet v. Niboyet. 33 And where there are differences between the two, the decisions on foreign judgments in rem are better guides for the determination of this case than decisions on foreign judgments in personam. The leading cases on foreign judgments in rem are Doglioni v. Crispin34 ; Castrique v. Imrie35 ; In re Trufort.36 There is nothing, however, in the decisions in these cases to assist the defendants. On the contrary, the judgments delivered in them are, in my opinion, adverse to the defendants' contention.

In Doglioni v. Crispin 37 a Portuguese Court decided that the respondent was the natural son of a deceased man domiciled in Portugal, and not a "noble," and that the respondent was consequently entitled to succeed to his father's personal estate. The appellant was a party to those proceedings, but she afterwards claimed the property in question under a will of the deceased. She was held precluded from disputing the Portuguese decree. Lord Cranworth distinctly stated 38 that the decision, having been pronounced by a court of competent jurisdiction, was one which English Courts were "bound to receive without inquiry as to its conformity or nonconformity with the laws of the country where it was pronounced"; and a little lower Lord Cranworth stated that, in his opinion, evidence to shew that the decision was not in accordance with Portuguese law ought not to have been received. Lord***794** Cranworth's judgment did not, as I understand it, turn on the fact that the appellant was personally estopped from disputing the Portuguese judgment because she was a party to the proceedings in Portugal: his decision was based on the competence of the Court and

the nature of the controversy before it. It is necessary, however, to bear in mind that undefended proceedings for divorce require to be very narrowly scrutinized, for such divorces may be easily connived at. It is unnecessary to consider whether an English Court would recognise a foreign divorce proved to have been obtained by collusion, even if the parties divorced were foreigners domiciled and resident within the jurisdiction of the foreign Court. No collusion is relied upon or proved in the present case. If, therefore, the principles above explained are correct, I see no ground on which an English Court can refuse to recognise the validity of the divorce in question in this case, unless it be on one or other of the two following grounds - namely, (1.) that a foreign divorce decree pronounced in an undefended action will never be recognised in this country; or (2.) that the Courts of this country will not recognise any divorce even of foreigners for any causes other than those for which a divorce can be obtained in this country. To lay down now for the first time either of these doctrines is, in my judgment, quite impossible, nor were they alluded to by counsel. I thought it, however, desirable to mention them, in order that it might not be supposed that they had been overlooked.

In the result the appeal must be allowed and the judgment reversed, and a declaration be made that the plaintiff is entitled to the 200l. a year, with an account and order for payment. The defendants must pay the costs of the action and of the appeal,

RIGBY L.J.

I entirely agree, and I base my judgment on the ground that we have no right in this action to inquire into the question whether or not the Court of Florida did or did not act upon a correct view of the law and procedure of its own State.

The State had exclusive jurisdiction to deal with divorces of***795** persons domiciled and resident within its territory, and (if that be material) the Court which pronounced the decree for a divorce was the proper court, and the only proper court, for entertaining and deciding upon divorce actions within the territory. It seems to me that, on principle and authority, the Courts of this country are bound to assume that the Florida Court understood its own procedure and law, and that the evidence of experts ought not to have been resorted to. I think that Castrique v. Imrie39 (a case of a judgment in rem) and Vanquelin v. Bouard40 are two of the most important authorities on the point. I think that the result of all the cases is that a decision of a proper Court having, in accordance with general principles of law recognised by our Courts, sole jurisdiction over the subject-matter of the action and the parties thereto must, by the Courts of this country, be treated as the only competent tribunal to deal with the question raised in the divorce action. Even though it were possible to point out some mistake as to the municipal procedure or law, the Courts of this country ought not, on that ground, to override the actual decision. The objection taken is that the Court of Florida had, according to the municipal law, no jurisdiction to pronounce a decree; but such an objection as that, I think, ought not to be entertained by us. Mrs. Erwin had all the notice of the proceedings which the law of the State required, though if we had a right to inquire further it might well be that there was an irregularity in fixing the day for appearance. The effect of a judgment such as this, determining the status of Mrs. Erwin to be that of a feme sole, has as much effect as against persons not parties to the action as a judgment in rem in analogous circumstances would have had.

VAUGHAN WILLIAMS L.J.

I agree with the rest of the Court that the divorce decree in the Court in Florida must be treated as the judgment of a foreign court of competent jurisdiction, and cannot be examined or impeached on any of the grounds suggested. That the Florida Court is, from an international point of view, a court of competent jurisdiction is not***796** questioned. The parties were married in Florida and domiciled there and present within the jurisdiction.

It is said that the evidence of the foreign experts shews that the judgment is a nullity by reason of the defective process, and that we are bound by their evidence as to what the foreign law is; but this evidence does not shew, in regard to judgments generally, that if, in civil proceedings in Florida, the judgment had been relied on, the party against whose interest it was set up would not have had to shew that the judgment had been set aside. It is clear, in the case of a judgment of a superior court on a personal action in England, that if a plaintiff, arrested on a process, sued in trespass and the defendant justified under process under a judgment of a superior court,

the plaintiff, if he impeached this judgment, even on a ground that the action was wrong in its inception, would have had to allege and prove that the judgment had been set aside, or that error had been successfully brought.

There is no evidence that this law is not the same in Florida, and I think that we ought, in favour of the foreign judgment, to make this presumption, that is to say, to treat it in a civil proceeding as we should treat the judgment of a superior court.

The present case is analogous to the case where, in a foreign country, the proceedings have been taken against a person subject to the jurisdiction, but not in the proper court. In Vanquelin v. Bouard41 and Doglioni v. Crispin42 the defendant was properly served and had the opportunity in the suit of pleading to the jurisdiction of the Court, which was not the proper court.

Here it is alleged there was no proper service. The true principle seems to me to be that a judgment, whether in personam or in rem, of a superior court having jurisdiction over the person, must be treated as valid till set aside either by the Court itself or by some proceeding in the nature of a writ of error, unless there has been some defect in the initiation of proceedings, or in the course of proceedings, which would make it contrary to natural justice to treat the foreign judgment***797** as valid, as, for instance, a case where there had been not only no service of process, but no knowledge of it. The allegation of no service alone would not in such a case avail the defendant: Buchanan v. Rucker43 ; Ferguson v. Mahon 44 ; Bullen & Leake's Precedents of Pleadings, 5th ed. p. 748.(G. I. F. C.)

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1. (1863) 15 C. B. (N.S.) 341.

2. (1807-8) 1 Camp. 63, 180 b; 9 East, 192.

3. (1846) 3 C. B. 187.

4. (1839) 11 Ad. & E. 179.

5. (1870) L. R. 6 Q. B. 155.

6. (1870) L. R. 4 H. L. 414, 448.

7. (1870) L. R. 6 Q. B. 139.

8. (1887) 36 Ch. D. 600 , 617.

9. (1843) 3 Hare, 100.

10. (1870) L. R. 4 H. L. 414, 448.

11. (1863) 15 C. B. (N.S.) 341.

12. [1893] P. 89.

13. (1888) 20 Q. B. D. 764.

14. (1866) L. R. 1 H. L. 301.

15. (1876) 1 C. P. D. 358, 370.

16. L. R. 4 H. L. 414.

17. 15 C. B. (N.S.) 341; 33 L. J. (C.P.) 78.

18. (1875) 23 W. R. 214.

19. (1887) 56 L. T. 858.

20. L. R. 6 Q. B. 155.

21. (1880) 14 Ch. D. 351.

22. (1838) 4 My. & Cr. 76.

23. 9 East, 192.

24. [1894] A. C. 670.

25. 15 C. B. (N.S.) 341.

26. 15 C. B. (N.S.) 341.

27. L. R. 4 H. L. 414.

28. L. R. 6 Q. B. 139.

29. (1872) L. R. 4 P. C. 144.

30. 15 C. B. (N.S.) 341.

31. L. R. 4 H. L. 414.

32. L. R. 4 H. L. 448.

33. (1878) 4 P. D. 1, 12.

34. L. R. 1 H. L. 301.

35. L. R. 4 H. L. 414.

36. 36 Ch. D. 600.

37. L. R. 1 H. L. 301.

38. L. R. 1 H. L. 315.

39. L. R. 4 H. L. 414.

40. 15 C. B. (N.S.) 341.

41. 15 C. B. (N.S.) 341.

42. L. R. 1 H. L. 301.

43. 9 East, 192 .

44. 11 Ad. & E. 179.

END OF DOCUMENT

EXHIBIT 13

THE

LAW TIMES REPORTS

OF

Cases Decided

IN

THE HOUSE OF LORDS, THE PRIVY COUNCIL

THE COURT OF APPEAL,

THE CHANCERY DIVISION, THE KING'S BENCH DIVISION, THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION,

THE KING'S BENCH DIVISION IN BANKRUPTCY,

THE COURT OF CRIMINAL APPEAL,

AND THE RAILWAY AND CANAL COMMISSION COURT.

VOLUME C.

FROM MARCH TO AUGUST 1909.

LONDON:

such an industry having grown up in the United Kingdom if no preference had been conferred on foreigners. Possibly a manufacturer in this country might have had to be content with smaller profits than a manufacturer abroad, but even this is not proved. It was said that the demand here was too small to justify the expense entailed in laying down the necessary plant, but there is no evidence, or at any rate, no satisfactory evidence, that this demand would not have been much greater than it is but for the manner in which the patentee has used his monopoly. It is to my mind abundantly clear that, if these patents had been granted after the passing of the Act of 1907, they ought to have been revoked; and the only question is whether, having regard to the fact that they were granted in 1900 and to what occurred before the passing of the Act of 1907, indulgence ought to be granted to the patentee. It is to be observed that on the 26th Jan. 1905 the patentee granted what is in effect an exclusive licence for this country to a manufacturing company in Belgium. The licence provided that the Belgian company might either import into this country goods made by them in Belgium or erect factories here, but the licensee precluded himself from granting licences here. The licensee has exercised the powers granted to him by the licence not to erect factories here, but to import his foreign made goods into this country, excluding any competition between such goods and goods made in this country or elsewhere abroad. The state of things which has resulted would, I think, have rendered the patent revocable under the Act of 1902, for it does not seem to me that the patentee could have discharged the onus imposed on him by that Act any more than, in my opinion, he has discharged the onus imposed on him by sect. 27 of the existing Act. There is no reason, therefore, why the patentee should be entitled to any indulgence, even if indulgence could be granted. Stress was laid on the fact that the patentee, in conjunction with his licensee, has recently, in advertisements and circulars, expressed his willingness to sell or enter into working arrangements for the manufacture of goods in this country under the patent process. This was, however, done at the last moment, and I am not surprised that under the circumstances no one willing to buy or take a licence has been found. Even if it had been done forthwith after the Act, and the possibility of a sale being made or licences being granted had been made known much more thoroughly, I do not think the fact of no one being found willing to buy or take up a licence and manufacture here would have proved much. I do not know what the terms were upon which the patentee and licensee contemplated selling or granting licences, or whether the terms of the licences included protection against Belgian imports. If they did not, possible manufacturers might well be deterred by the fact that the Belgian firm had had so long a start, and an intending purchaser or licensee might well be deterred also by the uncertainty of the patent remaining under the circumstances unrevoked for a sufficient time to start a new industry. Under all the circumstances, I think that the revocation of the patent was amply justified, and, further, I am of opinion that the refusal of the comptroller to suspend the revocation was also right. It would be wrong to suspend the revocation of a patent merely on the chance of an industry springing up here under some licence which some one may possibly in future be willing to take. If the patentee himself or the Belgian licensee had been prepared to start the industry here, and had utilised their year of grace in *bonâ fide* preparations with that end in view, but had found the year too short a period, the revocation might well have been suspended. But upon the evidence I do not believe that either the patentee or the Belgian firm has now or ever had any intention of manufacturing under the patented process in this country, or of allowing anyone else to do so, unless he purchases or accepts a licence from them on terms which they may consider reasonable, but which possibly no prudent purchaser or licensee could accept, and as to the nature of which I am not informed. I therefore affirm the comptroller's decision, and dismiss the appeal with costs.

Solicitors for the appellant, *Burn* and *Berridge*.

Solicitors for Zerenner, *Lloyd George*, *Roberts*, and *Co*.

Solicitor for Attorney-General, *Solicitor to the Board of Trade*.

KING'S BENCH DIVISION.

Nov. 22, 23, *Dec.* 1, 1908, *and March* 19, 1909.

(Before BRAY, J.)

JEANNOT *v.* FUERST. (*a*)

Foreign judgment—French court—Persons domiciled in England—Final judgment—Natural justice.

The plaintiff and defendants entered into an agreement whereby the latter obtained the exclusive right to sell the plaintiff's products in Great Britain and her colonies for a period of five years from the 1*st Jan.* 1906. *The defendants agreed to do business with the plaintiff to the amount of* 10,000*f. the first year and* 15,000*f. thereafter, and to pay an indemnity of* 5000*f. in the event of a breach of contract. It was further provided that the French tribunals of commerce were alone to have jurisdiction. On the* 2*nd May* 1907 *a writ was issued by the plaintiff in the Tribunal de Commerce de Lyon requiring the defendants to appear on the* 2*nd June* 1907, *and claiming a penalty of* 5000*f. The writ was served in accordance with the French Code of Civil Procedure and left at the office of the Procureur-Général on the* 2*nd May.*

On the 31*st May the writ was sent to the French Consulate in London, and, although notice was given to and received by the defendants the same day, they ignored it.*

On the 2*nd June the defendants did not appear before the Tribunal de Commerce de Lyon, and, without notice to them, the case was adjourned till the* 18*th June, when in their absence judgment by default was given for the amount claimed. The judgment was served at the office of the Procureur-Général, and on the* 8*th Aug. the defendants received notice of it through the French Consulate in London, but ignored it. Notice of the execution of the judgment and a certificate of* nulla bona *were sent to the defendants in November, and the plaintiff afterwards sued the defendants in England on the French judgment.*

Held, that, as the proceedings were not contrary to natural justice and there was a final judgment existing in France binding on the defendants at the time the English action was brought, the defendants were liable.

COMMERCIAL LIST.

Action tried before Bray, J., sitting without a jury.

Action brought by the plaintiff on a judgment of the Tribunal de Commerce de Lyon. The facts and arguments are sufficiently stated in the written judgment.

Hawke for the plaintiff.

Atkin, K.C. and *F. M. Abrahams* for the defendants.

BRAY, J.—In this case the plaintiff sued upon a judgment of the Tribunal de Commerce de Lyon dated the 18th June 1907. On the 1st Jan. 1906 he had entered into an agreement with the defendants by which he gave them the exclusive sale in Great Britain and her colonies of his products for five years from the 1st Jan 1906. The defendants undertook to do a yearly business with the plaintiff to the amount of 10,000f. the first year and 15,000f. afterwards, and, in case of breach of contract by one of the parties, the latter was to pay an indemnity of 5000f. and the Tribunal of Commerce were alone to have jurisdiction. On the 2nd May 1907 the plaintiff commenced proceedings by a writ of summons of that date in the Tribunal de Commerce de Lyon. A question arose whether the writ was dated the 2nd or 8th May, but the writ and duplicate were ultimately produced and were both found to be dated the 2nd May. This writ required the defendants to appear on the 2nd June. It recited the agreement and stated that the turnover for the year 1906 had been only 796f., and claimed the penalty of 5000f. According to the French Code of Civil Procedure, art. 69, in a case like this, where the defendants had no domicile or residence in France, service of the writ is effected by leaving the writ at the office of the Procureur-Général. This was done on the 2nd May. No further service is required, but by way of information the writ is sent to the Consulate of the country where the defendants reside, and it is the practice then for the Consul (in the case of England) to send by registered letter a notice in the following form: "Consulate-General of France, London.—You are requested to be so good as to call at the Chancery of the Consulate-General, 4, Christopher-street, Finsbury-square, for a matter concerning you. The offices are open from eleven to four. To take away a Judicial Act." No period is limited within which the writ should be sent or notice given. In this case the writ was received at the French Consulate in London on the 31st May, and notice given in the usual form to the defendants the same day. The defendants received the notice, but ignored it. On the 2nd June the defendant not appearing before the Tribunal de Commerce de Lyon, the case was adjourned to the 18th, when it came on in the absence of the defendants, and judgment by default was given for the amount claimed. No notice was given to the defendants of the adjournment. Evidence by French experts was given before me as to the effect of their judgment by default, and the French Code of Civil Procedure was referred to. The evidence was to some extent conflicting. The service of judgment by default is effected in such a case as this by leaving it at the office of the Procureur-Général. This is a good service, but the same procedure is adopted of sending it to the Consulate and of the Consulate giving notice. This was done, and a similar notice was sent to the defendants on the 8th Aug., which they also ignored. In the case of judgments by default "opposition" may be made at any time before execution of the judgments. Opposition is made by appearance before the court, and in that case there are pleadings, and the case is tried in the ordinary way. If the judgment is not executed within six months the judgment is void. Art. 159 of the code provides for the mode of execution. In this case the plaintiff alleged that the judgment had been executed by his procuring a certificate of *nulla bona* and leaving the same at the office of the Procureur-Général on the 6th Nov. 1907. This certificate was put in evidence, and it recites what was done. It was said by the expert on the part of the plaintiff that the leaving this certificate at the office of the Procureur-Général was sufficient, and that thereafter no opposition could be made. On the other hand the defendants' expert said, while admitting that a certificate of *nulla bona* is equivalent to execution, that it was necessary that the defendants should have actual knowledge of the execution and that opposition could be made before or immediately after the defendants knew of the execution. Looking at the words of art. 159, I think opposition could certainly be made at any time before notification to the defendants, but I am inclined to think if made afterwards, even immediately afterwards, it was a matter for the discretion of the court, and that the defendants would not be entitled as a matter of right to "oppose" after notification of the execution of the judgment. The first notification the defendants received of the execution was in this manner: Towards the end of November they received from the Consulate a notice similar to the other two. On receiving this the defendants consulted their solicitor, and on his advice sent to the Consulate and received a copy of the certificate of *nulla bona*. I do not think either the defendants or their solicitor were aware of the effect of this certificate, but I think it must be taken that, when they received it, the execution of the judgment had been made known to them within the meaning of art. 159. These being the facts, I have to decide whether an action will lie in these courts on the judgment so obtained and so notified. The first question is whether the defendants submitted to the jurisdiction of the French tribunal. It is claimed that they did so by virtue of the clause in this agreement. This seems to be decided by the case of *Feyerick* v. *Hubbard* (86 L. T. Rep. 829; 71 L. J., K. B. 509), provided that there was nothing in the proceedings contrary to natural justice. Was there anything so contrary? Certainly the defendants had no such notice of the proceedings as is necessary in our courts. The form of letter sent by the French Consulate contains no indication of the nature of the proceedings nor the name of the plaintiff, and it was sent at a time when it would be practically impossible for the defendants to have appeared before the tribunal on the day named. The defendants were called. I am

satisfied that they did not realise at that time that an action had been commenced against them by the plaintiff. Although the plaintiff was at this time actually corresponding with the defendants, not a word was said by him of his having commenced proceedings. I cannot help thinking that both he and his solicitor were careful not to inform the defendants of the proceedings until after the execution, when it would be too late to make opposition. Notwithstanding all this, however, I do not feel able to say that the proceedings were contrary to natural justice. The French courts in the case of foreigners residing abroad do not take the same precautions as we do to avoid injustice. There is an absolute right to come in and defend before execution, and even after execution I gather from the expert's evidence that in a proper case the defendant might be allowed to come in and defend. I have nothing to show that if at the end of November he had chosen to appear and ask for leave to defend he would not on the facts before me have been allowed to do so. The remaining question is whether the judgment of the 18th June was a final judgment on which an action would lie in our courts. It is clear that according to the case of *Nouvion* v. *Freeman* (62 L. T. Rep. 189; 15 App. Cas. 1) it was not final when pronounced on the 18th June, because the defendants had an absolute right to appear and defend and have the case tried in the same court on its merits and not by way of appeal. But it was said for the plaintiff that it became a final judgment on notification of the execution, and the action was not commenced till after that. I can find no authority on this point. It was argued that it was not the case of a judgment becoming final after a fixed period. It was after an uncertain period—viz., at such a time as it could be proved that the defendants were notified of the execution, a matter to be determined by evidence in the present action. There remains the fact, however, that in France there was a final judgment in existence and binding on the defendants at the time this action was brought. That being so, I think an action will lie on it in this country. There must, therefore, be judgment for the plaintiff for the amount of the judgment, and I think I must say with costs.

Solicitor for the plaintiff, *Joseph W. Astrey.*

Solicitors for the defendants, *Michael Abrahams, Sons,* and *Co.*

House of Lords.

Thursday, May 20.

(Before the LORD CHANCELLOR (Loreburn), Lords MACNAGHTEN, GORELL, and SHAW.)

BROOK AND OTHERS *v.* MELTHAM URBAN DISTRICT COUNCIL. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Sewer—Facilities for manufactories to drain into sewer—Sufficiency of sewer—Purification works—Rivers Pollution Prevention Act 1876 (39 *&* 40 *Vict. c.* 75), *s.* 7.

The Rivers Pollution Prevention Act 1876 *enacts by sect.* 7: "*Every sanitary or other local authority having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories . . . into such sewers . . . provided that no sanitary authority shall be required to give such facilities as aforesaid where the sewers of such authority are only sufficient for the requirements of their district.*"

Held, that the word "sewers" in the proviso means the sewage system as a whole, and not only the pipes in which the sewage is carried; and when sewage is passed into purification works, and such works are only sufficient for the requirements of the district, the sanitary authority cannot be required to give facilities to manufacturers for carrying the liquids from their factories into the sewers, though the actual pipes may be sufficient to carry off such liquids.

Judgment of the Court of Appeal affirmed.

Guthrie, Craig, and Co. v. Magistrates of Brechin (15 *R.* 385) *distinguished by Lord Shaw.*

APPEAL from a decision of the Court of Appeal (Vaughan Williams, Moulton, and Buckley, L.JJ.), reversing a judgment of the Divisional Court (Channell and Sutton, JJ.) which allowed an appeal from an order of the County Court of Yorkshire, sitting at Huddersfield.

The hearing below is reported 99 L. T. Rep. 641; (1908) 2 K. B. 780.

The appellants were thread manufacturers carrying on business at the Meltham Mills, in the West Riding of Yorkshire, and the respondents were the sanitary authority of the district.

In April 1907 the appellants commenced proceedings in the County Court under the Rivers Pollution Prevention Act 1876 claiming an order to enable them to carry the liquids proceeding from their factories into the sewers under the control of the respondents, and to allow the appellants to cause the drain containing such liquids to empty into the sewers, and to allow the appellants to make all necessary communi cations between their drain and the sewers for the purpose aforesaid on condition of the appellants complying with the respondents' regulations (if any) in respect of the mode in which such communication was to be made, or otherwise to give to the appellants such facilities for such purposes in the terms of the Act and on such terms and conditions as to the court might seem proper.

Sect. 7 of the Rivers Pollution Prevention Act 1876 enacts as follows:

> Every sanitary or other local authority having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into such sewers: Provided that this section shall not extend to compel any sanitary or other local authority to admit into their sewers any liquid which would prejudicially affect such sewers or the disposal by sale, application to land, or otherwise, of the sewage matter conveyed along such sewers, or which would from its temperature or otherwise be injurious in a sanitary point of view. Provided also, that no sanitary authority shall be required to give such facilities as aforesaid where the sewers of such authority are only sufficient for the requirements of their district, nor where such facilities would interfere with any order of any court of competent jurisdiction

EXHIBIT 14

THE

ENGLISH REPORTS

VOLUME CLIV

EXCHEQUER DIVISION

X

CONTAINING

EXCHEQUER REPORTS

(WELSBY, HURLSTONE AND GORDON)

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1915

alone chargeable with it; [289] and that, his interference with them having been entirely gratuitous, could not operate to extend the liability to him. But the invariable usage proved at the trial, and the futility of making chargeable the merchant to whom the goods may belong, and who, at the time of the importation, may be altogether unknown to the Corporation, may reside in a foreign country, or at a distance from the port, within her Majesty's dominions, shew that the word "owner," as used in the charter, cannot receive so limited a construction. Payment of the primage within the port appears to be contemplated by the charter; and one, under whose claim to the possession of them the goods are imported, may not improperly be deemed, for the purpose of importation and its incidents, the owner; and accordingly, in claiming the primage confirmed to the plaintiffs by the charter, the invariable usage had been to treat as the owner the importer; and, until the resistance of the defendant originating the present action, the importer had invariably paid it In the course of the argument, the defendant's counsel observed, that the existence of the usage was not found by the jury. But it is evident from the Judge's notes, that, after the jury had found that the duty had been legitimately established, the learned counsel, who was not likely to forego the chance of their negativing the existence of the usage, if he could have entertained the slightest expectation of their doing so, was content to rest his defence on the general ownership of Pinto & Co., and the gratuitous nature of the defendant's interference; he could not have done otherwise, as the evidence upon the subject of the usage was wholly uncontradicted.

The case then stood thus:—The duty was demandable from persons designated in the charter as owners of the goods imported; the usage shews, that by such designation the importers were intended. The defendant was the importer of the lead. The Judge at the trial held, that, under [290] such circumstances Hammond was liable. We think the learned Judge was right; that the defendant's having acted gratuitously for Pinto & Co. did not abridge his liability; and consequently, that the rule for a nonsuit or a new trial should be discharged.

Rule discharged.

VALLEE AND OTHERS *v.* DUMERGUE. July 6, 1849.—To an action on a French judgment, the defendant pleaded that he was not, during the accruing of the cause of action, or any part of the proceedings, nor from thence hitherto, resident in France, or within the jurisdiction of the Court, nor subject to the laws of France; that he was never served with any process or notice whatever; nor had he any notice whatever of any proceedings in the action; nor did he appear in Court, or have any opportunity of defending himself against the claim, and the proceedings were taken in his absence, and without his knowledge, privity, and consent. Replication, that the defendant became a shareholder in a certain Company in France, subject to all the liabilities and rights attaching thereto. That the defendant was resident in England, and by reason thereof it became necessary, by the law of France, for the defendant to elect a domicile in France, at which the directors of the Company might notify to him all proceedings relative to the Company, or the defendant as such shareholder. That, by the law of France, all legal proceedings affecting any party having his real domicile out of that kingdom, left for him at such elected domicile, were as valid as if left at his real domicile in France. That the defendant made election of domicile at a place in Paris, and gave notice thereof to the plaintiffs. That the assets of the Company being insufficient to discharge their debts, the defendant, as a shareholder, was, by the law of France, liable to pay a certain sum, and to be sued for the same by the plaintiffs. That the plaintiffs, for the recovery thereof, caused a summons to be left at his elected domicile, requiring him to appear in Court at a certain time and place. That the defendant did not appear, according to the exigency of the summons, whereupon the plaintiffs recovered judgment by default. On special demurrer to the replication—Held, first, that the facts stated in the replication afforded an answer to the plea.—Secondly, that the word "notice" in the plea, meant actual notice alone, and, consequently, the replication did not amount to an argumentative denial of that notice, but consisted of a statement of facts shewing that no such notice need be given.—Whether the plea was bad for omitting to state that the defendant was never resident in, or

a native of France, nor at the time of the proceedings had property there—quære.

[S. C. 18 L. J. Ex. 398. Referred to, *Copin* v. *Adamson*, 1874, L. R. 9 Ex. 352.]

Assumpsit on a judgment for 272,767 fr. 60 cent. recovered by the plaintiffs against the defendant, in the Court of the Civil Tribunal of First Instance of the department of the Seine, sitting at the Palace of Justice at Paris, in the kingdom of France.

Plea, that the defendant was not, at any time during the accruing of the supposed cause of action upon which the supposed judgment was founded, nor from thence continually during any part of the said proceedings towards the supposed judgment, and upon which it is founded, nor from thence hitherto, resident in or within the kingdom of France or the jurisdiction of the Court in which the supposed judgment was recovered; nor was he the defendant, **[291]** during any part of the above-mentioned period, subject to the laws of the kingdom of France, or any of them, or liable to be proceeded against therein. That the defendant was not, at any time before the recovery of the supposed judgment, served with any process or notice whatever; nor had he any notice whatever of any proceeding in the action or suit in which the supposed judgment was recovered; nor did nor could he the defendant in any manner appear in the said Court during the course of the proceedings in the said action or suit, or any part thereof; nor had he the defendant, at any time before the recovery of the supposed judgment, any knowledge or notice whatever of the said proceedings, or any of them; but, on the contrary thereof, he the defendant was wholly and entirely ignorant of the proceedings in the said action or suit, and every of them, or that the same or any was or were about to be taken against him; nor had he the defendant time, nor has he had any opportunity whatever, of opposing the said proceedings or of objecting to them, or of defending himself from and against the supposed claim or demand upon which the supposed judgment was obtained. And the defendant further says, that the said proceedings were taken and the supposed judgment was obtained against him in his absence and behind his back, and without his knowledge, privity, or consent. Verification.

Replication, that, before the commencement of the action or suit in which the judgment was so recovered, and before and at the time of the execution of the act or instrument of conveyance hereinafter next mentioned, one Alexander Méchin, then being a subject of and domiciled and resident in the kingdom of France, was a partner and shareholder of and in a certain Company then lawfully established and existing in the kingdom of France, for the supply of military beds to the Government of the said kingdom, called or known by a certain name or firm, to wit, the firm of Martin Valleé & Company, the social pro-**[292]**-perty whereof was then divided into divers, to wit, twelve shares, called and known in the kingdom of France by the name of sols, and which shares or sols were then, according to the law of France and the regulations of the Company, transferable by the holders thereof; and the said A. Méchin was then the holder and lawfully possessed of, to wit, one share or sol and the quarter of another share or sol in the said Company; and, being so possessed and such partner and shareholder, the said A. Méchin, long before the commencement of the said action or suit, to wit, on &c., by a certain act or instrument of conveyance then duly made and acknowledged in the kingdom of France, and according to the laws thereof, for the considerations therein mentioned, to wit &c., sold and conveyed to one Nicholas Baignieres, with power of repurchase or redemption during five years, to commence from the date thereof, all the rights of him A. Méchin in the said Company, to wit, one sol and one quarter of another sol therein, whereby N. Baignieres then became and was, according to the laws of France, the lawful holder of the said shares and interest of and in the said Company, subject to the right of repurchase and redemption. And thereupon afterwards, and before the commencement of the said action &c., and within five years from the date of the aforesaid act or instrument of sale and conveyance, to wit, on &c., A. Méchin, by a certain other act or instrument of sale and conveyance then duly executed &c., for the considerations therein mentioned, to wit &c., sold, made over, and conveyed to the defendant the right and power of redemption so reserved to him A. Méchin by the said act or instrument of conveyance, of and in the said one sol and a quarter of another sol of the social property of the Company, together with all the right and claims whatsoever of

him A. Méchin of and in the Company. That, at the time of the execution of the last-mentioned act or instrument of sale and conveyance, the defendant was present in the kingdom of France and had full notice and know-[293]-ledge thereof, and then duly and according to the law of France accepted the same and the benefit and liabilities thereof, and thereby then became and was, according to the law of France, duly entitled to the said right and power of repurchase and redemption of and in the said one sol and a quarter, &c. And thereupon afterwards, and whilst the defendant was so interested and entitled, and within five years from the date of the act or instrument of sale and conveyance first mentioned, and whilst the same was in full force, to wit, on &c., by a certain other act or instrument in writing, then duly made, executed, and acknowledges by the parties thereto and the defendant in &c., for the considerations therein mentioned, to wit, &c., the defendant was thereby duly, and according to the laws of France, put into possession of, and placed and substituted into the rights, titles, and privileges in the said Company, against the said Company and all whom it might concern, for him the defendant to exercise the said rights in the same manner as A. Méchin would have been entitled to do; and the said N. Baignieres thereby gave up to the defendant the exercise of all rights in the Company; whereby, and by the law of France, the defendant then became and was the lawful holder of the said share and interest, to wit, the said one sol and one quarter, &c., freed and discharged from all the rights, claims, and demands of the last-mentioned person in respect thereof, and thereby then became and was, by the law of France, subject to all the liabilities, rights, and privileges then attaching upon or belonging to the holders of shares in the Company; that, at the time of the execution of the said several acts or instruments, and when the defendant so became and was the holder of such share and interest of and in the Company, the Company was still lawfully existing and established in the kingdom of France, and the seat and place of business thereof then was in Paris, in the said kingdom, whereof the defendant then had notice; and that the defendant, at the several times, was resident and [294] domiciled in England, and not in the kingdom of France; and that, by reason and in consequence thereof, it became and was, at the time of the making and execution of the act or instrument of conveyance thirdly mentioned, necessary, according to the law of France, for the defendant, and he the defendant was then bound and obliged by such law, upon his so becoming the holder of such share and interest of and in the Company so then established and existing in the kingdom of France, to elect a domicile within the kingdom of France, to wit, in Paris, at which the directors or administrators of the affairs of the Company might and should, in case of need, notify to the defendant all instruments and other proceedings relative to the Company, or relating to or affecting the defendant as a shareholder in the same; and also, that the defendant should cause notice to be given to the Company and the directors thereof, of the place of such elected domicile; of all which &c. (notice); that, before and at the times of the execution of the several acts &c., and from thence until and at the time of the recovery of the judgment, it was and still is the law of and in force in the kingdom of France, that, when any person, not having an actual and real domicile within the kingdom of France, was desirous of electing a domicile within the said kingdom, for carrying into execution within the said kingdom any act or instrument in writing to which he was a party, or for any other purpose or matter relating to or arising out of such instrument, such election of domicile might and could be lawfully made by such party, by a statement and declaration in writing by him in and by such act or instrument, of the place within the said kingdom at which he then elected domicile for the execution of such act or instrument, and such place then thereby became and was by and according to the law of France, the elected domicile of such party within the said kingdom for the carrying into execution of the said act or instrument, and for all purposes and matters relating to or arising out of such act or instrument, and the [295] consequences thereof, until some change or alteration were made by such party in the place of such elected domicile; that, before and at the said several times, it also was and still is the law of and in force in the kingdom of France, that, when an act contained on behalf of the parties thereto, or one of them, an election of domicile, for the execution of the same act in a different place from that of the real domicile, the notifications, demands, and proceedings relative to such act might be made at the domicile agreed on, and before the judge of the place; that is to say, before the judge within whose jurisdiction the place of such elected domicile

was situate; that, by the law of France, at the several times aforesaid, all notices and all legal and judicial proceedings for or concerning or affecting any party having his real and actual domicile out of the kingdom of France, but having an elected domicile for any purpose within the said kingdom, and relating to and concerning the acts or matters in respect whereof such domicile had been and was so elected, or the consequences of such acts or matters, addressed to and left for such party at such elected domicile, were and are as valid and effectual in law, as if the same had been and were addressed to and left for him at the real and actual domicile of such party, within the jurisdiction of the judge of that place; of all which &c. (notice).

Averments, that, in and by the act or instrument in writing thirdly mentioned, and whereby the defendant became the holder of the said one sol and one quarter, &c., the defendant, for the execution and the carrying into execution of the same act or instrument in writing, and according to and in pursuance of the law of France in that behalf, made election of domicile at a certain place in Paris, within the jurisdiction of the court and tribunal in the declaration mentioned, to wit, at Mons. Callaghan's bank, Rue Neuve des Mathurins, in Paris aforesaid, to wit, by declaring and stating, in and by such last-mentioned act or instrument in writing, that he the defendant did then elect domicile, for the execution of the same instrument, at the [296] said Mons. Callaghan's, at the place last aforesaid; that such election of domicile by the defendant in manner aforesaid was, at the time of the execution of the last-mentioned act or instrument in writing, and from thence until and at the time of the recovery of the said judgment, an election of domicile by the defendant, good, valid, and effective, according to the law of the kingdom of France, so as to constitute the said place, to wit, Mons. Callaghan's &c., the elected domicile of the defendant, within the kingdom of France, for the execution and carrying into execution of the said last-mentioned act or instrument within the said kingdom, and for all that should relate to the same, or the consequences thereof, and for all matters relating to or arising out of the same act or instrument, within the said kingdom and the elected domicile of the defendant within the kingdom of France, at which, according to the law of France, all notifications, demands, and proceedings to, from, or against the defendant in the said kingdom relative to such act, or arising out of the same, might lawfully be made and left for the defendant; that the defendant, afterwards and before the commencement of the said action &c., to wit, on &c., as he the defendant was then bound and required by the law of France to do, caused notice to be given to the said Company, and the directors and administrators thereof, and to the plaintiff, as and then being one of such directors, that his the defendant's domicile had been and was elected, for all which should relate to the execution of the said act or instrument thirdly mentioned, at Mons. Callaghan's, &c.; and the said Company and the directors and administrators thereof then had notice from the defendant of his election of the said domicile for the purposes aforesaid. The replication then stated, that, from the time the defendant became such shareholder, the business of the Company was carried on within the kingdom of France; that the defendant continued a shareholder; that the directors of the Company caused to be paid at the banking-house of Mons. Callaghan, for the de-[297]-fendant, sums of money in respect of dividends payable to the defendant as such shareholder; and that such sums were so paid at the said banking-house as such elected domicile of the defendant; and that, by reason of having such elected domicile and of the said payments, the defendant actually received such dividends; that the plaintiffs were, according to the law of France, appointed by the shareholders as liquidators, to examine the affairs of the Company, and it was found by them, that the funds of the Company were insufficient to pay the debts; and it became necessary that the debts should be discharged by the shareholders, who were by the law of France liable to pay the same by a fund raised according to their several interests in the Company; and that the amount payable by the defendant was found to be 272,767 fr. 60 cent., for which the defendant was liable to be sued by the plaintiffs, as such liquidators: that the plaintiffs, for the recovery of such sum, afterwards, to wit, on &c., duly and according to the law of France, and the practice of the Court of the Civil Tribunal of First Instance &c., being the Court then having jurisdiction thereof, and within which jurisdiction the said elected domicile of the defendant was so then situate, caused to be issued out of the said Court a certain summons or precept, addressed to the defendant, whereby the defendant was summoned to appear in the said Court, sitting at &c., at a day and time therein named, to wit, in eight

clear days from the service thereof, with the addition of the term of two months, in consideration of the distance, to answer the now plaintiff in an action or claim for the sum of 272,767 fr. 60 cent., with interest &c., the same being a demand relative to and arising out of the said act or instrument in writing thirdly mentioned; which said summons the plaintiff, then and long before the recovery of the judgment in the declaration mentioned, to wit, on &c., duly caused to be left, served, and delivered for the defendant, at the said elected domicile of the defendant, to wit, at the said Mons. Callaghan's; that the defendant [298] did not, from the time when he in manner aforesaid so elected his domicile at the place aforesaid, in the kingdom of France, make or notify to the plaintiffs or the Company any change in his said elected domicile, but the same, from the time of such election until and at the time of the service and delivery of the said summons, continued to be and was the elected domicile of the defendant in the kingdom of France for the purposes hereinbefore mentioned. That the summons of the plaintiffs in the said action or proceedings was in all respects regular and valid according to the law of France and the practice of the said Court; and that the service thereof for the defendant at the real and actual domicile of the defendant, within the jurisdiction of the said Court, would have been, according to the law of France and the practice of such Court, notice to the defendant of such summons and proceedings, and the defendant would have been bound in such case to appear in the said Court at the time mentioned in the said summons. That, according to the law of France, the said summons was, at the time of such service thereof at the elected domicile of the defendant, and until and at the time of the recovery of the said judgment, a notification and proceeding relative to the act or instrument in writing thirdly mentioned; and that, according to such law and practice, the said delivery and service of the summons for the defendant, at the elected domicile of the defendant, was equivalent to, and as effective and valid, as a delivery and service thereof for him at the real and actual domicile of the defendant within the jurisdiction of the said Court, and then amounted to and was, according to the law of France, notice to the defendant of such summons and proceedings, he the defendant then having his real and actual domicile out of the kingdom of France, to wit, in England; and that the defendant then was, according to the law of France, bound to appear and ought to have appeared in the said Court at the time mentioned in the said summons, for the purpose [299] therein mentioned. The replication then stated, that the defendant did not appear in Court according to the exigency of the summons, whereupon the Judges of the Court, according to the law of France and the practice of the Court, granted default against the defendant for not appearing, and such proceedings were thereupon had, that the plaintiffs recovered judgment for 272,767 fr. 60 cent., which is the same judgment in the declaration mentioned. Averment, that the judgment, so in manner recovered, then was and still is, according to the law of France, regular, and valid, and conclusive, and binding upon the defendant and the plaintiffs, and not in any respect impeachable by the parties thereto, or either of them, or otherwise howsoever. Verification.

Special demurrer, assigning for causes (amongst others) that the replication amounted to an argumentative denial of the notice stated in the plea.

Needham argued in support of the demurrer (June 4). First, as to the plea. A foreign judgment recovered behind the back of a party not resident in the country, is a judgment from which the law will not imply an assumpsit: *Buchanan* v. *Rucker* (1 Camp. 63). This plea states facts shewing that the judgment was obtained contrary to natural justice: *Fisher* v. *Lane* (3 Wils. 297; S. C. 2 W. Bl. 834), *Cavan* v. *Stewart* (1 Stark. 525), *Bruce* v. *Wait* (1 M. & G. 1). *Douglas* v. *Forrest* (4 Bing. 686) will, perhaps, be relied on by the other side; but that was the case of a Scotch judgment of horning, which proceeding is recognised in English Acts of Parliament. In *Ferguson* v. *Mahon* (11 A. & E. 179), the facts alleged in the plea were less strong than in the present case; and Lord Denman, C. J., in delivering judgment, says, "When it appears, as here, that the defendant has never had notice of the proceeding or been before the Court, it [300] is impossible for us to allow the judgment to be made the foundation of an action in this country."

Secondly, the replication amounts to an argumentative denial that the defendant had notice of the proceedings in the action on which the judgment was founded. It will, perhaps, be argued, that the replication admits a want of notice in fact, but shews a sufficient notice in law; the meaning, however, of the plea is, that the

defendant never had such notice as rendered the judgment valid: *Dresser* v. *Stansfield* (14 M. & W. 822), *Wheeler* v. *Wright* (7 M. & W. 359). Where, to a declaration in case for a fraudulent representation, the defendant pleaded that the representation was not in writing signed by him, according to the 9 Geo. 4, c. 14, s. 6, and that it was made after the passing of that Act, the plea was held bad, as amounting to an argumentative denial of the representation charged in the declaration: *Turnley* v. *Macgregor* (6 M. & G. 46). It is difficult to say, whether the replication means to set up an excuse for notice, or to allege the law of France as to notice. If the latter, it contains a mere argumentative and inferential statement of the French law, upon which no certain issue can be taken. The proper mode of pleading is to state the foreign law as a fact, and then to aver the facts to bring the case within it: *Benham* v. *The Earl of Mornington* (3 C. B. 133). [He also cited *Astley* v. *Fisher* (6 C. B. 572).]

Phipson, contrà. First, the plea ought to have stated, in addition, that the defendant was never resident in nor a native of France, and that, at the time of the proceedings, he had no property there: *Henderson* v. *Henderson* (6 Q. B. 288); Story's Conflict of Laws, ch. xv. s. 607; *Culverson* v. *Melton* (12 A. & E. 753), *Cowan* v. *Braidwood* (1 M. & G. 882).

Secondly, the replication shews a state of circumstances **[301]** which, according to the law of France, renders the judgment valid. If the plaintiff had taken issue on the allegation of notice in the plea, or replied de injuriâ, he must have proved a notice in fact. If the plea means that the defendant had no notice in fact, the replication is good in confession and avoidance, for it states that the plaintiff did something, which, according to the law of France, was notice of the proceedings: *Reynolds* v. *Fenton* (3 C. B. 187).

Needham replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B. In this case, which was argued before the Lord Chief Baron, my Brothers Rolfe and Platt, and myself, I am now to deliver the judgment of the Court.

The declaration states, that the plaintiff heretofore, on the 17th of December, 1846, at the Court of Civil Tribunal of First Instance, for the department of the Seine, sitting at the Palace of Justice at Paris, before the judges of that Court, recovered against the defendant a debt amounting to the sum of 272,767 fr. 60 cent., which sum of money remains wholly due and unpaid. To this the defendant has pleaded, that he was not, at any time during the accruing of the supposed cause of action upon which the said supposed judgment was founded, nor from thence continually during any part of the proceedings towards such supposed judgment, resident in or within the kingdom of France &c. To this plea, which is in substance, that the foreign judgment does not bind the defendant in an English Court, as being pronounced contrary to natural justice, the plaintiff, by his replication, sets out that the defendant had become a member of a Company in France by holding shares therein, upon certain terms named in the replication; and that, being so, and being a resident in England, it became ne-**[302]**-cessary, according to the law of France, for the defendant, as such holder of shares, to elect a domicile in France, to wit, in Paris, at which domicile the directors and administrators of the affairs of the Company might, in case of need, notify to the defendant all instruments and proceedings relating to the said Company, or to the defendant, as such shareholder in it; and that the defendant should give notice to the directors of such elected domicile. The replication proceeded to state, that, by the law of France, the domicile contained in an instrument and declaration in writing became the elected domicile of the party, and that all proceedings might, by that law, be regularly served at such elected domicile on the party. It then set out an election of domicile duly made, according to the law of France, by the defendant, and then proceeded to shew that the suit in question in which the judgment was obtained was one relating to the Company, and that the proceedings were in due course served at the place of the defendant's elected domicile, and were in all respects regular according to the law of France. This replication concludes with a verification. To this there was a special demurrer, the ground being, that this replication was, in fact, an argumentative denial of the want of notice of the proceedings to the defendant, stated in the plea.

There is no doubt that the facts stated in the replication, if true, afford an answer

to the defendant's plea, and that the question before us is one only of form. But, no doubt, if by the word "notice" in the plea, that which amounts in point of law to notice is to be intended, the defendant is right in the objection he makes, and the plaintiff ought directly to take issue on the notice, and support his issue by proving the facts stated in his replication. But, after considering this plea, we think, that, by the word "notice" is to be understood actual notice alone. The defendant states, he was not served with any process, which clearly means not actually served, and then adds, nor had he any notice whatever of the said proceedings; **[303]** adding, afterwards, that he had not any knowledge or notice whatsoever of them. All these averments point to actual notice alone. Now, if this be so, the replication is not an argumentative denial of this notice, but consists of a statement of facts which shew, that, by the agreement to which the defendant has become a party, no such notice need be given to him, and that the plea, which is in substance that the circumstances under which the judgment was obtained were contrary to natural justice, cannot be supported; for that it is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have had actual notice of them.

We, therefore, think the replication sufficient; and it is not necessary, consequently, to give any opinion on the objections made by Mr. Phipson to the plea.

Judgment for the plaintiff.

PARTRIDGE *v.* GARDNER. July 6, 1849.—To a declaration in assumpsit the defendant pleaded several pleas, upon which issues were joined; and also a plea, to which the plaintiff demurred. The issues were tried, and found for the plaintiff, and, afterwards, judgment was given for the defendant on the demurrer, the Court holding the declaration insufficient:—Held, that the plaintiff was not entitled under the 4 Anne, c. 16, s. 5, to the costs of the issues found for him, as no issue in fact had been found for the defendant also.

[S. C. 7 D. & L. 106; 18 L. J. Ex. 415: affirmed, 6 Ex. 621. Overruled, *Callander* v. *Howard*, 1850, 10 C. B. 313.]

Phipson had obtained a rule calling upon the defendant to shew cause why the plaintiff's costs should not be taxed on the issues found for him, and be paid by the defendant, after deducting the amount allowed to the defendant. The plaintiff had declared in assumpsit. The defendant pleaded seven pleas. The first was non assumpsit. The second, third, fourth, fifth, and sixth respectively, traversed allegations in the declaration. The seventh was a plea in confession and avoidance. The plaintiff having **[304]** joined issue on the first five pleas, and demurred to the sixth and seventh, obtained a verdict on all the issues in fact, with contingent damages; but afterwards, on argument of the demurrer, failed, the Court holding that his declaration was insufficient, and expressly giving judgment against him accordingly, on the ground of such insufficiency.

Keating and Ogle shewed cause (May 23). The 4 Anne, c. 16, enables defendants to plead several matters. By sect. 5 it is provided, "that, if any such matter shall upon a demurrer joined be judged insufficient, costs shall be given at the discretion of the Court; or, if a verdict shall be found upon any issue in the said cause, for the plaintiff or demandant, costs shall be given in like manner, unless the Judge who tried the issue shall certify." According to the true construction of that section, the verdict must be found upon issues in respect of which there may be judgment. *Bird* v. *Higginson* (5 A. & E. 83) is relied upon by the other side. There the declaration contained two counts, and there were two pleas to the first count, and one to the second. Issues were joined on one plea to the first count, and on the plea to the second count; the other plea to the first count was demurred to. The issues in fact were tried, and a verdict was found for the plaintiff on the issue on the first count, and damages assessed, and for the defendant on the issue on the second count. Afterwards the defendant had judgment on the demurrer, and it was held that the plaintiff was entitled to the costs of the issue on which he had succeeded. That case is generally considered as overruling *Cooke* v. *Sayer* (2 Burr. 753), where the defendant pleaded to the whole declaration two pleas, upon one of which the plaintiff joined