# APPEARING UNDER PROTEST TO THE JURISDICTION OF A FOREIGN COURT

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## THE PROBLEM

Courts of justice in the world are legion. They function under the auspices of more than 120 sovereign states; but they apply a considerably larger number of legal systems because many of the political states are made up of territories which are, on the plane of private law, foreign to each other. There are some 50 such legal systems within the United States. In the United Kingdom, there are the sufficiently distinct laws of England and Wales, of Scotland and of the Channel Islands and the Isle of Man; and there are still areas within the British Empire, not sovereign states, but for purposes of private law quite separate from other parts of the Empire. There are some fifteen systems of private law applying to 127 different nationalities within the Soviet Union. There are the 22 cantons of Switzerland (three of which have half-cantons). Other examples can be given. Thus the number of law districts far exceeds the number of sovereign states.

It is neither practicable nor fair that every person on earth should be bound to respond to the summons of every law district, however remote, unfamiliar and unrelated, and to be liable to have a personal judgment entered against him, merely because somebody chooses to cite him before a court of such district, and the court is prepared, under its own rules, to act. The jurisdiction of all over all is chaos.

At common law, only those foreign courts are said[1] to be competent to bind a defendant by judgment *in personam* which deserves to be recognized (and, if need be, enforced) in England[2], between which and the defendant there exists one at least of the following contacts or links: (1) the defendant is (presumably at the date of judgment) a subject or citizen of the foreign country in question;[3] (2) the

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1 E.g., Fry J. in *Rousillon v. Rousillon* (1880) 14 Ch. D. 351; Buckley L.J. in *Emanuel v. Symon* [1908] 1 K.B. 302.

2 Or, to borrow from Wright J. in *Turnbull v. Walker* (1892) 67 L.T.R. 767, 769, to have 'jurisdiction in such sense that in conformity with general jurisprudence and ordinary international law or usage the courts of other states will regard its judgments as binding'. (Nevertheless, the 'general jurisprudence' varies from country to country; and the matter is not regulated by public international law.)

In this paper the country in which subsequent preceedings take place with reference to a foreign judgment is, for the sake of simplicity, referred to as 'England.' Similarly the second or subsequent tribunal is referred to as an 'English court', and the *lex fori* thereof as 'English law' or 'English private international law'.

3 This link is also expressly mentioned by Blackburn J., in his famous judgment in *Schibsby v. Westenholz* (1870) L.R. 6 Q.B. 155, 161; and, at least by implica-

defendant was resident there at the time when the action was begun;[4] (3) the defendant was served with the summons while within the territory of the foreign court, or possibly the defendant was within the territory when the summons was issued.[5]

None of these contacts relates to *the conduct of the defendant in connexion with the instant litigation.* They refer to pre-existing ties of allegiance or 'belonging', which render it proper, in the eyes of

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tion, by the Earl of Selborne in *Sirdar Gurdyal Singh v. Rajah of Faridkote* [1894] A.C. 670 (P.C.) *Douglas v. Forrest* (1828) 4 Bing. 686 furnishes sufficient (though not perfect) authority for this proposition.

In *Rossano v. Manufacturers Life Insurance* [1963] 2 Q.B. 352, 382-3, McNair J. was not disposed to concede the personal jurisdiction of Egyptian courts over an Egyptian national who 'was not physically in Egypt, had no intention of returning to Egypt, and, so far as lay in his power, had severed his connexions with Egypt'. In this case while the propositus was 'according to Egyptian law still an Egyptian national', he was at the same time 'also an Italian national by Italian law'.

In exceptional circumstances, where a state persists in inflicting its nationality upon an absent person in defiance of everything that that person may do or declare (and when, moreover, that person already has another nationality), it may perhaps be proper, on grounds of public policy or natural justice, to refuse effect to such nationality. This, however, does not throw much light on the general question whether the link of national allegiance should normally suffice for personal jurisdiction. McNair J. referred to the (inapplicable) provisions of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, and to the reservations expressed by the learned editors of Dicey's *Conflict of Laws;* he did not, however, mention any of the express statements in English cases (above) recognizing nationality as a ground of personal jurisdiction. See, however, a Note by Paul Jackson, 'Foreign Judgments: Nationality and Reciprocity', (1963) 26 *Modern Law Review* 563.

In America, *Grubel v. Nassauer* (1913) 210 N.Y. 149 rejects the link of nationality (the decision, however, turning largely on the absence of personal service upon the defendant—and thus on a point of natural justice, as distinct from one of jurisdiction—is not perhaps a clear authority). *Blackmer v. United States* (1932) 284 U.S. 421, however, points in the other direction; and the *Restatement of the Law of Conflict of Laws* (1934) § 47 (2) expressly recognizes the sufficiency of this link.

For the purposes of the following discussion the sufficiency of nationality will be assumed.

[4] This link is also expressly mentioned by Blackburn J. in *Schibsby v. Westenholz,* supra, the residence there being described as residence 'at the time when the suit was commenced'.

Carrying on business, as distinct from residence, does not appear to be one of the common law links, although it is recognized under the Foreign Judgments (Reciprocal Enforcement) Act, 1933. Where, however, the circumstances of carrying on business in a foreign country through an agent are such that the defendant impliedly agrees to submit to the foreign jurisdiction, there may be personal jurisdiction on the ground of his agreement to submit (*Cf. Blohn v. Desser* [1962] 2 Q.B. 116.)

The word 'residence' does not comprise every transient stay, as for instance at an airport during refuelling, but to such cases link no. 3 appears to be applicable.

Domicile, as distinct from residence, is not listed in the cases—nor by the Foreign Judgments (Reciprocal Enforcement) Act, 1933. It is arguable that if residence suffices, *a fortiori* domicile should suffice. The argument from residence to domicile is not, however, conclusive.

It does not, moreover, necessarily extend to cases of 'constructive' or 'dependent' domicile, such as that of a married woman living separately from her husband, or a fictitiously revived domicile of origin. (For the superiority of ordinary residence, as a ground of jurisdiction, over domicile of. *In re P. (G.E.) (An Infant)* [1965] 2 W.L.R. 1, 8-9, 16.) In America, domicile is recognized as a sufficient jurisdictional contact: *Miliken v. Meyer* (1940) 311 U.S. 457.

[5] While English courts assert their personal jurisdiction over defendants whose only tie with England consists of the fact of service of the writ on them while within the jurisdiction, however transient their stay (or, indeed, of their mere

English private international law, that the defendant should be made to obey, within England, the orders (in the form of personal judgments) issued to him by that country—not only because of the bond between him and the foreign country in question but also because the plaintiff, who must be able to sue *somewhere*, has *prima facie* chosen his tribunal reasonably. Hence the jurisdiction of these courts cannot be defeated by a defendant's lack of response. On the contrary, his very disregard of the summons of an internationally competent court is insubordinate, contumacious and also unjust. Proceedings held *ex parte* are far from ideal and are not favoured. But there must be some court to which a plaintiff can address himself without being stultified by the defendant's non-co-operation or elusiveness, that is, a court or courts the international competence of which over a person exists apart from such person's submission thereto.

In addition, English law holds that the courts of any country, however unrelated to a person, can acquire personal jurisdiction over such person if he 'submits' to the jurisdiction.[6] In particular, the

presence in England while substituted service is effected), there does not appear to be direct English authority for recognizing *foreign* jurisdiction in similar circumstances. Service on a defendant while within a foreign jursdiction is not one of the links with that jurisdiction listed in *Emanuel v. Symon* or in *Schibsby v. Westenholz, supra*. It was upheld as a sufficient link in the Connecticut decision of *Fisher v. Fielding* (1895) 67 Conn. 91 and in the Iowa case of *Darrah v. Watson* (1872) 36 Iowa 116. The English decision *Carrick v. Hancock* (1895) 12 T.L.R. 59 is more of an authority on submission, as distinct from merely being served with process, the defendant having appeared and actively litigated in the Swedish proceedings. It is, therefore, not an altogether satisfactory authority. (In support of the proposition that jurisdiction is obtained by actual service of the summons upon a defendant who is within the territory 'however transiently', *cf.* also *Peabody v. Hamilton* (1870) 106 Mass. 217.)

For enforcement under the Reciprocal Enforcement Acts, residence (or carrying on business) within the foreign jurisdiction is required, mere physical presence there while process is served not being sufficient.

Subject to one exception in Germany, the mere service of process during temporary physical presence of the defendant there, as also in France, does not appear to invest the local courts with jurisdiction over him. The Italian rule, on the other hand, is similar to the English. (Nussbaum, *Principles of Private International Law* (1943) 194.)

While it is eminently arguable that local service should suffice *in connection with events locally arising*, the alleged rule that at common law bare service upon a person while temporarily within the country of the serving court binds such person internationally, is much less convincing. *Cf.* B. D. Inglis, *Jurisdiction, the Doctrine of* Forum Conveniens, *and Choice of Law in conflict of Laws*, (1965) 81 L.Q.R. 380, esp. 386-92.

As with nationality, so with service of process, the sufficiency of the link is assumed for purposes of the following discussion.

[6] 'Submission' (or the question why a person who has submitted to a court is bound by decisions of that court) has been explained more than once, and on more than one ground. E.g. *Barber v. Lamb* (1860) 8 C.B. (N.S.) 95; *Griendtoveen v. Hamlyn & Co.* (1892) 8 T.L.R. 231; *Boissière v. Brockner* (1889) 6 T.L.R. 85; *Taylor v. Hollard* [1902] 1 K.B. 676; *Guiard v. De Clermont* [1914] 3 K.B. 145.

For the purposes of this paper it is sufficient to say that it is clear, 'on principle' that he who submits is bound: Blackburn J. in *Schibsby v. Westenholz* (1870) L.R. 6 Q.B. 155, 161.

Starting out from this core of certainty, we have to proceed to the consideration of a peripheral and perplexing question, not directly answered by the rule that submission binds. The question is: does a defendant, who enters an appearance solely to protest against jurisdiction, 'submit'?

following cases are considered to involve 'submission' and provide further contacts or links as aforesaid: (4) the judgment-debtor has himself chosen to sue in the foreign court as plaintiff (the proceedings having, however, terminated unfavourably to him as by the dismissal of the action, perhaps with an order for costs against him; or by allowing a counter-claim); (5) the judgment-debtor has previously agreed (as, for example, by a clause in a contract) to submit the controversy to the jurisdiction of the foreign court;[7] or (6) the judgment-debtor has voluntarily appeared before the foreign court as defendant.

The question whether a defendant appears 'voluntarily', *i.e.* whether his appearance is not vitiated by some force, fraud or duress, is distinct from the question what *scope* he assigns to his appearance, that is, whether it is entered solely to contest jurisdiction or generally to the merits. An appearance which is only to the jurisdiction is partial or limited, even if it is perfectly voluntary. On the other hand, an appearance can be unlimited, to the merits, and yet be vitiated by duress.[8]

Apart from cases where the defendant's appearance is not 'voluntary' because he is actually coerced or tricked, the common law also considers an appearance not to be 'voluntary' if it is made with a view to salvaging the defendant's property seized or threatened with seizure within the jurisdiction of the foreign court.[9] Since the theme of this paper is the effect of an appearance which is limited, it will be assumed that the appearance is otherwise impeccable, and in particular that it is voluntary. An appearance which is not voluntary is not in any event internationally binding on the defendant, even if entered without reservation.

[7] It is remarkable that at a time when English courts were looking askance at *arbitration* conducted in England as entailing a possible ouster of the jurisdiction of the courts, they saw nothing wrong in Englishmen freely agreeing to litigate before foreign tribunals rather than at home. *Cf.*, for example, *Copin v. Adamson* (1874) L.R. 9 Ex. 345, (1875) L.R. 1 Ex. D. 17; *Law v. Garrett* (1877) 8 Ch. D. 26. In English private international law there has traditionally been 'a nationalist tendency in the reluctance to apply foreign substantive law, *and an internationalist tendency in the readiness to recognize and to enforce foreign judgments*'. O. Kahn-Freund, *The Growth of Internationalism in English Private International Law* (1960) 13. (Italics added.)

That the foreign pre-selected court acquires jurisdiction is not, however, to say that the local court, which is otherwise competent and a *forum conveniens*, is necessarily excluded even where the parties purport by their agreement to confer on the foreign court exclusive jurisdiction: *cf. The Fehmarn* [1958] 1 W.L.R. 159. And see *Gilbert v. Burnstine* (1931) 255 N.Y. 348.

[8] To posit of an appearance that it has been entered 'voluntarily' leaves open the question whether the appearance was a plenary or a partial one. This is somewhat overlooked in, for example, the argument of counsel for plaintiff in *Harris v. Taylor* in the Court of Appeal: [1915] 2 K.B. 580, 583-4.

[9] *De Cosse Brissac v. Rathbone* (1861) 6 H. & N. 301; *Voinet v. Barrett* (1885) 55 L.J. (Q.B.) 39; *Guiard v. De Clermont* [1914] 3 K.B. 145. But the defendant's fear that property of his within the foreign jurisdiction, thus far unmolested, may be seized if he loses the case leaves his appearance 'voluntary': *De Cosse Brissac v. Rathbone, supra.* Fear that the defendant's property outside the foreign jurisdiction would be seized if it subsequently comes within the jurisdiction is too remote to invalidate the appearance: *Voinet v. Barrett, supra.*

A judgment-debtor who has not, by his own conduct (or 'submission'), precluded himself from challenging the foreign judgment (links 4, 5, 6), and who was also not subject to the foreign court on pre-existing extra-litigious grounds (links 1, 2, 3), is in principle free to resist the extra-territorial extension of the effect of a personal judgment rendered against him. No person is bound to respond to the summons of a court which has no authority over him merely because he would not in fact be inconvenienced thereby. Jurisdictional limitations

> are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the minimal contacts with that State that are a prerequisite to its exercise of power over him.[10]

It may happen that a person is summoned by some foreign court to which he does not appear to be related by any ties of allegiance or submission and which he consequently believes to lack international jurisdiction over him. He is then faced with the prospect of litigation far from his home and sources of testimony and legal advice, which is likely to be burdensome, awkward and costly, and perhaps conducted under the auspices of a legal system or of a regime unknown uncongenial or even hostile to him. He has, moreover, as has been seen,[11] a right not to be troubled by such a court even in the absence of inconvenient or aggravating circumstances. Yet although the judgment of the summoning court may be such that it will not be recognized or enforced in the defendant's home country, or in countries in which the defendant enjoys property, and there is for the moment no danger of execution within the territory of the summoning court itself, nevertheless to do nothing, to leave the foreign proceedings 'severely alone'[12] and let judgment go by default, is not always prudent.

In the first place, the defendant may at some future date desire or need to visit or pass through the foreign country in question on business or pleasure—but with an unsatisfied judgment hanging over him, the venture is fraught with danger. The more central or important or the closer that country is, the more is such a judgment likely to hamper his movements. Secondly, property of his may in the future

[10] *Hanson v. Denckla* (1957) 357 U.S. 235, 251.
On the other hand, a judgment rendered *with* international jurisdiction is binding on the defendant in England even where the foreign court is, in English eyes, a *forum non conveniens;* or even if it can be presumptively shown that, had the summoned defendant pleaded with the foreign court to refrain from the exercise of jurisdiction, that court would have desisted as being, in its own eyes, a *forum non conveniens.*

[11] N.10, *supra.*

[12] Davey L.J. in *In re Low* [1894] 1 Ch. 147, 160.

find its way into the country in question, perhaps unwittingly, as with merchandise in transit; or a debtor of his may move to the foreign country and the debt may then be garnished there; or he may bank with, or hold insurance from, a corporation which maintains branches in the foreign country in question. In all such cases execution of the judgment may become possible. Thirdly, there is also the possibility that whilst the default judgment would not be recognized or enforced in any country in which it can be executed, it might nevertheless be sued upon and converted into a local judgment in some other country whose rules of private international law do recognize the competence of the summoning court. That new judgment may then be eligible for recognition or enforcement in the defendant's home country, or in a country in which he has property, or which he is likely to visit, on the strength of a treaty or a statute which requires recognition of all judgments of that *other* country. For example, a domiciled Englishman has a default judgment entered against him by a foreign court exercising jurisdiction in personam on the sole ground of the existence within its territory of some property of that Englishman. The judgment is not entitled to recognition or enforcement in England. If, however, the judgment is sued upon Scotland (as, it seems, it may be) and a Scottish judgment is entered thereon, the judgment-creditor will therafter acquire an absolute right, under the Judgments Extension Act, 1868, to register the Scottish judgment in England. That judgment will then be 'of the same Force and Effect' (s.1) as if it were 'originally obtained or entered up' in England.[13] Thus the international effect of a judgment may be found to depend ultimately upon the liberal rules on recognition which obtain in some less exacting third country. A man's armour against arrogated jurisdiction is only as thick as is the thinnest sheet of his defensive plate.

In any event, apart altogether from any question of formal recognition or of enforcement, the content of an adverse judgment may be publicized and may come to be the source of social and business embarrassment, the influence of a judgment on people's minds not being necessarily confined by state frontiers.

And a final peril should be considered. The summoned person believes the foreign court to lack international jurisdiction over him. But this belief may be proved wrong. After the judgment is brought to England, the English court may hold, contrary to the defendant's honest belief, that the foreign court did have jurisdiction.

The advice, therefore, frequently offered, that a defendant summoned by a court which he believes not to have jurisdiction over him

[13] S. 8 of the Act, which excludes the extension to England of a judgment pronounced in Scotland upon an arrestment of property, only helps the judgment debtor where the *Scottish* proceedings are thus founded. It is immaterial, under the Act, that the jurisdiction *of the country whence the judgment has been brought to Scotland* was founded upon arrestment of property.

should do nothing, is not necessarily safe or wise.[14] However, if the defendant decides to counter these perils by responding to the summons, he will be saddled with the burden of highly troublesome litigation, the real cost of which may be such that even if completely vindicated he will be unable to recoup himself.

In an effort to outflank this dilemma, the summoned person may try to steer a middle course between the unattractive alternatives of ignoring the foreign summons and heeding it: he may decide to appear 'under protest' (or to enter a 'special' or 'modified' or 'conditional' appearance), solely in order to contest the jurisdiction of the summoning court or to induce it to stop the proceedings on the ground that, even if it has jurisdiction, it is a *forum non conveniens*. If he succeeds, the mischief of having to elect between undesirable litigation and an undesired judgment is averted at the outset. But if the summoning court determines the jurisdictional or preliminary issue against the protesting defendant and then proceeds with the merits of the case and enters judgment against him—will the defendant thereafter be precluded from resisting that judgment, in his own and in other countries, on the ground of want of jurisdiction? Will he for ever after be stopped from challenging the judgment, because having entered an appearance (albeit a modified one), he must be deemed to have submitted to the jurisdiction of the summoning court? Will he have to meet the argument that, having solicited the

[14] While no such advice is expressly given in *Harris v. Taylor*, it is there pointed out ([1915] 2 K.B. 580, 587) that this alternative was open to the defendant, and that had he taken it, it would have saved him much trouble. Cheshire, *Private International Law* (6th ed. 1961) 645-6 refers to the conduct of the defendant who chose to appear under protest, instead of doing nothing, as 'gratuitous intermeddling in proceedings *that might safely have been ignored* that led to the discomfiture of the defendant'. (Italics added.)

According to Westlake, *Private International Law* (7th ed. 1925) 404, 'it would appear that the only safe course for a British [why *a British*?] defendant sued in a foreign court whose jurisdiction he contests is to enter a protest against the jurisdiction, and do no more until application is made to enforce the judgment in England. He may lose the property he had in the foreign country, but he may be able to resist the execution of the foreign judgment against his property in England; whereas, if he submits in any way to the foreign jurisdiction, he will lose that power'. This view is adopted, and repeated almost verbatim, by Read, *Recognition and Enforcement of Foreign Judgments* (1938) 170.

Read appears to differ from Westlake on the advisability of sending even the barest protest. He thinks that the only safe course, before the defendant is sued at home on the resulting default judgment, 'is to do nothing' (*ibid.*).This departure from Westlake is probably due to apprehension that if under the foreign law in question a protest is construed as a general appearance, then, on the authority of *Harris v. Taylor, supra*, the defendant might be held to have submitted.

Advice not to go to the foreign court to contest the jurisdiction is also offered by Schmitthoff, *The English Conflict of Laws* (3rd ed. 1954) 468. For a rare, possibly unique, instance of *judicial* advice to ignore a foreign court altogether see Malins V.C. in *In re Boyse* (1880) 15 Ch. D. 591. Nevertheless, it will be argued that protesting, as distinct from contesting, will not of itself subject a person to an alien jurisdiction—regardless of any contrary provision of the foreign law on this matter. See p. 24 ff., *infra*.

By overlooking all but one of the risks which may arise from ignoring a foreign summons, the above writers tend to minimize unduly the gravity of the summoned defendant's predicament.

summoning court for a decision against jurisdiction, he must therefore abide by its adverse decision?

The question can be restated: Does a defendant summoned by a foreign court, who does nothing except enter an appearance under protest in order to challenge jurisdiction, establish by this very act a sufficient 'minimal contact' between himself and the foreign court, so that thereafter the foreign court is recognized by English law to have acquired authority over him?

## HARRIS V. TAYLOR

The Court of Appeal were presented with this problem in *Harris v. Taylor*[15]. The defendant, a domiciled Englishman, was summoned to appear before a foreign (Manx) court in a claim for damages for a tort[16] alleged to have been committed in the foreign country. Service was effected in England, out of the jurisdiction of the Manx court. The defendant sought and obtained from the Manx court leave to enter, and did enter, a 'conditional appearance'. In the words of the record of the foreign court[17], this is what then happened: 'Mr. Cruickshank *[*the defendant's local advocate*]* appears conditionally to set aside writ. Defendant to file motion to set aside writ.' A few days later the defendant complied with this ruling to file a motion. He also denied the commission of any wrong in the Isle of Man. Thereafter, we are told, counsel for both parties were heard and 'the motion was dismissed.' This jurisdictional or preliminary contest having been lost, '*[*t*]*he defendant took no further part in the proceedings.' In due course the foreign court entered judgment against him in his absence for £800 and costs.

The plaintiff later brought an action in England to enforce the judgment. He was successful in first instance, before Bray J., whose judgment[18] is stated[19] to have been based

> on the ground that the defendant by 'conditionally' appearing in the Isle of Man Court and applying to set aside the writ and the order for the service of the writ out of the jurisdiction had voluntarily submitted himself to the jurisdiction of the Court within the fourth rule in *Emanuel v. Symon.*[20]

15 [1915] 2 K.B. 580.

16 Virtually for a tort: the action was instituted as a preliminary to seeking from the Manx legislature an Act of divorce. The wrong charged to the defendant was a series of adulterous relations with the plaintiff's wife, both in England and in the Isle of Man. Initially, damages had been claimed for loss of consortium and for criminal conversation with her. The claim for loss of consortium was subsequently abandoned. See the first-instance report in (1914) 111 L.T. 564.

(Page references, where not otherwise indicated, are to the report of the proceedings in the Court of Appeal: [1915] 2 K.B. 580.)

17 Quoted in the judgment of Buckley L.J., at 585.

18 (1914) 111 L.T. 564.

19 [1915] 2 K.B. 580, 582.

20 [1908] 1 K.B. 302. The 'fourth rule' in *Emanuel v. Symon* is that in actions *in personam* a foreign judgment will be enforced in England where the defendant 'has voluntarily appeared' in the foreign court; [1908] 1 K.B. 302, 309. See p. 4, *supra*.

In the Court of Appeal the decision of Bray J. was unanimously upheld. The headnote runs as follows:

> *Held,* affirming the judgment of Bray J., that the defendant by reason of his application to the Isle of Man Court had voluntarily submitted to the jurisdiction of that Court and that the judgment was, therefore, enforceable against him in England.

The headnote, while not inaccurate, is very compressed. It may, moreover, mislead the reader to conclude that an appearance under protest has, as such, exactly the same force as an unqualified appearance to the merits and that, like the latter, it amounts to a full-bodied submission. It will, however, be argued that a qualified appearance differs from an appearance on the merits.

Three distinct *rationes decidendi* were uttered in the Court of Appeal, and they call for separate examination.

(a) The *ratio* of Pickford L.J. is found, it is believed, in the following passage:[21]

> . . . if a defendant applies to a Court to set aside the service of a writ . . . ., *and the court is one which has power to treat that application as constituting an appearance to the action*[22], that in my opinion amounts to such a submission on the part of the defendant to the jurisdiction of the Court as renders him liable to obey the judgment of the Court.

Pickford L.J. is thus prepared to distinguish between two otherwise identical instances of behaviour on the part of summoned defendants, according to the existence in, or absence from, the law of the foreign country of a provision equating limited appearance to plenary appearance. This view jettisons the English concept of appearance (and, thus, of submission by appearance) in deference to a different concept held by another system. It also leads to unlike results in like cases. For reasons developed hereafter, it is believed that no attention should be paid to such a provision in the foreign law, and consequently that this *ratio decidendi* is not valid.

(b) The *ratio* of Bankes L.J. is found, it is believed, in the following passage:[23]

> . . . the principle underlying the case of a person resident in the foreign country or of a person who has agreed to submit to the jurisdiction of its Courts applies equally to the case of a person who appeals at a preliminary stage to the foreign Court to relieve him from an obligation which the plaintiff by means of the action seeks to put upon him. In *Carrick v. Hancock*[24] it was held that the fact that the residence of the defendant in the foreign country was merely temporary was not

21 [1915] 2 K.B. 580, 590; italics added.
22 The Manx court was taken to have had, under its law, this power.
23 [1915] 2 K.B. 580, 591-2; italics added.
24 (1895) 12 Times L.R. 59.

> sufficient to oust the jurisdiction of the Courts of that country over him.[25] . . . *It seems to me that if the duty of allegiance exists in a case like that where a mere temporary protection of the law of the foreign Court is enjoyed, the case is far stronger when a defendant actually appeals to a foreign Court to relieve him from a liability which the plaintiff by his action seeks to place upon him.*

Bankes L.J. thus likens the alleged duty of a protesting defendant to obey the foreign court to the duty of temporary allegiance which is incumbent upon a person who lives, albeit only temporarily, under the protection of a foreign law.

The analogy, it is submitted, is imperfect and misconceived. Residence is a tie between the defendant and a country which is independent of judicial proceedings instituted against him there and usually antedates such proceedings. A resident in a country does, indeed, benefit from the protection of its laws. Thus a pact of sorts is formed between him and 'the laws' of that country—an old idea, invoked by Socrates[26]—and it is fair that he should live up to his part of the bargain by obeying those laws when they speak to him through the judgment of a local court. This idea, such as it is, is inapplicable to the case of a defendant summoned by a totally alien court. Here, the defendant had not, through conduct independent of and antecedent to the litigation in question, established a pact between himself and 'the laws' of the foreign country. He never received or benefited from the protection of those laws. The defendant appeals to the foreign court and seeks its interposition against an encroachment first threatened by the very proceedings in question.

Moreover, contrary to Bankes L.J., he does *not* appeal to the foreign court 'to relieve him from a liability which the plaintiff by his action seeks to place upon him'. The plaintiff, by his action, is powerless to place upon him any liability; it is not for protection against the plaintiff's activity that the defendant appeals to the foreign court. It is against *its own* proposed encroachment that he appeals to it; and if the foreign court accedes to his appeal it does not thereby preserve him from an external harm—it merely agrees to abstain from its own proposed encroachment. The only 'benefit' which the defendant receives lies in maintaining the *status quo*.

Such an appearance may be contrasted with an appearance to the merits by application of the following simple test: what will the defendant obtain if he is completely successful in the foreign court? In the case of a plea to the jurisdiction, he will merely find himself as before the proceedings and liable to be cited before some other court; in a plea to the merits, he will have a substantive judgment in his favour which will thenceforth bar, through *res judicata*, other

[25] See the observation on this case in n. 5, *supra*.
[26] *Crito*, 50-52. *Cf.* Job 2: 10.

suits against him. It is, therefore, submitted that the *ratio decidendi* of Bankes L.J. is also invalid.

(c) The *ratio decidendi* of Buckley L.J. is embedded, it is believed in the following passage.

> The course adopted by the defendant's advocate on March 17 was either a qualified appearance or an unqualified appearance. If it can be regarded as a qualified appearance, *it was an appearance for the purpose of getting a decision of the Court on the question whether the defendant was bound by the jurisdiction of the Court. The decision was against him, and thereafter it was not open to the defendant to say that he was not bound.*[27]

Buckley L.J. does not expressly utter the words '*res judicata*', but it is clear that this is the idea which dominates his thinking. If, as he says, the defendant appeared 'for the purpose of getting a decision of the Court', he is thereafter bound by its decision. *To the extent of soliciting such a decision*, he had submitted to the jurisdiction of the foreign court by voluntarily appearing therein. To this extent, then, the foreign court had jurisdiction over him in the eye of English private international law, and that court was therefore capable of creating, and did create, an estoppel by way of *res judicata*, endowed with extra-national authority.

The judgment of Buckley L.J. thus appears to be the soundest of the three and to lay down the kernel of a valid and important doctrine. This doctrine is that the question whether a summoned defendant is subject to the jurisdiction of a foreign court is a question that may, in certain circumstances, become concluded between him and the plaintiff by decision of that court itself.

The formulation by Buckley L.J. is in unqualified terms. A number of distinctions and difficulties which are suggested by it will now be discussed, as also incidentally the question whether his decision was properly attuned to the actual record in *Harris v. Taylor*.

## DOCTRINE OF HARRIS V. TAYLOR CONSIDERED

A summoned defendant who protests the jurisdiction but then abstains from resisting on the merits, does not cause his adversary to incur the trouble and expense incident to fighting a case on the merits. An appearance of this limited scope thus differs from the plenary appearance which constitutes full submission to the court.[28]

Such at least is the case unless the protesting defendant misleads the plaintiff to believe that battle will *also* be joined on the merits. If he misleads and encourages the plaintiff to make the preparations and to incur the trouble and expense incident to resisting the claim,

[27] [1915] 2 K.B. 580, 588; italics added.

[28] *Cf.* also Story, *Commentaries on the Conflict of Laws* (8th ed. Bigelow, 1883) 809 n. (6).

his appearance may be treated as plenary—and may be binding on him, although he does not in fact later take part in the litigation on the merits.[29]

In any event, the protesting defendant accepts the jurisdiction of the summoning court on the preliminary issue of his amenability to it, and causes the plaintiff to join battle and to incur the trouble and the expense involved in fighting him on this issue. He also causes the plaintiff to lose time that might be available to bring an action before some other court, where a local statute of limitations may intervene. The defendant should, therefore, in fairness to his adversary, be precluded for the future from acting in any country in disregard of the decision of the summoning court on this preliminary issue. On this issue its decision should be held, as between himself and his adversary, to be *res judicata.*[30] Otherwise, the plaintiff, who was made to fight on the jurisdictional issue, will have fought in vain.

However, the significance of the preliminary issue having become *res judicata* varies according to what it is precisely that has become *res judicata,* because the foreign court may have upheld its own competence on one ground rather than on another.

In *Harris v. Taylor* Buckley L.J. refers[31] to the question, for a decision on which the defendant appeared, as 'the question whether

29 What of the somewhat unusual case of a defendant *who enters an unqualified appearance* but refrains thereafter from participating in the litigation on the merits? In the passage quoted at n. 27, *supra,* Buckley L.J. appears to take it for granted that if the defendant enters an unqualified appearance, there is nothing more to be said—even where, as in *Harris v. Taylor,* he does not in fact later defend on the merits. In this, it is thought, Buckley L.J. is right. While the point does not appear to be directly covered by authority, such a defendant implicitly promises obedience to the judgment of the court. An analogy can perhaps be drawn between him and a defendant who *agrees* to submit the dispute to the foreign court and who is held to be bound on the strength of such agreement alone even where he does not subsequently enter *any* appearance to the proceedings, not even a qualified one.

Furthermore, a defendant who enters an unqualified appearance causes his adversary to alter his position: not to seek relief in any other jurisdiction, and possibly also (at least where the defendant fails to intimate his intention *not* to fight on the merits) to embark on the work preparatory to litigation on the merits, although such litigation may not eventually take place.

30 Even if it is assumed that, in principle, 'the doctrine of *res judicata* only applies to *facts* in dispute' (R. P. Meagher, 'Submission to the Jurisdiction of a Foreign Court' (1956-58) 2 *Sydney Law Review* 580, 585; but see, *e.g.,* 15 Halsbury (Simonds ed.) 183), it is nevertheless believed that, in this context, 'the alleged distinction between law and fact should be rejected, and that in every case where the question of jurisdiction *in personam* has once been litigated, the decision made should be regarded as final'. (Harold R. Medina, 'Conclusiveness of Rulings on Jurisdiction', (1931) 31 *Columbia Law Review* 238, 257; and see 251-2). This is so because the question whether a certain court had jurisdiction at a certain point of time over a certain person is not a question of objective law but a question as to the existence of a concrete right, a 'state of things', to which the doctrine of *res judicata* applies. Similarly a determination that Whiteacre belongs to John Smith involves 'law' and not only 'facts'. (*Cf. Cooper v. Phibbs* (1867) L.R. 2 H.L. 149, 170: *De Tchihatchef v. Salerni* [1932] 1 Ch. 330.)

That '[t]he principles of *res judicata* apply to questions of jurisdiction as well as to other issues' has been decided in the United States more than once, notably in *American Surety Co. v. Baldwin* (1932) 287 U.S. 156, 166 and in *Treinies v. Sunshine Mining Co.* (1939) 308 U.S. 66, 78.

31 P. 11, *supra.*

the defendant was bound by the jurisdiction of the Court'. What does this signify? The foreign court could not decide the very issue which arises in the subsequent proceedings in England, *viz* whether its judgment-to-be-given is recognizable or enforceable in England. It is not normally reasonable to suppose that parties argue before a tribunal of country A the question whether its judgment-to-be-given would or would not be recognized or enforced in country B. Assuming, however, that by some coincidence the parties moot this very question, and the court of country A purports to pass on it, it is quite clear that, *to this extent*, that court has no international jurisdiction whatever. To hold otherwise would mean that the courts of one country have direct authority over the courts of other countries. In the present state of public international law, as long as the rules *Par in parem imperium non habet* and *Extra territorium jus dicenti impune non paretur* continue substantially unimpaired, such a proposition cannot be entertained. and as *res judicata* can only flow from a court endowed with jurisdiction,[32] a decision by a court of one country which purports to prescribe its own future effects in another country cannot have the force of *res judicata*. The question whether a foreign court was acting with international jurisdiction must be ultimately answered by English private international law and cannot be prejudged by the foreign court in question.

Nevertheless, while the foreign court could not have concluded the question of its international jurisdiction as a synoptic or comprehensive issue, in consequence of litigating before it the question of its jurisdiction (or the question whether it was *forum conveniens*) various facts[33] may have become *res judicatae* between the parties. If the defendant goes to a foreign court to resist the proceedings on the ground (say) that the contract in question between him and the plaintiff, alleged by the latter to have been signed within the territory of the foreign court, was in fact made in some other country, and the court decides on the evidence that the contract was indeed signed within its territory, then the defendant is thereafter estopped from professing in England that the contract had not been signed where it was found by the foreign court to have been signed.

Yet this particular estoppel is of no relevance in subsequent proceedings in England for recognition or enforcement of the judgment: because the fact concluded—the place of signing of the contract—does not constitute one of the six links of international jurisdiction accepted by English law. Under the rules of the foreign summoning court it may have been important to determine whether or not the contract had been entered into within the territorial limits of the

32 *Cf.* Evershed M.R. quoted at p. 28, *infra*.

33 Including subjective legal conditions, as nationality, which is a mixed question of fact and law.

court, because under those rules the court may have been given authority over suits concerning contracts entered into within its jurisdiction. But the matter has no other importance.

Suppose, however, the summoned defendant goes to the foreign court to resist its jurisdiction on the ground that at no time had he resided within its territory, as against the plaintiff's contention that when proceedings were commenced the defendant was resident therein. The court decides on the evidence against the defendant. Here, again, it may be assumed that the reason why plaintiff and defendant took the trouble to join issue on the question of the defendant's residence, and why the foreign court saw fit to pass on the question, was that under its rules the question was material, *i.e.* that a defendant's residence within the territory of the summoning court is one of the circumstances in which that court is given, by its national law, jurisdiction over defendants. What concerned the foreign court was not its international jurisdiction but jurisdiction under its own law. And yet the fact of the defendant's residence within the territory of the foreign court also constitutes one of the jurisdictional links which suffice to endow a foreign court with *international* jurisdiction.

In the subsequent English proceedings the plaintiff maintains that the foreign judgment was given by a court endowed with international jurisdiction *because of the defendant's residence within its territory at the time of the institution of the proceedings* (a fact significant under English law);[34] the defendant is precluded from contesting this; the English court is thus led to decide that the foreign judgment was pronounced with international jurisdiction. The substantive ground of international jurisdiction is *not* the fact of the defendant's appearance before the foreign court to protest (which, of itself, is an insufficient link)[35], but the existence of an international link (say, that of residence) between him and the foreign country, the existence of which has become an adjudicated fact.[36] The defendant may still challenge the foreign judgment on such grounds as fraud, or that it

[34] *Cf.* p. 2, *supra.*

[35] *Cf.* p. 2, *supra.*

[36] It is failure to accord due weight to the defendant's estoppel to challenge the existence of the jurisdictional link (which has become *res judicata* between him and the plaintiff) that is responsible for considering 'illogical' the idea that a man who protests against a foreign jurisdiction may nevertheless submit to that jurisdiction. Meagher, *op. cit.*, says (at n. 10a), quite rightly we believe, that 'the normal usage of the word "submission" . . . is something not far distant from voluntary acquiescence'. And at 589 adds: 'Logically, . . . if a defendant protests a court's jurisdiction he does not submit to its jurisdiction. The essence of the idea of submission is that the defendant voluntarily accepts a court's arbitration. If any sort of protest be a submission, we have people submitting against their will, which is a logical contradiction.'

While 'any sort of protest' is not, indeed, a submission, still when a defendant voluntarily appears and litigates before a court (competent *ratione materiae*) the existence of a certain fact, he does submit to its judgment on the question of the existence of that fact.

offends against natural justice[37]—but not on the ground of want of international jurisdiction.

To have this effect the decision of the foreign court must have produced *estoppel* by *res judicata* as to the existence of one at least of the six contacts or links between the defendant and the foreign country in question recognized by English law as sufficient.

It is not invariably clear from the foreign judgment whether the existence of one of the six links has become *res judicata*. The foreign court may have decided to uphold its jurisdiction solely on one or more links sufficient under its municipal procedure but not recognized by English private international law, *e.g.* on the link, already referred to, that the contract in question had been entered into within its territory; or on the fact, disputed before it by the defendant, that the plaintiff was its national (as is possible with a French court); or on the fact, again disputed by the defendant, that the defendant had, at the commencement of proceedings, property within its territory (as is possible with a Scottish court). It is, indeed, worth recalling that no argument addressed to a foreign court to the effect that it lacked *international* jurisdiction is likely to be adjudicated by the court, unless the disputed fact or facts of international jurisdiction happen to be such that they also give jurisdiction under the domestic law of the foreign court. Just as it is clear, both in principle[38] and on authority,[39]

[37] Piggott, *Foreign Judgments and Jurisdiction* (3rd ed., 1908) i. 353. *Cf.* also *Freeman on Judgments* (5th ed. 1925) i. 531.

[38] From the very existence of the power to allow service in cases where there is no international jurisdiction it follows that the want of international jurisdiction cannot, *per se*, be a bar to the exercise of the power.

The court has a discretion, and will refuse leave to serve out of the jurisdiction, or will set service aside, when satisfied that the foreign defendant has a practically unanswerable defence on the merits (*Société Générale v. Dreyfus Bros.* (1888) 37 Ch. D. 215), or that the English proceedings will otherwise cause him undue hardship (*The Hagen* [1908] P. 189). *It will not, however, refuse leave, nor set aside, on the sole ground that it lacks international jurisdiction: and yet it is this ground that suffices to render its judgment unrecognizable and unenforceable in other countries.*

[39] Thus in *The Hagen* [1908] P. 189, 196, Lord Alverstone says: 'I am anxious not to be unduly influenced by the fact that we are dealing with a case in which it is sought to bring persons, who have not come here and whose property is not here, before the jurisdiction of these Courts. As far as that jurisdiction goes we are bound in this Court by the view—and I shall loyally act upon the view—that the Court has jurisdiction . . .' ('The view' is the provision of O. XI, r. 1(g) of the R.S.C.). Kennedy L.J. says (at 204): 'There is no doubt that there was jurisdiction under Order XI, r. 1. sub-r. (g) to bring in this foreign defendant'. See also *Fowler v. Barstow* (1881) 20 Ch. D. 240.

In *Société Générale v. Dreyfus Bros, supra*, which is an extreme case 'when one foreigner sues another [and of the same nationality!] in the courts of this country on a foreign contract' (per Lindley L.J. at 226), the question of possible impropriety of service abroad for want of international jurisdiction is not even considered. *Oppenheimer v. Louis Rosenthal & Co.* [1937] 1 All E.R. 23; *The Metamorphosis* [1953] 1 All E.R. 723; *Entores Ltd. v. Miles Far East Corporation* [1955] 2 Q.B. 327, *Matthews v. Kuwait Betchel Corporation* [1959] 2 Q.B. 57—are all cases (and there are many others) in which the availability of the alleged link under the R.S.C. is considered, but the question of international jurisdiction entirely disregarded.

It does not follow, however, because a summoned defendant cannot succeed in setting the writ aside for want of international jurisdiction, that he may not be successful on the ground of *forum non conveniens*. See B. D. Inglis, *op. cit.*

that an English court will not set aside *its own* summons, served out of the jurisdiction in accordance with English rules of procedure, merely because the defendant satisfies it that it lacks, in the circumstances, *international* jurisdiction, so it is reasonable to assume that other courts act.

If the foreign court could have upheld its jurisdiction on either one or more domestic grounds or on one or more international grounds, then a mere general decision affirming jurisdiction does not show on which ground or grounds it in fact passed; consequently the only possible answer to the question what has become *res judicata* is the formal one that nothing is known to have become *res judicata.*[40]

In *Harris v. Taylor* the protesting defendant moved the Manx court on the following grounds:

> (1) that the Rules of the Isle of Man High Court of Justice, 1884, do not contemplate or authorize service out of the jurisdictions; (2) that no cause of action arose or exists within the jurisdiction of these Courts; (3) the defendant is domiciled in England and has never had a domicile in the Isle of Man.[41]

We are not given the ground or grounds on which the foreign court dismissed the motion and upheld its jurisdiction. Consequently it cannot be said[42] what, if anything, had become *res judicata* between the parties.[43] If we assume that, in rejecting the defendant's argument, the Manx court decided that (1) the Manx Rules of Court did authorize the service on him out of the jurisdiction, and or (2) that the cause of action *did* arise and exist within the Manx jurisdiction —then we must suppose these matters to have become *res judicatae*

[40] If, however, the jurisdiction of the foreign court was contested on one or more facts which constitute international links and on no fact which is a purely national link, then it is evident that a decision by the foreign court upholding its jurisdiction must have rendered the existence of at least one such international link *res judicata.* It would be a nice question in the law of estoppel whether a judgment which must have decided that the defendant was a national of the foreign country *or* was resident therein, but without stating which, precludes him from subsequently challenging the international jurisdiction of the foreign court.

[41] [1915] 2 K.B. 580, 581. According to (1914) 111 L.T. 564, 567, the defendant only relied on the first two grounds, the third ground being incorporated as a statement of fact in the accompanying affidavit. See next note.

[42] The judgment of Bray J. in first instance does briefly refer to the Manx dismissal of the motion—thus: 'The learned [Manx] judge dismissed the motion with costs, holding that the rules authorized the order for service out of the jurisdiction, and that a cause of action was within the jurisdiction of the [Manx] court even if the offence was committed only in England.' ((1914) 111 L.T. 564, 567.) If these were the only two holdings, it is clear that no issue relevant to the subsequent enforcement proceedings in England (*i.e.* no issue as to the existence of at least one 'minimal contact' between the defendant and the Isle of Man) has become *res judicata.* See *infra.*

[43] On the version quoted in the preceding note, two matters have become *res judicata*: (1) that the service on the defendant out of the jurisdiction was authorized by the Manx rules of court; (2) that the cause of action 'was' (whatever that may mean, when speaking of a transitory cause of action) within the Manx jurisdiction neither matter establishing the existence of a contact deemed sufficient by English private international law.

against the defendant, and receivable as such, for what they were worth, in England. Yet these *res judicatae* would not be material in the enforcement proceedings in England.[44]

The third ground, *viz.* 'the defendant is domiciled in England and has never had a domicile in the Isle of Man', is on a different footing. Had the Manx court decided against the defendant that he had, at the time of the commencement of proceedings, been domiciled in the Isle of Man, a *res judicata* on this point would have been decisive against him in the English proceedings.[45]

As, *for the purposes of Manx law*, an affirmative finding on both (or even on one only) of the first two grounds would have sufficed for upholding jurisdiction, it cannot be known for certain that the Manx court passed on the existence or the non-existence of the third ground.[46] In these circumstances, the only conclusion formally possible from the record is that the existence of an international contact had not become *res judicata* against the defendant. In the result it follows that, on the reported facts, the defendant should not have been held internationally bound by the judgment of the Manx court.

So far we have assumed that, in the later proceedings in England, the fact of the protesting defendant's voluntary appearance before the foreign court is not denied by him: neither the fact of his having gone there, nor the fact of his having gone voluntarily. A defendant will not normally contest a manifest fact which is easy to prove or to disprove and is correspondingly difficult to lie, or to be obdurate or evasive about. If, nevertheless, the defendant is disposed to challenge the very fact of appearance, it is clear in principle that he cannot be precluded from trying to do so, and that notwithstanding any contrary recital in the judgment or record of the foreign court.[47] The foreign

[44] See also n. 42, *supra*.

[45] Assuming that in English private international law domicile is a sufficient 'minimal contact'. See n. 4 above. It is also assumed that 'domicile' in Manx usage is the same as in English.

[46] From the version given in n. 42, above, it is clear that the third ground had not become *res judicata*.

[47] Foreign courts are not 'courts of record.' The English domestic rule of estoppel by matter of record, as distinct from the narrower rule of *res judicata*, does not apply to them. I Wms. Saund. (ed. 1871) 116, n.(g). (In a sense *res judicata* is wider than estoppel by record, because it also applies to judgments of courts not of record.)

Whichever test is adopted for the venerable distinction between courts of record and courts not of record (power to punish by fine and imprisonment for contempt; power to hear and determine according to the course of the common law issues exceeding 40s. in value; amenability of its judgments to revision by writ of error; etc.), since all courts of record, except courts of the counties palatine, are courts of the Queen, foreign courts are of necessity excluded. See Halsbury *Laws of England* (Simonds ed.) ix, s. 816. (But see *Phipson on Evidence* (9th ed. 1952) 423.)

*Cf. Hall v. Lanning* (1875) 91 U.S. 160. We may accept, in principle, the statement in *Freeman on Judgments* (5th ed. 1925) iii. 2835: '. . . a party who was not in fact within and never in anywise submitted himself to the jurisdiction of a court cannot be brought within its control by its assertion of jurisdiction over him or even by its adjudication of facts the actual existence of which would confer such jurisdiction. An adjudication upon this matter could obviously be no more conclusive upon such a defendant than an adjudication of the merits of the action. There is

summoning court cannot 'lift itself by its bootstraps' and acquire jurisdiction over the defendant on nothing better than its say-so.

* * *

If a defendant does in fact litigate on the merits, should it make a difference in his favour that he also protests against the jurisdiction? Can he contrive to plead on the merits 'subject to' his protest to the jurisdiction? It may be asked why a defendant, who objects to the jurisdiction of a foreign court, should be '"disentitled to protect himself from the consequences of his own view . . . being wrong" by arguing on the merits subject to his protest'?[48]

This is a weighty question. Some answer that a defendant who acts thus should not indeed be internationally bound by the judgment. There is also some American authority to the effect that a defendant who only proceeds to answer on the merits after having his jurisdictional objections dismissed should not be held to have submitted.[49] To conform with this view the assumption is made that if the judgment on the merits turns out to be *favourable to the objecting defendant*, the defendant should nevertheless be bound by his objections to the jurisdiction and should not be allowed to avail himself of the judgment internationally. If so, the argument continues, is it not balanced and fair to hold the defendant internationally immune from the judgment if it is *against* him?

The question whether a defendant, who is eventually successful on the merits, continues to be bound by his objections to the jurisdiction is a truly difficult one,[50] in which estoppels and counter-estoppels appear to be delicately poised. It is believed that the assumption that such a defendant is 'bound by his objections' is not correct; and that the orthodox English view, *viz* that a defendant

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no jurisdictional foundation for any action by the court which would be binding *in personam* against him.'

Note the tacit assumption that competence is required to adjudicate upon jurisdictional facts as it is required to adjudicate upon substantive facts.

[48] Per Pollock C.B., with reference to arbitration proceedings, in the course of argument in *Davies v. Price* (1864) 34 L.J. (Q.B.) 8, quoted by J. A. Clarence Smith, 'Personal Jurisdiction' (1953) 2 *International and Comparative Law Quarterly* 510, 517. At 517-20 of Smith's important article the question is developed why a defendant should not be entitled to resist the international recognition of a foreign judgment which he has fought on the merits if he has, nevertheless, also contested the international jurisdiction of the foreign court.

[49] *Cf. Preston v. Legard* (1933) 160 Va. 364; *Toledo Rly. & Light Co. v. Hill* (1917) 244 U.S. 49. Duncan and Dykes, *The Principles of Jurisdiction as applied in the Law of Scotland* (1911) 257, writing on Scottish law, say that 'if a defender timeously pleads no jurisdiction, and his plea is repelled, the circumstances of his thereafter proponing other defences would not infer submission to the jurisdiction'.

[50] And was described as difficult by Chief Baron Pollock (in argument in *Davies v. Price*, (1846) 34 L.J. (Q.B.) 8, 9; see also Smith, *op. cit.*, at 519) and hinted at, in passing, by Gibb, *The International Law of Jurisdiction in England and Scotland* (1926) 252-3. ('And what if the defendant objected to the jurisdiction of the court, He might as well be said to be bound by his objections.')

who objects to the jurisdiction but who also litigates on the merits should be taken to submit, deserves to be preferred.[51] There appears to be no ground on which a defendant who objects to the jurisdiction, and is overruled, should for the future be 'bound by his objections', and thus precluded from availing himself of the judgment if favourable to him, except the very flimsy one of 'approbation and reprobation'. This adage, however, is not a rule of law.[52] If it is meant that such a defendant, having argued against the international jurisdiction of the foreign court, is held for the future estopped, in the strict technical sense, from propounding the international jurisdiction of that court, then it is thought that the ingredients of such an estoppel are altogether wanting. For an estoppel to apply it should be shown that the defendant's 'representation' of no jurisdiction induced the plaintiff to alter his position to his detriment. But, in our case, the 'representee' (*viz* the plaintiff) did not in any way alter his position on the strength of this 'representation': on the contrary, his entire conduct in litigating is referable to the assumption of the existence of jurisdiction. Moreover, the view that a litigant who argues a certain position in court, and is overruled, continues for the future to be bound by his argument rather than by the decision of the court is untenable.[53]

Although he attempts to 'subject' his activity to a protest, a defendant who objects but also litigates on the merits causes his adversary the trouble, expense and prolongation incident to litigation on the merits. Looked at from his adversary's point of view, what such a defendant does is a sheer *protestatio facto contraria*, or, to use words of Holmes J.,[54] 'bringing about the facts and attempting to prohibit their legal consequence'. The defendant had an immunity designed to preserve him from the mischief of troublesome and expensive litigation far from home. But now the mischief is done—and done, moreover, by himself. There is no good reason to relitigate the question and vex another court. A defendant who litigates on the merits, submits—whether or not he also does other things.

It should also make no difference whether the defendant argues on the merits simultaneously with his objection to the jurisdiction, or

[51] Though not necessarily on the sporting, or 'approbating-reprobating', ratio invoked in *Boissière v. Brockner* (1889) 6 T.L.R. 85, *viz* that such a defendant is bound because 'he intends to take all the advantage he hopes to gain by appearing and by a protest to relieve himself from the disadvantage. He wishes to have the benefit without the burden'. This ratio begs the question, because (as Smith rightly points out, *op. cit.*, 519 *if* we were to hold the defendant bound by his objections (*i.e.* if he were forced to confine the advantages of the judgment to the territory of the foreign court), then it might be not unjust to lighten his burden in return.

[52] *Lissenden v. C.A.V. Bosch* [1940] A.C. 412, esp. 417-422. *Cf. De Bussche v. Alt* (1878) 8 Ch. D. 286.

[53] See also Meagher, *op. cit.*, and a Note by Mary Ellen Caldwell in (1955) 15 *Louisiana Law Review* 849 on the case of *Garig, etc. v. Harris*, (1954) 226 La. 117; 75 So. 2d 28.

[54] In *Thomas v. Mathiessen* (1914) 232 U.S. 221, 234.

only after that objection has been overruled.[55] If the existence of a sufficient international link becomes *res judicata* at any time prior to the proceedings in England, it should be immaterial at what time it so becomes. Thus, where the defendant does nothing, enters no appearance whatever, and judgment goes against him in default, and it is only later that he first applies to the foreign court to set the judgment aside, then if in the course of this application he has a day in the foreign court on the existence *vel non* of one of the international link—a determination made against him should be considered an estopping *res judicata*.[56] Indeed, it should make no difference that the existence of an international link has become *res judicata* as the result of litigation between the same parties quite unrelated to the instant proceedings.[57]

If the foreign court decides against the existence of any alleged international link, upholding its jurisdiction upon the existence of one or more links sufficient only under its domestic law, it may be wise for the defendant to retire forthwith from the case. He will be armed with *res judicata*, binding on his opponent, that the foreign court lacked international jurisdiction over him. For this reason it may be tactically wise for a protesting defendant to confine his attack to the existence of one or more 'domestic' links. In this way no estoppel can ensue as to the existence of any international link. So to confine the attack may not, however, always be feasible or profitable.

Where the foreign court is authorized, under its procedure, to decide the jurisdictional objection in favour of the defendant even though he has also gone on to engage on the merits, and does so

[55] Therefore, it is believed that the orthodox view, as expressed in the statements which follow, deserves to prevail. In *In re Dulles Settlement Trusts (No. 2)* [1951] Ch. 842, 850 Denning L.J. said: 'I quite agree, of course, that if he fights the case, not only on the jurisdiction, but also on the merits, he must then be taken to have submitted to the jurisdiction . . .'

In Dicey's *Conflict of Laws* (7th ed. 1958) 1021 it is said: 'There is held to be such [voluntary submission] also where he does indeed protest the jurisdiction but nevertheless proceeds further to plead to the merits.'

The *Restatement of the Law of Conflict of Laws* (1934) § 82, Comment b, says: 'An appearance entered by a defendant for a purpose other than to object that the court has no jurisdiction over him is usually held to subject him to the jurisdiction of the court.' And see, more explicitly, the *Restatement of the Law of Judgments* (1942) § 19, Comment c: 'At common law if the defendant appears to object that the court has no jurisdiction over him and also for other purposes, the court acquires jurisdiction over him.'

[56] It is assumed that his appearance in such circumstances is not vitiated by lack of 'voluntariness', as where he wants to save property. Here, as throughout this paper, we are concerned with the *scope* of the appearance; and it is assumed that it is otherwise impeccable. *Cf. In re Low* [1894] 1 Ch. 147.

[57] But see *McLean v. Shields* (1885) 9 Ont. R. 699; *Esdale v. Bank of Ottowa* (1920) 51 D.L.R. 485.

If, in the course of the defendant's application to set aside, there develops litigation on the merits, and the judgment is confirmed on the merits, the defendant should be held bound simply on the ground that he has voluntarily appeared and submitted. *Cf. Guiard v. De Clermont* [1914] 3 K.B. 145. A defendant who in fact voluntarily appears is not any the less responsible for his conduct because he acts 'in the course' of, or with a view to, some other aim, such as a setting aside of the summons.

decide, the litigation does not ultimately ensue in an operative judgment. In this case there may be nothing to be recognized or enforced in England.[58]

* * *

From a protesting appearance we must distinguish all varieties of *non-appearance*. He who appears under protest does two things: he appears and he protests. By protesting he assigns to his appearance a limited scope and purpose. He appears only in order to challenge the proceedings. But for that limited purpose he does appear. To do a thing under protest is not equivalent to not doing it.[59] The defendant does submit to the jurisdiction of the court, he does invite its decision and does have—on *this* matter—a day in court, and is therefore estopped by such *res judicatae* as follow. Otherwise his very protest would be under protest: a chimerical concept of protesting raised to the second power.

On the other hand, a person may decide not to appear at all, not even in order solely to raise the question of jurisdiction or of *forum conveniens*. Instead, however, of nursing a sullen resentment and leaving the foreign proceedings 'severely alone', he may prefer to write back and say that he protests against the summons. He does not ask for, nor does he have, a day in the foreign court. He does not contest the jurisdiction and ask for a decision of the foreign court: he rather tells it that it has none. He does not bow to it: he sends a communication as between equals. While he protests, he does not 'enter a protest'. 'Appearing without protesting' and 'appearing and protesting' are both forms of appearing and submitting, in contrast to 'not appearing without protesting' and 'not appearing and protesting' —both of which are forms of *not* submitting.[60]

A summoned person who does not in fact appear should not be held bound by anything that the foreign court may decide; in particular, he should not be bound by any recital which may appear in the record or in the judgment of the foreign court to the effect that he had appeared.[61] The English court should be free to scrutinize such a recital with a view to determining (1) whether or not it is factually accurate, and (2) whether, perhaps, the foreign court was employing the word 'appearance', or some semantic equivalent, in a sense dissimilar to that in which 'appearance' is understood by English

58 *Cf.* Note by David Shute in (1958) 56 *Michigan Law Review* 1004 (which is not, however, directly concerned with recognition of foreign judgments).

For the purposes of the present discussion it is assumed that a judicial decision which is null in the country in which it is rendered can produce no consequences between the parties in England—whether as an arbitral award, a compromise, or otherwise. (*Contra: Pemberton v. Hughes* [1899] 1 Ch. 781; *Merker v. Merker* [1962] 3 All E.R. 928, among others.)

59 See Appendix B, *infra*.

60 And see p. 33, *infra*.

61 *Cf.* n. 47, *supra*.

private international law. This sense is: acceptance of the jurisdiction of the court—be it only of its jurisdiction to determine whether or not it has jurisdiction of the case—which acceptance is intimated to the court and to the other party. 'Appear' is a technical term which of itself conveys the legal connotation of submission. Neither 'looking in', nor physically 'showing up', nor 'writing back', suffices. A non-appearing person does not cause the other party to incur the trouble, expense and loss of time involved in adducing proof and argument in support of jurisdiction. And, as long as he does not appear, such person should not be prejudiced merely because he voices a protest. On the contrary, by protesting he does his best to warn his adversary that any judgment that might result would lack international authority, and thus to induce him *not* to invest time, money and effort in pursuing the litigation.

The distinction between 'appearing, protesting', and 'not appearing, protesting', between taking steps 'in' an action and taking steps only 'against' an action, may, on occasion, be a very fine one.[62] To be on the safe side the summoned person should avoid any suggestion of his having submitted, should take care to make any document which he lodges as far as possible 'waiver-proof', and should in general endeavour not to act in the manner of a defendant who appears.

The more reasoned a person's protest, the greater is his chance of swaying the foreign court. Unfortunately, however, the danger that he might be taken to have embarked upon a jurisdictional litigation, as distinct from having merely voiced protest, is also greater. A mere protest should not be excessively deferential. If the summoned person concludes with an invitation to the court to decide that there is no jurisdiction, he runs the risk of being held to have asked for its decision. The summoned person should act not as a defendant but rather as an *amicus curiae*, and should 'make known' his view rather than engage in an intellectual dialogue under the auspices of the court.[63] If the protest is a reasoned one, and is submitted formally,

62 Normally, it is not. In *Harris v. Taylor* the defendant clearly litigated 'in' the Manx action, actively, consciously and articulately. He more than once solicited the leave of the court and complied with its directions.

What does a defendant have to do to 'appear' in the legal sense? The *Restatement of the Law of Judgments* (1942) § 19, Comment a, says: 'A defendant makes an appearance in an action when he takes any part in the action . . .' (1965) 1 *The Annual Practice* 131 says that 'Appearance is the process by which a person against whom a suit has been commenced (a) shows his intention to defend the suit and (b) submits himself to the jurisdiction of the Court'. Again, we are told by the (Earl Jowitt) *Dictionary of English Law* (1959) 132 that the object of appearance is 'to intimate to the plaintiff that the defendant intends to contest his claim; or, in a friendly action, to take part in the proceedings in the action'. These statements, though tentative and even somewhat circuitous, are not unhelpful: they underscore the idea of some sort of activity 'in' an action as distinct from one which is only 'against' it.

It is clear that the mere presence in the courtroom of a party or of his attorney is not appearance. *Cf.* 3A *Words and Phrass* (1953) 348.

See also Appendix B, *infra*.

63 *Cf.* the formula of 'appearance' quoted by Medina, *op. cit.*, 247.

and perhaps a copy sent to the other party, it may be prudent (though not necessarily effective) to insert some unequivocal words to disclaim any intent of inviting a decision from the summoning court.

Yet, though it is 'safer' to protest than to contest, there will always be defendants who embark upon the riskier course and enter a contesting appearance—not only because a defendant's prospect of influencing the foreign court is so much better when he appears before it to contest and asks for its decision. It is also possible that the foreign court will pay no attention to a communication which is not presented in accordance with a prescribed form and with a view to its adjudication. It is even safer to leave the foreign proceedings 'severely alone', to refrain from even the barest protest—but such inactivity enhances still more the risk of an adverse judgment.

Where the summoned person studiously refrains from inviting the decision of the foreign court, and merely voices a protest, then if the court requires the plaintiff to plead to this bare protest, there will be no direct causal connection between the summoned person's conduct and any trouble to which the plaintiff may be put. If all the summoned person does is to voice his protest, it should be no concern of his that the foreign court makes the plaintiff act otherwise than he would have acted had the defendant remained silent. As far as he is concerned, what passes between the plaintiff and the foreign court is *res inter alios acta.*

A different face may be put on things if the plaintiff pleads to the bare protest, and then the defendant responds to the plaintiff's arguments and proofs. Whatever his initial intentions, the summoned person will thus eventually be taking his day before the foreign court. Beyond a certain point one cannot go in and claim that one stays out.

Conduct, started as bare protest, may 'escalate' into an appearance under protest. Suppose the registry office of the foreign court writes back to the defendant saying that informal communications are not brought to the notice of the judges, and that, if he wants his protest to receive attention, he must duly file a motion to set the summons aside. If he defendant complies, he may be held to have submitted on all matters raised by his motion. If a man standing on the platform wishes to reason with a passenger in a train which is about to start, and the passenger calls back that they can only talk if the man gets on the train, and the man complies, his position is changed. Having boarded the train, he may have to pay a fare; there may be a No Smoking sign to comply with; and he may find himself being sped along an undesired route toward an unwanted destination, without being able to leave the train at will. At least to this extent he has committed, or submitted, himself to the movement of the train. At least to the extent of the preliminary, jurisdictional, issue a summoned defendant who complies with the suggestion that he file a motion

under the foreign procedure, commits himself to the foreign court and is absorbed by the processes of the foreign system. Thereafter, if the foreign court directs the plaintiff to reply to the motion, it will no longer be open to the defendant to deny his responsibility for the plaintiff's added burden.

A summoned defendant who takes his day in the foreign court on the issue of jurisdiction, cannot escape the consequences of an adverse decision by labelling his activity as non-appearance, heading all documents 'without prejudice', or the like.

* * *

What if, regardless of the summoned person's conduct, the foreign law equates bare protest to appearance? And what if it provides that an appearance under protest shall be deemed a plenary appearance? Should a summoned person who only protests be taken to have entered an appearance under protest? And should a summoned defendant who only enters an appearance under protest be taken to have submitted in full? Should it, further, make any difference that the defendant knew about the existence of a provision of this kind, or else that he was acting through a local attorney who must be taken to have known about it?

In *Harris v. Taylor*, it will be recalled,[64] Pickford L.J. considered the existence of a provision of this nature in the foreign law to be decisive. It is thought, nevertheless, that the English court should not concern itself with a foreign provision of this kind—and this regardless of the defendant's ignorance or knowledge.[65] What does such a provision really mean? It means that when a summoned defendant protests to the court, instead of doing absolutely nothing, the court nevertheless acts as it would in default of defence rather than as in default of appearance. This is an idiosyncrasy of the foreign procedure; it can be of no importance when the English court is faced with the question how to treat the end-product of this procedure.

Again, such a provision may mean that if, under the foreign law, a defendant's appearance is necessary to invest the court with jurisdiction over him, the required 'appearance' comprehends species of

64 *Cf. p.* 9, *supra.*

65 In the United States it appears that a statute which provides that the filing of a plea in abatement has the effect of general submission is not one which denies due process of law. *Chicago Life Ins. Co. v. Cherry* (1916) 244 U.S. 25 (Medina, *op. cit.*, 240). And see, in general, the *Restatement of the Law of Judgments* (1942) § 20, Comment c; *Restatement of the Law of Conflict of Laws* (1934) § 82, Comment a. But see also *York v. Texas* (1890) 137 U.S. 15.

As such a provision does not deny due process of law, the resultant judgment is valid within the summoning state. Sister states must therefore, under the federal Constitution, give it 'full faith and credit'. But English private international law (and, indeed, American law in an international setting, where the conflict of laws, rather than constitutional law, governs) is quite accustomed to not allowing a foreign judgment the same force that it has in the foreign country from which it emanates.

conduct which English law does not choose to regard as appearance. This would be somewhat similar to the situation which arises when a foreign law does not treat as 'domicile' a set of facts which English private international law does consider to amount to domicile;[66] or treats as 'penal' an enactment which English private international law does not regard as penal.[67] It secretes a conflict of classifications, or rather the use by two legal systems of words which are etymologically (or even phonetically) homologous but which have gone on to acquire different technical meanings. When English law insists that a defendant must have appeared before a foreign court, English law presumably knows its mind: and it should not be deflected from its course because some other system employs somewhat similar symbols or words to denote another thing.[68]

If the foreign law recognizes *foreign* judgments[69] as binding upon a summoned defendant on the strength of his 'appearance' when all that defendant does is to send a bare protest, this merely shows that that law has a rule on recognition of foreign judgments which is unlike the English rule on this subject. It need not mean that the English rule should abdicate.[70]

* * *

To sum up, the effect of an appearance under protest as to jurisdiction can be stated as follows:

(1) An appearance under protest is not, as such, equivalent to a submission on the merits, and unlike the latter is not one of the grounds on which international jurisdiction can be founded. *A fortiori*, a bare protest against the jurisdiction of a foreign court is no submission to it and constitutes no ground of international jurisdiction.

(2) An appearance to contest the jurisdiction of a foreign court (as distinct from a bare protest) is, however, capable of producing between the parties *res judicata* upon issues of fact in accordance with the ordinary rules on this kind of estoppel.

(3) If what a party is estopped from challenging in the subsequent proceedings in England is the existence of at least one factual link which, in the eye of English private international law, endows the foreign court with international jurisdiction over him, then the international jurisdiction of the foreign court is, in effect, established

66 *Cf. Re Annesley* [1926] Ch. 692.

67 *Cf. Huntington v. Attrill* [1893] A.C. 150.

68 And *cf.* generally Mann, 'The Primary Question of Construction and the Conflict of Laws', (1963) 79 *Law Quarterly Review* 525.

69 *I.e.* judgments foreign to itself.

70 Thus, also, if a summoned defendant appears before a foreign court to protect property of his which has been seized—an appearance which English law, as it now stands (n. 9, *supra*), chooses to regard as not voluntary and, for this reason, as not binding on him—it should make no difference that the foreign law regards appearance under such circumstances (before itself, or before tribunals foreign to it, or in both cases) as 'voluntary'.

for the purposes of the English proceedings. The foreign judgment is no longer challengeable for want of jurisdiction.

## SOME LATER CRITICISMS OF HARRIS V. TAYLOR

*Harris v. Taylor* has run into heavy criticism[71]—much of it, it is believed, undeserved.

*Harris v. Taylor* had followed *Boissière v. Brockner*,[72] and was in turn directly followed by Sankey J. in *Richardson v. Army, Navy & General Assurance Association, Ltd.*[73]—both, like *Harris v. Taylor* itself, cases on the recognition in England of a foreign judgment given against a protesting defendant. It was, on the other hand, strongly criticized, and 'distinguished', in *In re Dulles' Settlement (No. 2)*. This case[74] did not turn on the question of recognition in England of a foreign judgment given against a protesting defendant, but on the quite distinct question whether a foreign defendant (over whom there is otherwise no jurisdiction) who is summoned to appear in England, and who appears under protest, is to be taken to have thereby submitted to the jurisdiction of the English court. It was decided that the defendant should not be taken to have submitted. Hence the law of England abstained from the merits of the claim and did not impose a judicial obligation. Consequently, no question of recognition could arise.

*Harris v. Taylor*, therefore, was not really relevant to the *Dulles* situation; and it is perhaps significant that no mention was made of it in the course of the first excursion of *Dulles* into the Court of Appeal;[75] and that in the course of the second excursion[76] the authority of *Harris v. Taylor* was invoked not by the plaintiff (whose cause, had it been relevant, it would have promoted), but by the protesting defendant,[77] who relied on it marginally, to infer that his conduct had *not* amounted to submission. On the other hand, it is a pity that the relevant authority of *Mayer v. Claretie*[78] and of *Keymer v. Reddy*[79] was not alluded to. These cases show that the English court will not proceed against a defendant (over whom it has otherwise no jurisdiction) who only appears under protest to satisfy the court of

71 Most commentators find it, to a greater or lesser degree, 'troublesome'. (*Cf.* Cheshire, *op. cit.* 645.) Wolff thinks it is unfortunate (*Private International Law* (2nd ed. 1950) 259). Graveson, *The Conflict of Laws* (4th ed. 1960) refers to it as 'strict' (at 542) and to the reading of it in *In re Dulles' Settlement (No. 2)* [1951] Ch. 842 as '[a] narrower and more liberal interpretation' (at 543).

72 (1889) 6 T.L.R. 85. From which, however, it is distinguishable. In *Boissière v. Brockner* the defendant, who had protested against the foreign jurisdiction, also presented a defence on the merits.

73 (1925) 21 Ll.L.R. 345 (K.B.D.).

74 [1951] Ch. 842. Like *Tallack v. Tallack & Broekema* [1927] P. 211, to which it makes reference but which had not itself in any way referred to *Harris v. Taylor*.

75 *In re Dulles' Settlement (No. 1)* [1951] Ch. 265.

76 *In re Dulles' Settlement (No. 2)* [1951] Ch. 842.

77 [1951] Ch. 842, 845.

78 (1891) 7 T.L.R. 40.

79 [1912] 1 K.B. 215 (C.A.).

its lack of jurisdiction, on the supposed ground that this very appearance is the 'voluntary appearance' by which the defendant submits and thereby confers jurisdiction. They further illustrate the proposition that the English court may allow an objection of want of jurisdiction to be first raised even as late as at the trial and will treat the pleadings as amended accordingly.[80]

Neither in these cases, nor in *Dulles*, nor in *Tallack v. Tallack*,[81] was an English court faced with the questions, central to *Harris v. Taylor*, as to how to treat a foreign judgment. They were not cases on former adjudication—and therefore also not on foreign adjudication. Their subject matter was local procedure, not international jurisdiction.

And there is another reason why *Harris v. Taylor* was not relevant to *Dulles*: while the parties implicated in the latter were there referred to as 'plaintiff' and 'defendant', *Dulles* was not a proceeding *in personam*[82] and, properly speaking, there never was a 'defendant' to it.

Nevertheless, the Court of Appeal apprehended that *Harris v. Taylor* somehow stood in their way, and that it was necessary to be 'relieved' of it.[83]

Denning L.J. said:[84]

> I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court, when he has all the time been vigorously protesting that it has no jurisdiction. If he does nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference in principle does it make, if he does not merely do nothing, but actually goes to the court and protests that it has no jurisdiction? I can see no distinction at all. I quite agree, of course, that if he fights the case, not only on the jurisdiction, but also on the merits, he must then be taken to have submitted to the jurisdiction, because he is then inviting the court to decide in his favour on the merits; and he cannot be allowed, at one and the same time, to say that he will accept the decision on the merits if it is favourable to him and will not submit to it if it is unfavourable.[85] But when he only

[80] *Cf. The Annual Practice* (1965) 377. See also Appendix B, *infra*.

[81] [1927] P. 211. *Cf.* n. 74 *supra*.

[82] Evershed M.R., at [1951] Ch. 265, 275: 'The summons taken out in the action was not in form inter partes . . .'; and at 847: 'The action is one by writ to administer the trusts of the settlement, to which the father is no party . . . an ordinary summons, not inter partes . . .' Denning L.J., [1951] Ch. 842, 849: '. . . no direct claim was made on the father. . . . He was no party to the action . . .'; and at 852: 'no application was made in this case to make the father a party to the proceedings . . .'. There are three more statements by Denning L.J. to this effect at 852-3.

[83] *Cf.* Denning L.J., [1951] Ch. 842, 851.

[84] [1951] Ch. 842, 850.

[85] Denning L.J. nowhere tells us why, if a defendant who litigates on the merits is bound on the merits 'because he is then inviting the court to decide in his favour', a defendant who litigates on the jurisdiction should not be similarly bound on the jurisdiction. The latter, too, is 'inviting the court to decide in his favour'. Inviting the foreign court to decide in one's favour is common to both. Only the subject matter of the decision invited varies. Should it not follow that *in both cases* he who invites is bound; and that only what he is bound about varies with the content of the foreign court's decision?

> appears with the sole object of protesting against the jurisdiction, I do not think that he can be said to submit to the jurisdiction: see *Tallack v. Tallack.*[86]

With reference to *Harris v. Taylor,* Denning L.J. further said:

> The defendant entered a conditional appearance in the Manx court and took the point that the cause of action had not arisen within the Manx jurisdiction. That point depended on the facts of the case, and it was decided against him; whence it followed that he was properly served out of the Manx jurisdiction in accordance with the rules of the Manx court. Those rules correspond with the English rules for service out of the jurisdiction contained in Ord. 11; and I do not doubt that our courts would recognize a judgment properly obtained in the Manx courts for a tort committed there, whether the defendant voluntarily submitted to the jurisdiction or not; just as we would expect the Manx courts in a converse case to recognize a judgment obtained in our courts against a resident in the Isle of Man, on his being properly served out of our jurisdiction for a tort committed here. *Harris v. Taylor* is an authority on *res judicata* in that the defendant was not allowed in our courts to contest the service on him out of Manx jurisdiction; because that was a point that he had raised unsuccessfully in the Manx court, and he had not appealed against it. To that extent he had submitted to the jurisdiction of the Manx court and was not allowed to go back on it. But the case is no authority on what constitutes a submission to jurisdiction generally.[87]

And Evershed M.R. said:[88]

> . . . I agree with Denning L.J. that *Harris v. Taylor* can only be regarded as deciding that the matter of jurisdiction had on the facts of the case become *res judicata* between the two parties to it. As such, it is, of course, binding on this court. Its correctness may, however, fall at some time to be considered in the House of Lords, for, as I understand the principles of private international law applied in these courts, a foreign judgment can be treated as conclusive only if, *inter alia,* it was pronounced by a court of competent jurisdiction; and the question of the court's competence would *prima facie,* I should have thought, be open to the consideration of our own courts.

Although Evershed M.R. and Denning L.J. purport to be in accord, whether they are in fact agreed is a question of considerable difficulty. According to the first-quoted passage from Denning L.J., a man who 'has all the time been vigorously protesting' against the jurisdiction of the summoning court (and has refrained from litigation on the merits) cannot fairly be said to have submitted to the jurisdiction of that court. He can, indeed, see 'no distinction at all' between such a man and a man who 'does nothing and lets judgment go against him in default of appearance'. Presumably Denning L.J. means that he can see no difference not only between a 'do-nothing

[86] [1927] P. 211, 222, per Lord Merrivale, P.
[87] [1951] 1 Ch. 842, 851.
[88] [1951] 1 Ch. 842, 849.

defendant' and a defendant who merely *voices protest against the proceedings but does not contest*—a point on which his view would command general assent—but also not between a 'do-nothing defendant' and a defendant who, like in *Harris v. Taylor* (with reference to which Denning L.J. was speaking), goes to the foreign court and fights the case on the jurisdictional issue.[89] Denning L.J. therefore suggests that there should be no valid *res judicata* to estop such a defendant on the jurisdictional issue, as he has not (so Denning L.J. assumes) submitted even to the extent of this issue. By implication, in as far as *Harris v. Taylor* decides that the jurisdictional issue has become *res judicata*, *Harris v. Taylor* is said to be wrong, although binding on the Court of Appeal.

Evershed M.R. concurs in considering *Harris v. Taylor* wrong, and is even more explicit in expressing his view. He, however, regards the question not so much in the light of the defendant's conduct as from the angle of the competence of the foreign court. He thinks that 'the question of the court's competence would *prima facie* . . . be open to the consideration of our own courts'. This is undoubtedly so. It does not, however, follow (as Evershed M.R. appears to have taken for granted) that when the foreign court's competence comes to be weighed in the scales of English law, it will be found wanting. If it is established that the defendant voluntarily appeared before the foreign court and litigated on one or more jurisdictional issues, then to the extent of those issues the defendant submitted; and submission to a foreign court renders that court competent in the eye of English law itself.

The second-quoted passage of Denning L.J. is somewhat differently conceived; and is perhaps inconsistent with the first. Here Denning L.J. says that the defendant in *Harris v. Taylor* could not 'go back on' a jurisdictional point that he had raised before the foreign court and that was there decided against him, because '*[t]*o that extent he had submitted to the jurisdiction of' the foreign court. He does not question that the foreign court is, on the issue thus submitted to it, a court of competent jurisdiction. On the contrary, he expressly says that *Harris v. Taylor* 'is an authority on *res judicata*', although he adds, somewhat puzzingly, that it 'is no authority on what constitutes a submission to jurisdiction generally'. If this last reservation means (1) that a barely protesting, as distinct from a contesting, defendant is not bound; or that a defendant is not bound by a determination on a point as to which he never submitted; or if the reservation means (2) that a defendant is not prejudiced by a holding which indeed

89 That this is indeed so in his mind is made clear from his remark in that passage 'I quite agree, of course, that if he fights the case, not only on the jurisdiction, . . .', then his position is different. Hence, as long as he fights the case only on the jurisdiction—but does fight, does contest 'in' the case, and not only makes bare protest against it—according to Denning L.J. he nevertheless does not submit at all.

creates *res judicata* but which is irrelevant because it determines the existence of a link which is of exclusively domestic validity under the foreign law—one can only respectfully agree. If so, however, the reservation ceases to carry a qualification of any importance, and *Harris v. Taylor* (or, rather, the *ratio decidendi* Buckley L.J. therein) is actually approved rather than disapproved. On this Evershed M.R. would not, perhaps, find himself in agreement with Denning L.J.

It will be observed that, rightly or wrongly, Denning L.J. considers the Manx decision that the alleged tort arose within the Isle of Man[90] to have concluded the existence of a sufficient international link between the defendant and the Isle of Man. He assumes that a foreign court has international jurisdiction to pronounce personal judgment on the sole ground that the defendant has committed a tort within its territory, because this would correspond to the English rules on service out of the jurisdiction. This is not orthodox doctrine,[91] and is even less likely as an interpretation of the views entertained by the Court of Appeal in 1915.[92] However, to the theme of this paper the point is peripheral. Central is the expressed opinion of Denning L.J. that the defendant is concluded in England upon the existence of an international link litigated by him abroad and determined by the foreign court—an opinion applicable whichever be, from time to time, the links recognized by English law as conferring international jurisdiction.

On the whole, therefore, *In re Dulles' Settlement (No. 2)* does not detract from and even supports the *ratio* of Buckley L.J. in *Harris v. Taylor.*

## APPENDIX

### A. A NOTE ON SOME RELEVANT STATUTES

#### (1) Judgments Extension Act, 1868, and Inferior Courts Judgments Extension Act, 1882.

The general effect of these statutes is that judgments for debt, damages or costs entered in courts of one part of the United Kingdom can be registered in another part and then have the same force and effect as if originally obtained in that part of the United Kingdom

90 On whether this was in fact decided, see n. 42, *supra.*

91 See pp. 1-4 *supra* as to the minimal contracts required to endow a court with international jurisdiction. In all personal actions the courts of the country in which the defendant resides, *not the courts of the country where the cause of action arose,* should be resorted to: *Sirdar Gurdyal Singh v. Rajah of Faridkote* [1894] A.C. 670, 684.

As is well known, French courts are under French law (Art. 14, Code Civil) competent in proceedings where the only link to France is that the plaintiff is French; but French jurists do not even pretend to expect 'reciprocity', *i.e.* that a judgment thus obtained in France will be recognized abroad. *Cf. e.g.* Lepaulle, *Le Droit International Privé,* . . . (1948) 38.

92 Before the new thinking of *Travers v. Holley* [1953] P. 246 has begun its oblique attrition of the non-reciprocity doctrine of *Schibsby v. Westenholz* (1870) L.R. 6 Q.B. 155.

to which they are thus extended by registration. Subject to one or two exceptions (s. 10 of Act of 1882; s. 8 of Act of 1868), judgments governed by these Acts are not examinable as to their jurisdictional foundations any more than they are as to their merits. Just as a plea of, for example, fraud will not avail in an English court against a Scottish 'extended' judgment, so also a plea that a defendant had not submitted to the jurisdiction or had only submitted to it as far as the jurisdictional issue. Full credit must be given to the original court's interpretation of the limits of its own jurisdiction.

(The Acts do not apply to the Isle of Man. Had they applied, the problem of *Harris v. Taylor* could not have arisen.)

(2) Administration of Justice Act, 1920.

Under this statute (s. 9 (2)(a)) no foreign judgment otherwise registerable thereunder in England shall be ordered to be registered if 'the original court acted without jurisdiction'. No special jurisdictional criteria are laid down, and therefore the case of a protesting defendant appears to be governed by the general common-law principles and considerations discussed in this paper.

(3) Foreign Judgments (Reciprocal Enforcement) Act, 1933.

This statute is liable to cause considerably more difficulty. Under s. 4(2)(a)(i), a foreign court shall be deemed to have had jurisdiction 'if the judgment debtor, being a defendant, in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings otherwise than for the purpose of contesting the jurisdiction of that court'. This may mean[93] that, as far as the Act reaches, a summoned person who appears in order to contest jurisdiction is safe from enforcement in England even in the case where he has asked for, and has had, a day in the foreign court on the jurisdictional issue. Such an interpretation would deeply, and perhaps unnecessarily, undermine the effect which an adjudication normally has under the English rules on estoppel by *res judicata*, as recognized not only by the judgment Buckley L.J. in *Harris v. Taylor* but, also, as we have seen,[94] by the *Dulles* case.

The following construction, of which the provision admits, is therefore suggested: when the only jurisdictional link with the foreign court which is invoked against the judgment debtor consists of his having appeared under protest before that court, he is not bound. This is also the rule at common law, apart from this Act. If, however, some other link recognized by the Act (for example, that he 'was at the time when proceedings were instituted resident in . . . the

[93] Thus, Dicey's *Conflict of Laws* (7th ed. 1958) 1022: 'Having regard to the wording . . . there can be no question of the enforcement in England under that statute of a judgment against a defendant whose appearance has been . . . limited.' Cheshire, *op. cit.*, 647 also regards this provision as being in the 'opposite direction' to *Harris v. Taylor*.

[94] Pp. 27-30, *supra*.

country of that court' (s. 4(2)(a)(iv)) is invoked, the existence of such link can be established by a foreign decision which is binding on the judgment debtor by way of *res judicata* in consequence of his having litigated on the matter in the foreign court. This construction would unify the position under the Act with that at common law. It is also warranted by s. 8(3) of the Act which states that 'Nothing in this section shall be taken to prevent any court in the United Kingdom recognizing any judgment as conclusive of any matter[95] of law or fact decided therein if that judgment would have been so recognized before the passing of this Act'.

### B. ACTING 'UNDER PROTEST'

Defendants occasionally enter their appearances 'conditionally' or 'under protest'[96] when sued before a court whose international authority they do not question. The expression 'conditional appearance' appears to be peculiarly inapt. To what condition does the defendant subject his appearance? Presumably to the court deciding that it has no jurisdiction. (The defendant's aim is to ensure that if the court decides that it has jurisdiction, his position shall be as if he had not appeared.) It is arguable that 'conditional appearance' is an impossible concept.[97] Indeed, the prevailing view in England is that while such appearance intimates, or reserves, the defendant's intention to raise preliminary matters, it 'is a complete appearance to the action for all purposes, subject only to the right reserved by the defendant to apply to set aside the writ or the service thereof, on any ground which he can sustain.'[98]

The purpose of entering this kind of appearance is then to preserve the right to raise an argument which, had the appearance been unqualified, the defendant would have been precluded (or so he apprehends) from raising. He may, for example, wish to reserve the right to argue that the writ had not been issued or served in accordance with the rules of procedure, that it is bad for misjoinder or nonjoinder of parties, and the like. Another purpose is to avoid or reduce costs which might otherwise be payable by him (see *infra*).

The effect of protest as reservation of the right to raise a certain matter in the future is even more evident where something other than appearing is done 'under protest'. Thus when payment is made 'under protest' it cannot be argued, and it is not the payer's intention to be free to argue, that payment had not been made, that payment

95 For example, of the place of defendant's residence at the time of the institution of proceedings before the foreign court.

96 Virtually interchangeable expressions: the latter being ordinarily used in England by a defendant, sued in respect of the liability of a firm, who wishes to reserve his right to plead non-membership in the partnership.

97 *Cf. Davies v. André* (1890) 24 Q.B.D. 598.

98 (1965) 1 *The Annual Practice* 144.

under protest is the equivalent of non payment. On the contrary, it will be to his advantage to show that money had been taken from him; and he normally insists on a receipt. What a protesting payer guards himself against is the effect of some legal rule, unfavourable to him, which would otherwise operate upon the fact of making the payment. Payment implies admission of indebtedness. Normally a payer does not seek to negative this admission, because the money paid is truly owing, payment extinguishes the debt, and there is no disagreement on this between payer and payee. But if a man pays under compulsion money which he insists he does not owe, and for the return of which he intends to press, it is prudent for him to insert some such qualifying words as 'under protest' or 'without prejudice' to repel the presumption of prior indebtedness that payment raises.

Again, assuming the existence of a rule [99] that money paid under mistake of law is not recoverable, it is prudent for the payer to insist on some such words as 'under protest' which will be probative, or at least corroborative, of his claim that it was not a mistake of law that moved him to pay. The effect of the protest is not to undo the act but to make a certain rule of law apply to it or, on the contrary, to immunize it to the operation of a certain rule (evidentiary or substantive) that might otherwise fasten on it.

Similarly, 'to appear under protest' is the equivalent of 'to appear, protesting', and is not the same as 'not to appear'. To appear 'under protest' is, as has been seen,[1] to do two things: (1) to appear and (2) to protest. As with payment under protest, so with appearance under protest, the effect of the second act is not to undo the first, but, at most, to sterilize or immunize it against a rule of law which might otherwise seize upon and qualify it. Appearing without protesting means (or is apprehended by pleaders to mean) that he who thus appears will thereafter be prevented from contesting various preliminary issues—if not prevented from contesting them at all, then at least prevented from contesting them as preliminary issues—notably that of the jurisdiction of the court; or that, if allowed to raise them, he might nevertheless be prejudiced in his costs (see *infra*). Appearing *and* protesting gives express notice of one's intention to contest such issues.

In English municipal law the most unconditional appearance does not deprive a defendant of the right to challenge the jurisdiction of the court, when he subsequently delivers his defence to the merits.[2] It is 'to the jurisdiction to decide whether or not it has jurisdiction' that, 'by entering an unconditional appearance, a litigant submits'.

[99] Or continued fear of its undiluted existence: *cf. Kiriri Cotton Co., Ltd. v. Dewani* [1960] A.C. 192.

[1] P. 21, *supra*.

[2] *Wilkinson v. Barking Corporation* [1948] 1 K.B. 721 (C.A.).

He does not, by his mere unconditional appearance, abandon the right to argue that a certain matter falls outside the jurisdiction of the court.[3] What, if so, it may be asked, is the added advantage which a defendant, who intends to contest jurisdiction, derives from appearing 'conditionally' or 'under protest'? It seems that there are two advantages. (1) The defendant will be able to raise the issue of jurisdiction as a separate and *preliminary* issue and will not, as long as it has not been disposed of, be considered to have defaulted his pleading to the merits; and he will also be entitled to appeal it separately. (2) Also, if the challenge to the jurisdiction is not 'taken at the earliest possible moment . . . any costs which *[the defendant]* incurs ought afterwards to fall upon him' even if his challenge proves ultimately successful.[4] Hence, the second advantage is in avoiding or reducing costs.

In English law protesting against the jurisdiction *without* appearing (a 'bare protest') does not seem to be a familiar response: largely because the jurisdiction of the superior courts at Westminster extended virtually throughout the realm and over all persons, while service out of the jurisdiction was, at common law, unknown.[5] In rare cases only, as in those claimed to be within the exclusive jurisdiction of the (Welsh) Courts of Great Sessions, could the question of jurisdiction be raised before the superior courts at Westminster by a defendant personally served with a writ within the realm. In these rare cases the protest would be raised *as a plea to the jurisdiction*, the summoned defendant entering an appearance as in other cases. Traditionally, then, in English law a summoned defendant who protests against the jurisdiction 'appears', and submits, and *prays the judgment of the court* as to whether the court has jurisdiction. This was well reflected in the old rule[6] that 'In every plea to the jurisdiction, you must state another jurisdiction . . . and in every case to repel the jurisdiction of the King's Court, you must show a more proper and more sufficient jurisdiction: for if there is no other mode of trial, that alone will give the King's Court a jurisdiction.' It follows that the court is *invited to decide* whether or not there is another jurisdiction; and the protesting defendant clearly acts 'in' the action.[7]

Even well-mannered ambassadors, who prefer not to ignore the Queen's writ altogether, assert their immunity by entering a conditional appearance, and then take out a summons to set the writ aside.[8]

[3] *Wilkinson v. Barking Corporation* [1949] 1 K.B. 721, 725, per Asquith L.J.

[4] *Grange v. Grange* [1892] P. 245, at 246-7. *Cf.* also *Wilson v. Wilson & Howell* (1871) 2 L.R. (P. & D.) 341, esp. at 350; *Levy v. Levy & De Romance* [1908] P. 256; *Keymer v. Reddy* [1912] 1 K.B. 215 (C.A.).

[5] It was first introduced by the Common Law Procedure Act 1852 (Eng.).

[6] *Cf.* Lord Mansfield in *Mostyn v. Fabrigas* (1774) 1 Cowp. 161, 172.

[7] *Mayor of London v. Cox* (1867) L.R. 2 H.L. 239, 260; see Sutton, *Personal Actions at Common Law* (1929) 146-7.

[8] See, *e.g. Fenton Textile Association v. Krassin* (1921) 38 T.L.R. 259; *Engelke v. Musmann* [1928] A.C. 433.