Keeping Up Appearances -The Development of Adjudicatory Jurisdiction in the English Courts

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Abstract: This article traces the development of the adjudicatory jurisdiction of the English courts between the 17th and 20th centuries. The account provides, it is submitted, a number of valuable insights, which call into question current accounts of the common law rules governing both the adjudicatory jurisdiction of local courts and the recognition and enforcement of foreign judgments. It is the present author's principal contention that the so called "principles" of presence and submission, which are central tenets of English private international law, are not only unsatisfactory in principle, but lacking in historical support as elements of the common law landscape.

Key words: Legal history - Law reform - Private international law - Conflict of laws - Jurisdiction - Recognition and enforcement of judgments - Adjudicatory jurisdiction - Albert Venn Dicey - Principle of presence - Principle of submission - Submission to the jurisdiction - Voluntary appearance - Default Judgments - Service out of the jurisdiction - Waiver of irregularity - Court of King's Bench - Court of Common Pleas - Court of Chancery - Supreme Court

KEEPING UP APPEARANCES - THE DEVELOPMENT OF ADJUDICATORY JURISDICTION IN THE ENGLISH COURTS

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I. INTRODUCTION

Jurisdiction based on presence of the defendant is a central tenet of private international law in common law systems, including England and Wales. It defines both the *in personam* jurisdiction of local courts[1] and the limits of international competence of foreign courts for the purposes of recognition and enforcement of their judgments.[2] The significance of the defendant's presence within the territorial limits of the legal system's jurisdiction appears to rest, in modern accounts, on a coupling of sovereign power and allegiance (or, possibly, tacit consent): the courts' ability as the representative of the State to command a person within the territorial jurisdiction to come to court to answer a claim and to comply with its rules, orders and judgments and the defendant's civil obligation to answer that call as the *quid pro quo* of the protection that he receives from the State while present.[3]

Equally prominent in modern accounts is the notion of jurisdiction based on the "voluntary submission" of the defendant, a concept which is also taken to define the adjudicatory jurisdiction of local[4] and foreign[5] courts. This ill-defined[6] concept rests upon conduct of the

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1 Lord Collins of Mapesbury and others (eds.), Dicey, Morris and Collins: The Conflict of Laws (London: Sweet & Maxwell, 15th edn, 2012) (**Dicey, Morris and Collins**), Rule 31; A Briggs, *Private International Law in English Courts* (Oxford: Oxford University Press, 2014) (**Briggs**), [4.387], [4.390].

2 Dicey, Morris & Collins, [14R-054] (Rule 43), First Case; Briggs, [6.137]-[6.138], [6.151]-[6.157].

3 As regards the adjudicatory jurisdiction of the English courts, see *John Russell and Co Ltd v Cayzer, Irvine and Co Ltd* [1916] 2 AC 298, 302 (Viscount Haldane) (HL); *Colt Industries v Sarlie* [1966] 1 WLR 440, 442-44 (Lyell J). The case most commonly cited in support of this proposition, *Maharanee of Baroda v Wildenstein* [1972] QB 283 (CA) is of no assistance: the defendant appeared in the proceedings to seek a stay and the point was neither argued nor analysed.

As regards the recognition and enforcement of foreign judgments, see *Carrick v Hancock* (1895) 12 TLR 59, 60 (Lord Russell CJ.); *Adams v Cape Industries plc* [1990] Ch 433, 518-19, 552-56 (CA).

4 Dicey, Morris & Collins, [11R-124] (Rule 32); Briggs, [4.394].

5 Dicey, Morris & Collins, [14R-054] (Rule 43), Second, Third and Fourth Cases; Briggs, [6.139]-[6.141], [6.163]-[6.171].

6 *Esal (Commodities) Ltd v Pujara* [1989] 2 Lloyd's Rep 479, 482 (Slade LJ) (CA).

defendant that is divisible into two broad categories: formal participation in litigation and agreement to accept the court's jurisdiction.

That the common law in England is shaped in this fashion is due in no small measure to the influence of A V Dicey. In the first edition of his seminal work on the Conflict of Laws, published in 1896,[7] Professor Dicey identified two general principles as regulating matters of jurisdiction. By the first, the principle of effectiveness, Dicey suggested that the sovereign of a country acting through its courts has jurisdiction over any matter with regard to which its courts can give an effective judgment and has no jurisdiction over any matter with regard to which it cannot give an effective judgment.[8] Dicey identified jurisdiction based on the defendant's presence within the territorial jurisdiction as being a pre-eminent example of this first principle.[9] By the second, the principle of submission, Dicey suggested that the sovereign has a right to exercise jurisdiction over any person who voluntarily submits to his jurisdiction.[10]

Dicey admitted that these principles had not been directly supported in the jurisprudence of the English courts, and that indeed some difficulties lay in reconciling them with actual judicial practices.[11] Although the principle of effectiveness has not endured, with presence taking on a pre-eminent role,[12] the second principle (although barely acknowledged as such judicially[13]) has been more persistent in shaping the English courts' approach to questions of jurisdiction. The current (15th) edition of what is now *Dicey, Morris & Collins on the Conflict of Laws* still refers to

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7 A V Dicey, *The Conflict of Laws* (London: Stevens & Sons, 1896) **(Dicey)**. See also A V Dicey, 'Criteria of Jurisdiction' (1892) 8 LQR 21.

8 Dicey, xliii, 38-40. By a corollary to this rule (ibid, xliv, 40-42) if the courts of no one country can give a completely effective judgment but the courts of several countries can give a more or less effective judgment, the courts of the country where the most effective judgment can be given have a preferential jurisdiction.

9 Dicey, 46, 373.

10 Dicey, xliv, 42.

11 Dicey, 42-43

12 In his work on *The English Conflict of Laws* (London: Stevens & Sons, 3rd edn, 1954), Dr Schmitthoff denied the existence of the principle of effectiveness, preferring to formulate his discussion of competence in terms of principles of presence and submission (ibid, 422-25). Doubts concerning the principle of effectiveness were expressed by Dr Morris in his introduction to the next (7th) edition of *Dicey's Conflict of Laws* (1958), 17-18. For an isolated example of judicial approval of the principle of effectiveness, see *Bank voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248, 257-258 (Devlin J).

13 The author has found only one reference to the "principle of submission" in a judicial decision, in a heading within the judgment of Lawrence Collins J (later Lord Collins of Mapesbury, the current general editor of the work that still bears Dicey's name) in *Starlight International v Bruce* [2002] EWHC 374 (Ch), [2002] I.L.Pr. 35, [11]. The principle was also referred to expressly in argument before the Court of Appeal in *Re Dulles Settlement* [1951] 1 Ch 265, 266.

"the principle of submission" in its commentaries on the *in personam* jurisdiction of English courts.[14]

This article provides an account of the development of the adjudicatory jurisdiction of the English courts between the 17th and 20th centuries. The account provides, it is submitted, a number of valuable insights, which call into question current accounts of the common law rules governing both the adjudicatory jurisdiction of local courts and the recognition and enforcement of foreign judgments. It is the present author's principal contention that the so called "principles" of presence and submission are not only unsatisfactory in principle, but lacking in historical support as elements of the common law landscape.

II. DEFINING ADJUDICATORY JURISDICTION IN PRIVATE INTERNATIONAL LAW

This article is concerned with the adjudicatory jurisdiction of courts within private international law, and not with jurisdiction in its public international law sense. Adjudicatory (or adjudicative) jurisdiction refers in a broad sense to the power of courts to make a binding adjudication with respect to a person or a thing.[15] More specifically, it refers to the court's power to make a binding adjudication upon particular subject-matter, having the status of *res judicata* between the parties or their privies. Although this concept is well understood in the context of English court proceedings,[16] it plays a particularly prominent role with respect to the recognition and enforcement of foreign judgments. In that context, it is the recognition of the foreign court's adjudicatory jurisdiction, manifested in the requirement that the judgment to be recognised and enforced be "final and conclusive",[17] that provides the basis for the judgment's binding force within the English legal system. If the foreign judgment is not final and conclusive (i.e. it does not have the status of *res judicata* within the legal system in which it originates) then it will not be recognised or enforced by an English court under common law rules, even if the circumstances are such that the foreign court's jurisdiction to adjudicate would be recognised.

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14 Dicey, Morris & Collins, [11-133] (in the commentary to Rule 32, which provides that, except in cases where another Member State or Lugano Convention State court has exclusive jurisdiction, "the court has jurisdiction to entertain a claim *in personam* against a person who submits to the jurisdiction of the court"). See also ibid, [11-416].

15 *Restatement (Third) Foreign Relations Law of the United States*, §§401(b), 421(1). cf C Ryngaert, *Jurisdiction in International Law* (Oxford: OUP, 2nd edn, 2015), 11, referring to "the power of courts to claim jurisdiction over persons".

16 *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] 1 AC 160, [17] (Lord Sumption).

17 *Nouvion v Freeman* (1889) 15 App Cas 1, 9-10 (Lord Herschell); Dicey, Morris & Collins,[14R-020] (Rule 42(1)(b)), [14-023]-[14.025]; Briggs, [6.176]-[6.179]; P Barnett, *Res Judicata, Estoppel, and Foreign Judgments* (Oxford: OUP, 2001), [1.30]-[1.33], [2.35]-[2.41], [5.78]-[5.84].

A court's adjudicatory jurisdiction has two components, as to the parties and the subject-matter of the adjudication.[18] Rules of adjudicatory jurisdiction with respect to the subject-matter (competence) set limits as to the nature of the action which a court may entertain.[19] Those with respect to the parties lay down requirements for bringing them, and the subject-matter of the claims between them, before the court.[20]

In this connection, certain distinctions are of importance, as follows.

First, between the exercise by an English court of its adjudicatory jurisdiction and questions, involving the recognition and enforcement of foreign judgments, which arise following the exercise by a foreign court of its adjudicatory jurisdiction. Although both types of case require the application of rules that fall within the province of private international law, they are obviously different in character and (although parallels may be drawn) there is no necessary correlation between the two sets of rules.[21] This article focuses on the development of the adjudicatory jurisdiction of the English courts, but the following analysis has implications for both aspects of English private international law.

Secondly, between a court's jurisdiction to adjudicate and its prescriptive jurisdiction, in regulating the conduct of parties and non-parties to the proceedings brought before it.[22] In particular, for present purposes, a court will ordinarily have powers to require parties or non-parties to appear before it and to punish a default in appearance. As appears from the following analysis, the jurisdiction to prescribe does not correspond in extent with the jurisdiction to adjudicate.

Thirdly, between the jurisdiction of a court to adjudicate upon the substance of the main subject-matter of the dispute before it, and its jurisdiction to adjudicate upon questions concerning its

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18 *Pemberton v Hughes* [1899] 1 Ch 781, 791 (Lindley MR).

19 Sir F T Piggott, *Foreign Jurisdiction and Judgments* (London: Butterworths, 1908), vol I, 101 (**Piggott**).

The limits on the subject-matter jurisdiction of the English courts are few and far between and will not be considered in this account. As to the distinction between local and transitory actions and the fiction in pleading which together underly the common law approach to subject-matter jurisdiction, see *British South Africa v Companhia de Moçambique* [1896] AC 602, 605-17 and the speech of Lord Herschell, LC, 618-24, and the valuable analysis of that case and other authorities by Piggott, vol I, Ch 2. See also Briggs, [4.05]-[4.08].

20 Piggott, vol I, 101-102.

21 *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236, [126] (Lord Collins).

22 *Restatement* (n 15), §401(a); Ryngaert (n 15), 9; A Mills, 'Rethinking Jurisdiction in International Law' (2013) 84 BYBIL 185, 195.

own jurisdiction with respect to that subject-matter.[23] It is important to distinguish these two elements of a court's adjudicatory jurisdiction, particularly when a party has sought to raise a jurisdictional challenge. The English courts have been mindful of this distinction in matters concerning their own jurisdiction,[24] but have tended in the past to ignore or underplay it matters concerning the recognition and enforcement of foreign judgments.[25] The distinction has also been papered over in legislation concerning the effects of a challenge to jurisdiction before a foreign court.[26]

III. DEVELOPMENT OF THE ADJUDICATORY JURISDICTION OF COURTS IN ENGLAND

A. *Appearance as the basis of adjudicatory jurisdiction in personal actions*

To begin, it is necessary to sketch the key features of litigation of personal actions before the three main courts in England prior to the Judicature Acts, the courts of King's Bench, Common Pleas and Chancery.[27] Although the detailed procedure and practice varied greatly between these courts, the structures and some of the key features of litigation were common among them. Our focus is on the early stages of an action, before what is now described as close of pleadings, which may be broken down (at least in theory[28]) into five parts as follows: (1) originating process (in the King's Bench or Common Pleas, by a writ issued out of Chancery or bill; in Chancery, a

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23 *Wilkinson v Barking Corporation* [1948] 1 KB 721 (CA); *Williams & Glyn's Bank plc v Astro Dinamico Compania Naviera SA* [1984] 1 WLR 438 (HL). See Briggs, [4.09]-[4.12].

24 *Williams & Glyn's Bank* (n 23); *Canada Trust v Stolzenberg (No 1)* [1997] 1 WLR 1582, 1589 (CA).

25 eg *Harris v Taylor* [1915] 2 KB 580 (CA); *Henry v Geopresco International Ltd* [1976] QB 726 (CA).

26 Civil Jurisdiction and Judgments Act 1982, s 33.

27 The principal sources of material in the following account are *Blackstone's Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765-1769), Book III, esp Ch 19 and 27; T Lee, *A Dictionary of the Practice in Civil Actions in the Courts of King's Bench and Common Pleas* (London: S Brooke, 1825); H Stephen, A *Treatise on the Principles of Pleading in Civil Actions* (1st edn, London: J Butterworth, 1824); T J Mowbray, *Debtor's Manual* (London, 1825); W Tidd, *The Practice of the Courts of King's Bench and Common Pleas in Personal Actions and Ejectment* (2nd American edn from 8th English edn, Philadelphia: Towar & Hogan, 1828); E R Daniell, *A Treatise on the Practice of the High Court of Chancery* (London: W.T. Clarke, 1841) (**Daniell**), esp vol II, Ch XI; R W Millar, *Civil Procedure of the Trial Court in Historical Perspective* (New York: New York University, 1952) (**Millar**), 74-79, 361-63; N Levy, "Mesne Process in Personal Actions at Common Law and the Power Doctrine" (1968) 78 Yale LJ 52 (**Levy**); C Crifo, "The 'Creation' of the Default Judgment in Nineteenth-Century English Procedural Reforms", 181-205 in A Lewis, P Brand and P Mitchell (eds.), *Law in the City* (Dublin: Four Courts Press, 2007) (**Crifo**); P Polden, "Part 3 (The Courts of Law)" in W Cornish and others, *Oxford History of the Laws of England*, vol XI (1820-1914) (Oxford: OUP, 2010) (***Oxford History***). I have found Levy's account to be especially valuable.

As to jurisdiction in real actions, see n 36 below.

28 In practice, in the King's Bench and Common Pleas, the issue of the correct originating process and steps to bring that process to the notice of the defendant were, by fiction, assumed, with the consequence that the action in practice was commenced by the command to arrest the defendant (see, eg, Millar, 74-76).

bill or petition), (2) mesne process, (3) appearance, (4) declaration, and (5) plea. Upon the commencement of proceedings, the object of mesne process was to compel the defendant to appear in court, assuming that he was reluctant to do so. This process consisted, in a combination varying with the court and with the form of action and changing over time, of steps taken to bring the suit and the summons to appear to the notice of the defendant and steps taken against the goods (attachment, distraint) and/or person (arrest, proceedings of outlawry or contempt) of the defendant, with a view to compelling him to make his appearance.

Appearance, the first formal act of the defendant in the proceedings, could take place after or without the need for measures of compulsion against the defendant's person.[29] In the former case, a defendant who had been arrested, being in the custody of a sheriff or the marshal of the King's Bench or the warden of the fleet,[30] and who had provided bail (personal security) to the sheriff in order to regain his liberty ("bail below") was, on the designated return date, required to put in bail to the action ("bail above"[31]) or, in the court of Common Pleas, to enter a common appearance. This formal step was taken either in open court or before one of the judges or before a commissioner appointed for this purpose.[32] A (truly) voluntary appearance, on the other hand, occurred when the defendant in person or through his attorney appeared on the return date of the originating process to avoid arrest and imprisonment. In the King's Bench and Common Pleas, the appearing party delivered to the appropriate court officer (*filacer*) a document recording the appearance and, if represented by an attorney, a memorandum of the attorney's warrant, both documents being duly stamped.[33] In Chancery, a Clerk in Court or Waiting Clerk

29 Tidd (n 27), 262; Daniell, vol II, 4.

30 eg on a writ of *capias ad respondendum*, bill of Middlesex, *latitat* or (in Chancery) attachment.

31 Such bail being either special or common, depending on the action. Special bail required the giving of a bond by nominated persons, whereas the sureties in the case of common bail, for cases in which special bail was not required, were nominal only. For a concise explanation of the distinction between these two forms of bail, see Levy, 64.

32 In Chancery proceedings, one who had been admitted to bail could enter an appearance with the Clerk of Court in the same way as one who came in voluntarily (Daniell, vol II, 10). If, however, he failed to do so, he would be re-arrested and brought into court, being then in the same position as one in custody (ibid 10-11; text to n 46 below).

33 Originally, parties were required to present themselves in open court in person (Stephen (n 27), 28, 32 and Appendix, ix-x). The liberty of suing and defending by attorney was granted by the second Statute of Westminster, 13 Ed. I, c 10 (1285).

The same requirement of physical presence in open court applied also to the plaintiff, but was also thereafter attenuated (Stephen (n 27), 32: "On the part of the plaintiff, no formality expressive of appearance, is observed, but, upon appearance of the defendant, effected in the manner above described, both parties are considered as *in Court*.").

representing the appearing defendant delivered to the plaintiff's Clerk in Court a written notice of the defendant's appearance and recorded the matter in his own memorandum book.[34]

This formal act of appearance was of great significance in the litigation of personal actions before the courts of common law and equity. Four features are of particular note here. First, subject to certain exceptions[35] and later statutory reforms to be described in the following sections of this article, the plaintiff could not proceed to declare in the matter and to prosecute his claim to judgment unless the defendant had appeared. All that he could do in these circumstances was to take further steps against the defendant's person or goods with a view to compelling the defendant to change his mind.[36] Secondly, in the conduct of litigation, a voluntary appearance had the same effect as an appearance achieved by compulsory means: the defendant appearing voluntarily was no better off procedurally than one who had been brought before the court by being arrested, imprisoned and brought into court.[37] Indeed, in the King's Bench, by appearing voluntarily or putting in bail, the defendant was deemed to be in the custody of the marshal or sheriff so as to give the Court jurisdiction to proceed to try and sentence him with respect to other claims.[38] Thirdly, an unconditional[39] voluntary appearance was taken to cure any irregularity in the mesne process or the service of process.[40] Although discussion of this latter point is often couched in terms of waiver of the irregularity, and sometimes in the language of

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34 Daniell, vol II, 4-5.

35 Text to n 46 below.

36 *Williams v Lord Bagot* (1825) 3 B & C 772, 787 (Holroyd J) ("In personal actions, it must appear that the person of the defendant has been brought into court."); also Bayley J, 787 (both references at 107 ER 920, 925). In *Williams*, a customary rule of an inferior court allowing judgment to be entered without appearance was held to be bad in law. cf *Culverson v Melton* (1840) 12 Ad & E 753, 113 ER 999.

The position was otherwise in real actions, which allowed for the entry of judgment by default (3 Bl Comm 296; F Pollock and F W Maitland, *The History of English Law* (Cambridge: CUP, 1968), vol II, 592-93). These actions can be put to one side for the purposes of the present enquiry, for the English conflict of laws draws a distinction between actions *in personam* and actions *in rem* and the adjudicatory jurisdiction of the English courts in such cases has rests upon the location of the land (or other property subject to the proceeding), and not upon the presence, formal or otherwise, of the parties. See Dicey, 226-27 (Rule 43), and Chs V and VI containing separate rules for determining jurisdiction in actions *in personam* and actions i*n rem*. See also Dicey, 384-86 (Rule 82) (jurisdiction of foreign court in action *in rem*).

37 *Mason v March* (1699) Holt KB 760, 760-61; 90 ER 1318, 1318 (Holt CJ).

38 3 Bl Comm 285, referring to Coke (4 Inst 72); *Sulyard v Harris* (1768) 4 Burr 2180, 98 ER 137. See also S Jenks, 'Bills of Custody in the Reign of Henry VI' (2002) 23 Jo. Legal History 3, tracing this device to the early fifteenth century; J Baker, *The Oxford History of the Laws of England*, vol VI (1483-1558) (Oxford: OUP, 2003), 151-54, on the role that it played in extending the jurisdiction of the King's Bench through fictitious Bills of Middlesex and *latitat*.

39 As to conditional appearances in Chancery, see text to nn 151-53 below.

40 *Fox v Money* (1798) 1 Bos & P 250, 126 ER 887. cf *Taylor v Phillips* (1802) 3 East 155, 102 ER 556, where the irregularity could not be waived under the statute. A prisoner brought to court did not waive any irregularity in the process (*R v Tyler* (1706) 1 Comyns 109, 92 ER 986).

"By the ancient rule of Court there could not be a voluntary appearance without a writ" (Mason v March (n 37), 760 (Holt CJ)). It was not, however, necessary that the writ be served, as the defendant could enter an appearance *gratis*. This practice continued until 1979 (see n 311 below).

estoppel,[41] this consequence of the act of appearance is more satisfactorily explained on the basis that the appearance, in securing the object of bringing the defendant into court, cast the mesne process into history.[42] Fourthly, by contrast, an appearance, however occurring, did not cure any defect in the original process or in the court's jurisdiction with respect to the subject-matter or over a defendant holding a protected status taking them outside the court's authority.[43] In such cases, the defendant, having appeared, could enter a plea of abatement to the writ or a plea of jurisdiction at any rate before pleading in the action (imparlance).[44]

Thus, voluntary appearance was a sufficient and, in most cases, necessary condition for establishing the adjudicatory jurisdiction of the English courts over the defendant in personal actions: sufficient because the defendant's formal presence in the courtroom was a manifestation of the court's competence to pass judgment within the limits of its (subject-matter) jurisdiction[45] and necessary because, unless the defendant was a court officer or was actually in custody,[46] the

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41 Analysis in terms of an estoppel is more obviously needed in cases in which the defendant had not entered an appearance but was nevertheless barred from raising the irregularity by his conduct or failure to act. See Tidd (n 27), 561-64; *Downes v Witherington* (1810) 2 Taunt 243, 127 ER 1070; *Fletcher v Wells* (1815) 6 Taunt 191, 128 ER 1007.

42 See the submission advanced as advocate by Philip Yorke (later Lord Hardwicke, LC) in *R v Hare and Mann* (1718) 1 Str 146, 155; 93 ER 439, 444.

43 *Dashwood v Folks* (1692) 3 Lev 343, 83 ER 721; *Penn v Baltimore* (1750) 1 Ves Sen 444, 446-47; 27 ER 1132, 1134; 27 ER 1132, (Lord Ellenborough); *Duke of Brunswick v King of Hanover* (1844) 6 Beav 1, 32-33; 49 ER 724, 736-37 (Lord Langdale MR).

44 Sir Matthew Bacon records that the plea to jurisdiction must be made in person "for he cannot plead by Attorney without Leave of the Court first had, which Leave acknowledges their Jurisdiction" (M Bacon, *A new abridgement of the law* (1st edn, London: HM Law Printers, 1736), 2; also *Grand v Lord Sondes* (1776) 2 Black W 1094, 96 ER 646 but cf *Hunter v Neck* (1841) 3 Man & G. 181, 133 ER 1107 (plea of privilege).

See also *Meredith v Harris* (1741) University of Adelaide Library, Rogerson Manuscripts, Series 2 Notebook 7, folios 11-12, where Lee CJ draws the distinction between "where there is want of jurisdiction of the cause, and where only the want is in *in personam*". I am grateful to my colleague, Mike Macnair, for drawing my attention to this manuscript.

45 It was said that the defendant could not plead to the jurisdiction of the court of the King's Bench or court of Common Pleas, in the sense described above, unless he could show what another court had jurisdiction (Tidd (n 27), 681); but such a plea was held not to be necessary when the limits of subject-matter jurisdiction had been exceeded (*Mayor and Aldermen of the City of London v Cox* (1867) LR 2 H.L. 239, 259-260 (Willes J) (HL)).

Indeed actions classified according to their subject-matter as local (see n.17 above), it seems that the limit upon the court's jurisdiction was (and is) such that it cannot be cured even by pleading on the merits (*City of London v Cox*, above, 261).

As to cases in which the cause of action arose outside England and Wales, see *Mostyn v Farbrigas* (1774) 1 Cowp 161, 172-73; 98 ER 1021, 1027-28 (Lord Mansfield); *Phillips v Eyre* (1869) LR 4 QB 225, 229 (Lush J and Cockburn CJ in argument); Piggott, vol I, 117.

46 In these cases, the defendant's formal presence in court was (at least for the purposes of actions in the King's Bench and Common Pleas) established by other means being, in the case of court officers, the fact of the office itself and, in the case of prisoners, the use of the writ *habeas corpus cum causa* requiring the sheriff or other officer to turn him over to the marshal or warden (J Baker, *An Introduction to English*

court could not proceed to try the action and to pass judgment upon claims against a defendant who did not formally appear.[47]

Accordingly, from a historical perspective,[48] the *sole* common law basis of the superior courts' adjudicatory jurisdiction in personal actions was the defendant's formal presence in the courtroom, and voluntary appearance was the most important of the ways in which this could occur. By contrast, the defendant's presence or residence in England and Wales (or, for that matter, his or her British nationality) was not sufficient at common law to confer jurisdiction to rule in the case, even if coupled with the service of originating or mesne process within the jurisdiction. The fact of judicial power over the body, or assets, of the defendant within the realm (or the defendant's allegiance as a subject of the Crown) did not entitle the court to proceed to hear the case and to enter judgment.[49] Put another way, the court's authority to coerce or punish non-compliance with a demand, by originating or mesne process, that the defendant present himself at court did not carry with it the authority to adjudicate upon the dispute between him and the plaintiff and to bind the parties by a decision upon the subject-matter of the dispute, having the force of *res judicata*. The jurisdiction to command appearance

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Legal History (4th edn, London: Butterworths, 2002), **). As to the position in Chancery proceedings, see text to nn 149-50 below

47 Levy, 58-60, 68-79; Millar, 74, 361; W S Holdsworth, *History of English Law*, vol II (London: Methuen & Co., 2nd ed., 1898), 104-105 and vol IX (London: Methuen & Co., 1926), 252-53 (cf. vol I (London: Methuen & Co., 3rd ed., 1922), 22, discussed Levy, Ibid 77-79); Pollock and Maitland (n 35), 594-95; Crifo, 183-85.

See also *Dennis v Mannaring* (1617) Pop 145, 79 ER 1216 (discussed by Levy, 72, n 94), where there is a reference by Doderidge J to defendants in the King's Bench being forced by the court to put in bail.. This can be seen as an example of a case in which the conduct of the defendant (here, in the face of the court) or his attorney generated a consensual obligation to appear, which the court was prepared to enforce. For other examples, see Levy, 72-76. In such cases, the court might compel the defendant or his attorney to do what he had promised, or proceed on the basis that the defendant had authorised the plaintiff to enter an appearance for him by filing bail. The reference in the Rules of the King's Bench, Trin. 4 W&M II (1692) to "signing of Judgment by Default" is to be understood as applying to cases of this kind.

As to the role of party autonomy today, see text to nn 359-69 below.

48 Ehrenzweig, in 'The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens' (1956) 65 Yale LJ 290, 296, notes the echoes of litigation in Rome under the *legis actiones* and formulary procedures (as to which, see W W Buckland, *A Textbook of Roman Law from Augustus to Justinian* (3rd edn, revised by P Stein, Cambridge: CUP, 1963), 610, 630-631; J A C Thomas, *Textbook of Roman Law* (2014 edition, Cambridge, Philip McDonald), 80, 91; compare the position under the later *cognitio* procedure (Buckland, above, 666; Thomas, above, 127-128; Digest, 5.1.68-73, 75). See also R W Millar, 'The Formative Principles of Civil Procedure' (1923) 18 Illinois LR 1, 4-7.

49 See *Balch v Wastall* (1718) P Wms 445, 24 ER 465 (discussed by Levy, 70-71).

and to prescribe sanctions for non-compliance with that command did not confer the jurisdiction to adjudicate at common law.[50]

Writing in his judicial capacity in 1828, in his judgment in *Picquet v Swan*, Joseph Story summarised the position with acuity as follows:[51]

> "The principles of the common law (which are never to be lost sight of in the construction of our own statutes) proceed yet farther. In general, it may be said, that they authorize no judgment against a party, until after his appearance in court. He may be taken on a *capias* and brought into court, or distrained by attachment and other process against his property to compel his appearance; and for non-appearance be outlawed. But still, even though a subject, and within the kingdom, the judgment against him can take place only after such appearance. So anxious was the common law to guard the rights of private persons from judgments obtained without notice, and regular personal appearance in court."

Further, appearance as a basis of jurisdiction at common law applied, without distinction, to subjects and non-subjects alike and regardless of whether the defendant was present within the jurisdiction at the time the process was issued or served, or only temporarily present.[52] Even if, at the turn of the 19th Century, it was correct to state that the King's writ did not ordinarily run (i.e. could not be given effect by service or otherwise) beyond the realm (*breve domini regis non currit*[53]*),* an overseas defendant who took the formal step of appearing voluntarily in proceedings

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50 cf. Dicey, 45-46; Westlake, *A Treatise on Private International Law* (London: William Maxwell, 1880), 200-201, without any citation of authority.

51 *Picquet v Swan* (1828) 5 Mason 35, 44; 19 F Cas 609, 612-613 (Story J., Circuit Court, Massachusetts). cf *Burnham v Superior Court of California* (1990) 495 US 604; 110 S Ct 2105, 2110-11 (Scalia J), but the passages and authorities relied on appear to concern other matters (subject-matter jurisdiction; jurisdiction in international law; requirements of natural justice) and do not contradict the proposition in the text.

It must, nevertheless, be acknowledged that Story's extra-judicial writings (which were strongly influenced by developing doctrines of public international law) were undoubtedly more influential in shaping not only US, but also English law. Story's work on the conflict of laws was frequently cited in cases before the English courts in the 19th Century, and its influence is manifest in the judgment of Lord Westbury in *Cookney v Anderson* (1863) 1 De G J & S, 46 ER 146 (text to nn254-60 below) as well as in the pivotal foreign judgments cases of *Schibsby v Westenholz* (1870) LR 6 QB 155 (CA) and *Singh v Rajah of Faridkote* [1894] AC 670 (PC).

52 *Travers v Bulkeley* (1750) 1 Ves Sen 384, 27 ER 1095; *Curry v Anonymous (Mackenzie)* (1753) 3 Keny 29, 96 ER 1296; *Howden v Rogers* (1812) 1 V & B 129, 35 ER 151. cf *Burton v Maloon (Malone)* (1740) Barn Ch 401, 27 ER 695, distinguished in *Travers* (at 385, at 1096) on the ground that the plaintiff had knowingly used improper procedures to procure the defendant's appearance).

53 *Calvin's Case* (1608) 7 Co Rep1a, 20a; 77 ER 377, 401, drawing a distinction between two classes of writs, *brevia mandatoria* and *brevia remedialia*, the former being capable of extending to subjects beyond

could not complain of any irregularity with regard to service for he was present in court, and had thereby not only subjected himself to the court's judicial authority but also rendered it otiose to complain of any defect in the earlier process designed to compel his appearance. It no longer mattered how his presence before the court had come about: the fact of that formal presence was sufficient to enable the court to proceed to judgment.

It was, in this connection, not unusual for commentators, reporters, advocates or judges to refer to the fact of the defendant's formal appearance as a "submission to the jurisdiction".[54] Nevertheless, such usage was opaque and, it is submitted, misleading, for it was well-established that the defendant's presence in court did not operate to enlarge the court's jurisdiction with respect to the subject-matter of the dispute. As noted above,[55] it was still open to the defendant to contest this aspect of the court's jurisdiction at the pleading stage. If, instead, he pleaded to the merits, the right to object might be lost, depending on the nature of the objection raised and

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the realm (eg *Bartue and the Duchess of Suffolk's Case* (1559) 2 Dyer 176b, 73 ER 388; *East India v Sandys* (1683) Skin 197, 90 ER 91) but the latter not. See also *Ex p Mwenya* [1960] 1 QB 241 (CA).

The question of the geographical limits of writs issued by the courts of the King's Bench and Common Pleas was muChDiscussed in cases concerning the service, in particular, of mesne process in parts of the British Isles with their own courts and court officers

Berwick: *Jackson and Crisp v Mayor of Berwick* (1669) 1 Mod 37; 86 ER 716; *R v Cowle* (1759) 2 Burr 834, 97 ER 587.

Wales: *Draper v Blaney (Blanye, Blany)* (1669) 1 Wms Saund 193, 85 ER 959; 1 Lev 291, 83 ER 412; 2 Keble 649, 657 and 714, 94 ER 408, 413 and 451; *Whitrong (Witterong) v Blaney* (*Blany*) (1674) 2 Mod 10, 86 ER 912; Freem KB 108, 146 and 173; 89 ER 80, 106 and 124; 3 Keb 401, 84 ER 789 (see also *Process into Wales* (1672) Vaughan 395, 124 ER 130, apparently intended by the Chief Justice as a judgment to be delivered in that case, but he died before it concluded - see the first note to the report of *Draper v Blaney* in Wms. Saund.); *Lampley v Thomas* (1747) 1 Wils KB 192, 95 ER 568; *Penry v Jones* (1779) 1 Doug KB 213, 99 ER 139. See also *Trantor (Tranter) v Duggan (Duggen)* (1698) Comb 468, 90 ER 595; 12 Mod 138, 88 ER 1219; *Vaughan v Evans* (1724) 8 Mod 374; 88 ER 266; 1 Str 630, 93 ER 744.

Ireland: *Otway v Ramsay* (1738) 2 Str 1090, 93 ER 1051, also 14 Vin Abr in notes 569, no.5

Durham: *Chapman v Maddison (Mattison)* (1738) 2 Str 1089, 93 ER 1051; Andr 191, 95 ER 358.

As to service out of the jurisdiction in Chancery proceedings, see n 166 below.

Further consideration of this topic is beyond the scope of this paper. For what it is worth, and by reference to the above authorities, the best historical explanation of the maxim *brevia domini regis non currit* may be that it refers to limits upon the mandate of court officers (*Chapman v Maddison*, above) or as a form of judicial self-restraint, and does not define the outer limits of the courts' inherent authority to serve process commanding the defendant to appear.

In any event, as appears above (text to nn48-50), this article takes the position that the courts' authority to command appearance (ie their prescriptive jurisdiction) does not correlate with their adjudicatory jurisdiction at common law. See *Cookney v Anderson* (1862) 31 Beav 452, 468; 54 ER 1214, 1220 (extract from the judgment of Romilly MR quoted in the text to n 175 below).

54 eg Daniell, 4 ("Appearance is the process by which a person against whom a Bill has been filed submits himself to the jurisdiction of the Court."); *R v Sibbernes* (1687) Burr 261, 167 ER 564; *Scrimshire v* Scrimshire (1752) 2 Hag Con 395, 161 ER 782; *Forbes v Phipps* (1760) 1 Eden 502, 28 ER 780; *R v Barnes* (1769) Burr 64, 167 ER 473; *Hill v Rimell* (1837) 2 My & C 641, 40 ER 784; *Sherwood v Ray* (1837) 1 Moo PC 353, 12 ER 848; *Keys v Williams* (1839) 3 Y & C Ex 462, 160 ER 784; *Earl of Chesterfield v Bond* (1840) 2 Beav 263, 48 ER 1181; *Re Taylor* (1840) 11 Simons 178, 59 ER 842.

55 Text to nn 42-43.

in particular whether the court was exercising a statutory jurisdiction or the defect in the court's jurisdiction appeared on the record.[56] The failure to raise a challenge to the court's jurisdiction at this stage was also sometimes described by commentators as involving a submission to the jurisdiction,[57] a label that is equally uninformative as to the nature of the enquiry involved.

B. *Statutory Reforms of the 18th and 19th Centuries - the Evolution pf Appearance and of Judgments in Default Of Appearance*

1. The courts of common law

(a) Earlier developments - before 1830

In his judgment in *Picquet v Swan*, referred to in the last section, Story J stated:[58]

> "[T]he right to serve process upon the property of the party, and thereby to bring him into court, when an absentee so as to bind that property, or him personally, by the judgment, is not a right growing out of the common law, but everywhere, at least in countries governed by the common law, depends on statute regulations."

In the 18th and 19th centuries, the adjudicatory authority of the principal, superior courts in England evolved not by common law innovation, but by statutory reform of the procedural institution of appearance and the development of the courts' powers to enter judgment in cases where the defendant was not formally present in court according to common law notions of appearance.[59] These reforms, as will be seen, had important implications for cross-border cases, although that was neither their exclusive nor even principal focus.

The first inroad, in 1692, had no obvious cross-border element, and was concerned with compulsory rather than voluntary appearance. In order to relieve plaintiffs from the trouble and expense of bringing prisoners into court by a writ *habeas corpus cum causa*, it was enacted that plaintiffs might issue a declaration against a defendant detained in custody who had been unable to post bail, that a copy of the declaration be delivered to the prisoner giving him an opportunity to appear and plead and that "if such Prisoner or Prisoners shall not appear and plead to the same, the Plaintiff or Plaintiffs in such Cases *shall have Judgment in such Manner as if the Prisoner or Prisoners had appeared in the said respective Courts*, and refused to answer or plead to such

56 Tidd (n 27), 638-39. The right to plead to the jurisdiction could also be lost by delay (ibid.).
57 eg Bacon (n 43), 2.
58 *Picquet v Swan* (1828) 5 Mason 35, 47; 19 F.Cas. 609, 613-614.
59 Section III.A above.

Declaration".[60] The plaintiff was, thereby, entitled to proceed to judgment without the defendant being formally present in court on the basis of a provision which deemed an appearance to have been entered when the defendant had been given the opportunity to do so. The common law condition for the exercise of personal jurisdiction (i.e. formal presence in court) is maintained at the expense of a statutory fiction.

A more significant inroad occurred in 1725, with the adoption of a statute seen as the foundation of the judgment in default of appearance[61] in modern English civil procedure.[62] To prevent frivolous and vexatious arrests, Parliament enacted that no person should be held to special bail upon any process issuing out of any Superior Court where the cause of action was valued at less than £10.[63] Instead, in such cases, the plaintiff was required to serve the defendant with a copy of the process issued against him. If the defendant did not appear within four days after the return date:[64]

> "[I]t shall and may be lawful to and for the Plaintiff or Plaintiffs, upon Affidavit being made, and filed in the proper Court, of the Personal Service of such Process as aforesaid *... to enter a Common Appearance or file Common Bail for the Defendant or Defendants, and to proceed thereon, as if such Defendant or Defendants had entered his, her or their Appearance, or filed Common Bail*; any Law or Usage to the contrary notwithstanding."

In such cases, therefore, the defendant's formal presence in court through appearance, although still insisted upon as a pre-condition to the entry of judgment,[65] was no longer attributable to an act of the defendant or his authorised representative. Instead, the court was authorised to

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60 Pleadings in Actions Act (4 & 5 W & M, c 21), s 2 (emphasis added), repealed by the Statute Law Revision Act 1867 (30 & 31 Vict c 59), s 1. See *Blyth v Harrison* (1796) 1 Bos & P 535, 126 ER 1051. This statute applied to prisoners of the sheriff, but similar treatment was extended to prisoners of the Fleet (Escape of Debtors, etc. Act, 8 & 9 Will. 3, c 27, s 13) allowing judgment to be entered "as if suChDefendant or Defendants had been actually charged at the Bar of the Common Pleas or Exchequer with such Action or Actions".

61 The defendant's failure to participate in proceedings *following* appearance could, at common law, result in a judgment of *nil dicit*, often described as a judgment by default (Millar, 365). As to the position in Chancery proceedings, where the equivalent was a decree *pro confesso*, see Millar, Ibid 365-66; also *Hawkins v Croke* (1730) Mos 383, 25 ER 453; *Davis v Davis* (1739) 2 Atk. 21, 26 ER 410; see also the cases summarised under *Bills taken pro confesso* (1744) 2 Eq Cas Abr 178, 22 ER 154.

62 Levy, 70-79; Millar, 361-62; Crifo, 187; G Hazard, 'A General Theory of State Court Jurisdiction' (1965) Supreme Court Review 241, 248, fn.19.

63 Frivolous Arrests Act (12 Geo 1, c 29), s 1, repealed by the Bankruptcy Repeal and Insolvent Court Act 1869 (c 83), s 20. By s 2 of the 1725 Act, an affidavit was required to evidence the value of the claim if the plaintiff wished to proceed by arresting the defendant.

64 Ibid (emphasis added).

65 *Williams v Bagot* (n 36), 688 (Littledale J).("By the [Frivolous Arrests Act 1725), the plaintiff has authority to enter an appearance for the defendant, but every such entry shows the defendant has appeared; and they cannot be made until the process has been personally served.")

proceed to try the matter and to enter judgment on the basis of the legal authorisation granted to the plaintiff to enter an appearance on the defendant's behalf, itself founded upon the earlier act of service and the defendant's default, and upon the statutory fiction that the defendant had in fact entered an appearance.

This enactment was amended in 1732[66] and then revived and made perpetual in 1747,[67] its scheme subsequently being modified and extended without (for present purposes) material alteration in terms of the overall approach until 1832.[68] One extension, in particular, merits closer attention. The enactment was originally limited to proceedings by original and other writs upon which process for the arrest of the defendant (*capias*) could be issued, but in 1811 it was extended to cases in which that mesne process was not available.[69] In such cases, the statute provided for the personal service of the originating process with a written notice informing the defendant of the intent and meaning of such service including a statement in the following terms:

> "And take Notice, that in Default of your Appearance, the said [plaintiff] will cause an Appearance to be entered for you, and proceed thereon as if you had yourself appeared by your Attorney."

Additionally, the statute provided that if a Judge was satisfied that the defendant could not be personally served with the originating process, and that such process had been duly executed at the defendant's dwelling house or lawful abode, then the claimant may, by leave of the court, sue out a writ of distraint to compel the defendant's appearance and, if the defendant was given due notice of that writ and still did not appear, the plaintiff could enter a common appearance for the defendant upon filing further evidence to confirm that the required procedural steps had been taken. The potential efficacy of this procedure was, however, diminished by the practice of the Courts of Common Pleas and Exchequer in requiring the plaintiff to show, by affidavit, that the defendant had acted to avoid service of the process.[70]

(b) Harmonisation of common law civil procedure in the first half of the 19th Century

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66 Process for Small Debts Act (5 Geo 2, c 27).

67 Vexatious Arrests Act (21 Geo 2, c 3).

68 For a summary of later extensions of this legislation, see the preamble to and provisions of the Frivolous Arrests Act (47 Geo 3, c 124), itself repealed by the Statute Law Revision Act 1873 (c 91), s 1.

69 Frivolous Arrests Act, 51 Geo 3, c 124, s 2. See Levy, 90.

70 First Report of the Commissioners authorised to inquire into the practice and proceedings of the Superior Courts of Common Law (1829), 87. See *Scott v Gould* (1811) 4 Taunt 156, 128 ER 288; *Hannam v Dietrichsen* (1814) 5 Taunt 853, 128 ER 929; *Anonymous* (1818) 8 Taunt 171, 129 ER 349; *Godkin v Redgate* (1831) 3 Cr & J 401, 148 ER 1478.

In a report produced in 1829, Commissioners appointed to review the practices and procedures of the common law courts made a number of recommendations for reform of the rules governing originating and mesne processes and the entry of appearances.[71] In the section of its report on "Process", the Commissioners began with the following account of the role of appearance in court proceedings:[72]

> "In all Actions it is a fundamental rule that the plaintiff is not permitted to declare until the defendant has appeared. The rule, as so expressed, has reference to that ancient state of practice by which the plaintiff or defendant personally, or by their respective attornies, were opposed to each other in open court and conducted *viva voce* their altercations. The plaintiff at that period, from an obvious consideration of justice, was not allowed to declare, that is prefer his claim or complaint, except in presence of his adversary. But the *appearance*, whether of plaintiff or defendant, has for centuries past ceased to be an actual one,[73] and the declaration and all the pleadings are delivered in writing, out of court, between the parties. The rule above mentioned accordingly imports at the present day no more than this - that the plaintiff shall not deliver his declaration until by some formal entry or act in Court (of such kind as the practice of the Court in different cases prescribes) the defendant has first admitted that he has had sufficient intimation of the suit, and that the plaintiff is consequently in a situation to declare against him; such entry or act on the part of the defendant being called his *appearance*.

The Commissioners continued:

> "This practical regulation, though not so indispensably necessary to the fairness of the judicial proceeding as was the ancient principle from which it is derived, is yet an useful and convenient one, and should be retained. It would be possible, indeed, to establish a scheme of practice by which the declaration should be delivered, in the first instance, without previous appearance, and should form (as in the excepted case of defendants who are attornies, officers or prisoners of the court, it now in fact does) the commencement of the action; but under such a system it would not, in ordinary cases, be consonant with justice to give judgment for the plaintiff (in the event of no plea being

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71 First Report of the Commissioners(n 70). The Commissioners were Serjeants at Law, John B Bosanquet (later a Justice of the Common Pleas) and Henry John Stephen (author of the leading work on the principles of pleading in civil actions) and Barristers, Edward Hall Alderson (later a Justice of the Common Pleas), James Parke (by the time of the report, a Justice of the King's Bench; later Baron Wensleydale) and John Patteson (later a Justice of the King's Bench).

72 Ibid 70.

73 ie by physical presence in court.

> offered on the part of the defendant) without some previous proof that the latter had received the declaration, and received it in sufficient time to prepare and deliver his plea. In short, whatever be the mode in which the suit is intimated, it is evidently necessary to the protection of the defendants, that before judgment is obtained against any person, the Court should be satisfied that such intimation has been duly effected."

These passages demonstrate, in the clearest possible terms, the Commissioners' view that the rules and requirements concerning the entry of appearances (whether the ancient practice of requiring the parties to be physically present in court,[74] the then prevailing practice of an appearance by a formal act or entry in court[75] or statutory rules entitling a declaration to be given without a voluntary appearance[76]) all rested on considerations of justice, namely of ensuring that the defendant received a sufficient intimation of the claimant's case and has had a sufficient time to prepare and deliver his defence.[77] Such considerations are familiar to modern students of private international law, who will recognise them as being a central concern of the common law's insistence that a foreign judgment be rendered in conformity with the requirements of natural justice.[78]

In the following pages of their report, the Commissioners proceeded to consider the forms of originating and mesne process presently in use in the Courts of King's Bench, Common Pleas and Exchequer, and to suggest possible reforms to eliminate the defects that they had identified. They identified one such defect, of an "important character",[79] as being that the processes used in the common law courts:[80]

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74 n. 33 above.

75 Section III.A above.

76 Section III.B.2(a) above.

77 See also *Hope v Hope* (1854) 4 De G M & G 328, 342; 43 ER 534, 539-40 (Lord Cranworth LC) (substituted service).

78 Dicey, Morris & Collins, [14R-162] (Rule 52); *Jacobson v Frachon* (1927) 138 LT 386, 392 (Atkin LJ) (CA). See also Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2012] O.J. L351/1 (**Brussels Ia Regulation**), Art. 45(1)(b), under which recognition or enforcement of a judgment of an EU Member State shall be refused "where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so".

79 First Report of the Commissioners (n 70), 90.

80 Ibid As to proceedings of outlawry of persons beyond the jurisdiction, see *Matthews v Erbo* (1703) Carth 459, 90 ER 865; *Hesse v Wood* (1812) 4 Taunt 691, 128 ER 502; *Solly v Forbes* (1818) 8 Taunt 516, 129 ER 516; *Bryan v Wagstaff* (1826) 5 B & C 314, 108 ER 117; *Governor and Company of the Bank of England v Reid* (1840) 7 M & W 159; *Jackson v Spittall* (1870) LR 5 CP 542, 550 (Brett J); Tidd (n 27), Ch 7; Piggott, vol I, 222-23; Levy, 81-90.

> "all suppose, either that the defendant may be personally found within the jurisdiction (that is, within the limits of England and Wales and Berwick-upon-Tweed) or that he has some known place of abode there, and some property against which *[the plaintiff might distrain]*. But if the case be supposed of his being absent from the realm, and without a known place of abode or property in this country ... the plaintiff then has no means of compelling an appearance, except by proceeding to Outlawry".

After discussing the cumbersome and often fruitless processes upon outlawry, highlighting further difficulties arising if one or more defendants to a suit upon a contract was abroad,[81] the report summarised the Commissioner's proposed reform package, including what appear from a modern perspective to be radical proposals to allow a plaintiff to enter an appearance for a defaulting defendant who could not be found within the jurisdiction, and had no place of residence, if either the defendant had an interest in property held by an agent or partner within the jurisdiction upon whom a summons had been served or, failing which, if a judge allowed the summons to be served "by affixing a copy on the door of any parish church near to which the defendant may lately have been resident, or on the Royal Exchange, or by inserting notice thereof in the London Gazette, or in any other manner that under the circumstances may seem suited to the nature of the case".[82]

The Commissioners' report led to legislation in 1832. Although not following all of the Commissioner's proposals, the Uniformity of Process Act made significant changes with respect to the entry of appearances, and the consequences of the defendant's failure to enter an appearance.[83] The forms of originating process in the common law courts were reduced to two: a writ of summons (non-arrestable process) and a writ of *capias* (arrestable process).[84] Upon personal service of a writ of summons, in or within 200 yards of the border of the county in which the defendant resided or was supposed to reside, the defendant was commanded by the terms of the writ to cause an appearance to be entered within 4 or 8 days[85] by delivering a

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Although the process of outlawry could enable a plaintiff to secure satisfaction of his claim through delivery up of the property of the outlaw seized by the Crown, such procedure was "*de grata* and not *de jure*" (*Jennings v Hatley* (1602) Yel. 20, 80 ER 14 (Popham CJ), cited by Levy, 85). It did not involve an assertion of adjudicatory jurisdiction by the court with respect to the claim.

81 First Report of the Commissioners (n 70), 92. See the materials referred to in the preceding footnote.

82 Ibid 96. See also r 18.II of the Proposed Regulations as to Process, Arrest and Bail contained within the Supplement to the Report.

83 Uniformity of Process Act, 2 Will. 4, c 39.

84 Ibid s 1 and 4. Only the procedure following issue of a writ of summons is described below.

85 Ibid Sch. No. 1 and *Regulae Generales* (2 c &.J. 167), r 31.

memorandum in writing in the prescribed form[86] to the appointed officer of the court out of which the process issued.[87] If he did not do so, the plaintiff was authorised by the terms of the statute and the writ to cause an appearance to be entered for the defendant and to proceed to judgment and execution in default of the defendant's actual appearance.[88]

If personal service of a writ of service proved impossible, the plaintiff could proceed by applying to the court for the issue of a writ of distraint[89] commanding the sheriff to seize the defendant's goods and chattels, at his place of abode or elsewhere, in order to compel his appearance. The plaintiff was then authorised to enter an appearance for the defendant and to proceed to judgment and execution if the defendant did not appear within 8 days of the return of the writ, whether the defendant had been served with it or not.[90] In the latter circumstance, the plaintiff could choose instead to proceed to outlawry.[91]

On its face, not being limited in terms to defendants present or residing within the jurisdiction, this extension of the distraint procedure available under the Frivolous Arrests Act 1811[92] could have been taken to signal a significant extension of the courts' adjudicatory jurisdiction over defendants abroad and a dilution of the courts' insistence that the defendant should have received a sufficient intimation of the plaintiff's case and had a proper opportunity to respond. That possibility, however, was quickly curtained by the practice of the courts, which required the plaintiff to elect between a writ of distraint to compel appearance and a writ of distraint for outlawry, and allowed the issue of the former type of process against a party who was abroad at the time of service of the writ of summons[93] only if it was shown on affidavit that he had done so to avoid his creditors.[94] It is, nonetheless, important to note that issue a writ of distraint to compel the appearance of a defendant who was abroad at the time of service of the writ of summons, and who had not left the country to avoid his creditors, was treated as mere

86 Ibid Sch. No. 2.
87 Ibid s 2.
88 Ibid s 16 and Sch. No. 1.
89 Ibid Sch. No. 3
90 Ibid ss. 3 and 16 and Sch. No. 3.
91 Ibid s 5.
92 Text to nn 69-70.
93 Or whom the plaintiff could not state on affidavit to have been within the jurisdiction.
94 *Fraser v Case* (1833) 9 Bing 464, 131 ER 687; *Simpson v Lord Graves* (1833) 2 Dowl PC 10; *Moon v Thynne* (1834) 3 Dowl PC 153; *Evans v Fry* (1835) 3 Dowl PC 581; *Partridge v Wallbank* (1837) 2 M & W 893, 150 ER 1021; *Esdaile v Marshall* (1838) 4 Bing NC 172, 132 ER 754; *Norman v Winter* (1838) 4 Bing NC 637, 132 ER 934; *Grover v Hindmarsh* (1839) 7 Dowl PC 607; *Brough v Eisenberg* (1849) 14 QB 446, 117 ER 174.

In the case of a writ of distraint *for outlawry*, it was not necessary to show that the defendant had gone abroad to avoid his creditors (*Dick v Beavan* (1849) CB 621, 137 ER 651).

irregularity, and not undermining the courts' statutory jurisdiction to authorise the plaintiff to enter an appearance and to proceed to enter judgment if the defendant did not respond. Accordingly, a judgment founded upon an appearance entered by the plaintiff in these circumstances would be upheld as a valid judgment if the defendant did not apply to set aside the proceedings within a reasonable time or if he took a fresh step after knowledge of the irregularity.[95]

In *Brough v Eisenberg*,[96] the defendant, a chiropodist residing in Isleworth, left England in accordance with his usual habit to spend the winter on the Continent. In his absence, the plaintiff issued a writ of summons for debt and proceeded (via the issue of a writ of distraint to compel appearance) to enter an appearance on the defendant's behalf under the statute, to enter judgment and to execute that judgment against the defendant's assets. Upon hearing of the execution, the defendant made his way home, a journey that took over 2 months, and applied to set aside the proceedings. The court did not accept that he had acted promptly, and refused his application to set aside the judgment and execution upon it. The defendant's application having failed on account of his tardiness, it could not be doubted that the judgment was one that the court had jurisdiction to give in consequence of the appearance that the plaintiff had entered for the defendant under the statute. It may be noted that language of "submission to the jurisdiction" had no part to play in the court's reasoning. Indeed, it would be liable to mislead. In *Brough*, the defendant, who had not been present in England during the entire course of the proceedings up to judgment, had vigorously protested the court's jurisdiction, but in vain. However, the exact same reasoning would have followed if the defendant had returned promptly to England, but had taken a "fresh step" in the proceedings before making his application to set aside the judgment and execution. Today, such a case would likely be analysed in terms of whether the defendant had submitted to the court's jurisdiction.[97] Such reasoning was (and, in the author's view, remains) unnecessary in a case such as this: notwithstanding that the proceedings leading to judgment were irregular the statute authorised entry of the judgment, and the defendant had lost his right to challenge the irregularity in accordance with rules of court made under the statute.

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95 *Regulae Generales* (2 c &.J. 167), r 33. The *Regulae Generales* were made under the Uniformity of Process Act, s 14. Rule 33 provided that: "No application to set aside process or proceedings for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity". This followed the earlier practice of the Court of King's Bench (see 2 c &.J. 177, note (h) and n. 40 above). Note that, although an appearance by the defendant would prevent him from objecting to any irregularity (text to nn 38-39), an appearance entered on his behalf by the claimant did not.

96 *Brough v Eisenberg* (n 94); also *Ross v Gandell* (1849) 7 CB 304.

97 Text to nn316-319 and 351 below.

Six years later, in 1838, the writ of *capias* was abolished as a form of originating process[98] in civil actions, it being provided that all personal actions in Her Majesty's Superior Courts of Law at Westminster were to be commenced by writ of summons.[99] This statute provided, however, for a judge to authorise the issue of a writ of *capias* as mesne process authorising the arrest of the defendant if a plaintiff (or intended plaintiff[100]) in any action in which the defendant was formerly liable to arrest could show by affidavit[101] that (1) he had an action worth £20 or upwards, and (2) there existed probable cause for believing that the defendant was about to quit England unless arrested.[102] A defendant arrested following the issue of such a writ was to remain in custody until posting bail or depositing the sum claimed into court.[103] The statute also provided for the discharge of those in custody upon mesne process at the date of commencement subject to the requirement that the prisoner enter a common appearance to the action.[104]

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98 J Dixon, *Lush's Practice of the Superior Courts of Law at Westminster* (3rd edn, 1865), vol II, pp. 687, 747.

99 Judgments Act, 1&2 Vict, c 110, ss. 1-2. Sections 1 to 10 of the Act were repealed by the Bankruptcy Repeal and Insolvent Court Act, 32&33 Vict, c 83. See also Debtors Act 1869, s 4. For the historical background to this legislation, see *The Oxford History*, pp. 575-579; B Kercher, 'Transformation of Imprisonment for Debt' (1984-1985) 2 Austr J L & Society 60.

100 *Schletter v Cohen* (1841) 7 M & W 389, 151 ER 816. The writ of summons must, however, be sued out before the writ of *capias* could be issued: *Brooke v Snell* (1840) 8 Dowl 370.

101 See eg *Bateman v Dunn* (1838) 5 Bing N C 49, 132 ER 1023; *Harvey v O'Meara* (1839) 7 Dowl PC 725; *Willis v Snook* (1841) 8 M & W 147, 151 ER 986; *Gibbons v Spalding* (1843) 11 M & W 173, 152 ER 763; *Graham v Sandrinelli* (1846) 16 M & W 191, 153 ER 1156; *Pegler v Hislop* (1847) 1 Ex. 437, 154 ER 186.

102 Judgments Act 1838, s 3; *Mitchell v Simpson* (1890) 25 Q.B.D. 183, 191 (Fry L.J.: "the effect of the statute was not to abolish arrest on mesne process, but to confine it to certain cases and modify its operation") (CA).

This provision applied even if the defendant intended to return to his country of residence, within or outside the United Kingdom: *Lamond v Eiffe* (1842) 3 QB 910, 114 ER 758. As to the possibility of an action for malicious arrest under the Act, see *Daniels v Fielding* (1846) 16 M & W 200, 153 ER 1159. See also *Larchin v Willan* (1843) 4 M & W 351, 150 ER 1463; *Arkenheim v Colegrave* (1845) 13 M & W 620, 153 ER 259 (army officer). cf *Atkinson v Blake* (1842) 1 Dowl NS 849 (ship's captain). See generally *Lush's Practice* (n 98), vol II, bk. II, Ch I.

In the remarkable case of *Stein v Valkenhuysen* (1858) El, Bl & El 65, 120 ER 431, the defendant was induced by the plaintiff to come to England for a spurious meeing, and was promptly arrested on the ground that he was about to quit England. Without deciding whether the court had discretion to grant or refuse an order, the court held that the plaintiff could not take advantage of his own fraud. Crompton J also doubted whether the defendant could be said to be about to quit England within the meaning of the Act.

See also the Absconding Debtors Act, 14 & 15 Vict, c 52, considered *Hughes v Griffiths* (1862) 13 CB NS 324, 143 ER 129; Debtors Act 1869, c 62, s 6. This enactment was designed to counter "frauds ... perpetrated upon creditors residing at a distance from London by debtors embarking for distant countries from various towns and seaports in England". See *Lush's Practice* (n 98), vol II, bk. II, Ch II.

As to the relationship between the process issued under the Judgments Act and the prerogative writ *ne exeat regno*, see *Felton v Callis* [1969] QB 200, esp 206 (Megarry J).

103 Judgments Act 1838, s 4.

104 Ibid s 5.

(c) The Common Law Procedure Act 1852

At this juncture, therefore, the defendant's formal presence in court could be secured by a truly voluntary appearance or an appearance entered by the plaintiff under the Uniformity of Process Act or, with decreasing frequency,[105] by proceeding against a defendant in custody.[106] Accordingly, the common law requirement of formal presence in court as a pre-condition to the existence of adjudicatory jurisdiction remained to the fore. More fundamental reforms were to follow.

In 1850, separate Royal Commissions was established to examine the practice of the courts of common law and Chancery.[107] The common law Commissioners[108] produced their first report in 1851.[109] They described the reforms introduced by the Uniformity of Process Act[110] as "a great improvement on the former modes of commencing actions",[111] but made a number of criticisms and recommendations for reform of the prevailing procedures. Of particular note, for present purposes, are the following proposals:

- That the writ of summons may be served anywhere within the territorial jurisdiction of the court, and not only within or near to the boundary of the county named in it.[112]

- That power be given to a judge, if it should appear that a defendant in England has evaded personal service of the writ, to enable the plaintiff to proceed immediately as if personal service has been effected or to authorise the plaintiff to proceed upon taking further steps to bring the writ to the defendant's attention.[113]

105 *Oxford History*, vol XI, p. 579 ("[A]s a means of securing appearance to answer a writ, bailable process was of minimal importance after 1838."). See Kercher (n 99), 95, showing a reduction in committals from mesne process from 4070 in 1838 to 627 in 1839 and 154 the following year.

106 Lush's Practice (n 98), vol II, pp. 647-648.

107 As to Chancery, see text to nn 193-198 below.

108 Sir John Jervis, Attorney General (later Lord Chief Justice of the Common Pleas); Samuel Martin (later an Exchequer Baron); William Henry Walton, one of the Masters of the Court of Exchequer; George William Bramwell (later Baron Bramwell); James Shaw Willes (later a Justice of the Court of Common Pleas).

109 First Report of HM Commissioners for Inquiring into the Process, Practice and System of Pleading in the Superior Courts of Common Law (1851).

110 Section III.B.1(b) above.

111 First Report of HM Commissioners (n 109), 1.

112 Ibid 4 and Appendix A, recommendation 5.

113 Ibid 4-5 and Appendix A, recommendation 6.

- That the writ of distraint should be abolished, both for the purpose of compelling appearance and for proceeding to outlawry.[114]

- That provision be made for the service outside the territorial jurisdiction of a writ of summons upon British subjects ,[115] of a notice of the writ on foreigners.[116]

With regard to the latter proposal, for service out of the jurisdiction, it is noteworthy that the Commissioners' principal concern about allowing service out of the jurisdiction appears to have been that the proceedings would not be brought properly to the attention of the overseas defendant. They reassured themselves that, in the case of British subjects, "the Court or Judge would always take care that proceedings were not carried on to judgment without the defendant having ample opportunity of defending himself, if he thinks fit" and, in the case of foreign subjects, "[i]t will rarely, if ever, occur that proceedings will be instituted against foreigners unless they have property in this country, and when this is the case, there invariably exist some means of communication with the owner, so we cannot anticipate any serious difficulty in giving the requisite notice of the action". As with their predecessors in 1829, considerations of natural justice appear to have been to the principal controlling factor in shaping proposals to develop the courts' adjudicatory jurisdiction.

At this point in their report, the Commissioners turned to consider the institution of the defendant's appearance in the proceedings. Having referred to the former (common law) requirement that the defendant enter an appearance before the action proceeded to judgment, and to the statutory provisions for the entry of appearances by the plaintiff (as described in the preceding sections of this article), the Commissioners reached the following conclusion:[117]

> "We propose to abolish the entry of an appearance by the plaintiff for the defendant, which is really an unmeaning form, but to retain the substance by permitting the plaintiff, ... to proceed as though the defendant had been served. It has, indeed, been suggested that an appearance by the defendant is altogether needless, but in our judgment it is a convenient mode of intimating to the plaintiff the defendant's intention of resisting the action."

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114 Ibid 5-7 and Appendix A, recommendation 10.

115 Ibid 7 ("We see no reason why a British subject, by going out of the jurisdiction of the Court, should deprive his creditor of the benefit of a judgment.") and Appendix A, recommendation 7.

116 Ibid 8 ("In other countries ... a power exists of suing a person resident in England, and it seems but reasonable that British subjects should have the same advantage of availing themselves of the process of their own Courts against foreigners.") and Appendix A, recommendation A.

117 Ibid 8-9 and Appendix A, recommendations 13-15.

The Commissioners then made certain proposals as to the form, and consequences, of an entry of an appearance.[118]

These proposals, more radical than those of the 1829 Commissioners,[119] were implemented by the Common Law Procedure Act of 1852.[120] By s 2, all personal actions brought against persons residing or supposed to reside within the jurisdiction[121] were to be brought by a writ of summons in the prescribed form. By s 17, provision was made for the Court to dispense with personal sevice in circumstances where reasonable efforts had been made to bring the writ to the attention of a resident defendant, and either he had been made aware of the writ or had wilfully evaded service.[122] By s 18, in the case of a British subject residing out of the jurisdiction (otherwise than in Scotland or Ireland[123]) a plaintiff could issue a writ indorsed for service out of the jurisdiction, with further provision made for a Judge to enable the plaintiff to proceed with his action in the event of the defendant's non-appearance if the plaintiff, by affidavit,[124] satisfied the Court that (1) a cause of action had arisen within the jurisdiction, or a contract made within the jurisdiction had been breached,[125] (2) the writ had been personally served upon the defendant or that it had come to his knowledge after reasonable efforts to effect personal service, and (3) either the defendant had wilfully neglected to appear or that he was living out of the jurisdiction in order to delay and defeat his creditors. By s 19, like provision was made for proceedings against foreign subjects residing out of the jurisdiction, only substituting service of notice of the writ for service of the writ itself. By s 22, provision was made for the issue of concurrent writs, for service within and outside the jurisdiction. By s 24, the distraint procedures contained in the Uniformity of Process Act were repealed.[126]

The Act made also detailed provision for the entry of appearances and the consequences of non-appearance. By s 26, the provisions of the Frivolous Arrests Act[127] and the Uniformity of Process

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118 Ibid 9 and Appendix A, recommendations 16-18.

119 Text to n 82 above.

120 15 & 16 Vict, c 76, substantially repealed by the Statute Law Revision and Civil Procedure Act 1883 (46&47 Vict, c 49), s 3 and Sch.

121 *Lush's Practice* (n 98), vol I, 360-62

122 Ibid 375-376.

123 As to the reason for this exclusion, see the comments of the Lord Justice-Clerk in *Comber v Maclean* (1881) 9 R 215, 221.

124 Common Law Procedure Act 1852, s 23, laying down formal requirements for the swearing of such affidavit and the consequences of forgery or false testimony.

125 Initially, the prevailing view was that the whole cause of action must have arisen within the jurisdiction: *Sichel v Borch* (1864) 2 H & C 954, 159 ER 395;*Thelwall v Yelverton* (1864) 16 CB NS 813, 143 ER 1346; *Allhusen v Malgarejo (*1868) LR 3 QB 340; *Lush's Practice* (n 98), vol I, 382-83, but this view was overturned in *Jackson v Spittall* (n 80).

126 Text to nn 89-95 above.

127 Text to nn 61-65 above.

Act[128] relating to the entry of appearances by plaintiffs for defendants were repealed. By ss. 26-27, in the case of non-appearance by the defendant, the plaintiff was authorised to sign judgment by default, on filing certain documents (including, where service had taken place outside the jurisdiction, a Judge's order for leave to proceed[129]). Sections 30 to 31 made provision as to the form of an appearance. Finally, s 32 authorised the continuation of proceedings to judgment in default of appearance.

These provisions, in combination, represented a significant shift in emphasis, which would have significant ramifications for the development of private international law in England. They mark the point in time at which personal service displaced appearance as the key determinant of the common law Courts' adjudicatory jurisdiction. The former common law position, that an appearance (actual or fictitious, voluntary or by compulsion) was necessary in almost every case for the action to proceed to judgment had been superseded and the appearance, if not "altogether needless", was transformed from a pre-condition to the existence of adjudicatory jurisdiction into a less fundamental element of the procedural landscape. In these circumstances, it is perhaps understandable that the idea of formal presence in court as the basis of the court's authority to rule in the case would no longer be at the forefront of the minds of common law judges when addressing questions of adjudicatory jurisdiction in a cross-border context. At the same time, however, it must be recognised that this change had come about not by a shift in judicial reasoning, for the common law had been inert, but by legislation introduced because the processes of the common law courts were seen as wholly inadequate.

At the same time, one must also bear in mind that the difficulties identified by the Commissioners in their 1852 report, and tackled in the 1852 Act, were not limited to cases in which the defendant was abroad. As well as providing for service out of the jurisdiction, the report and legislation also sought to address questions of adjudicatory jurisdiction over defendants who had been served or notified of the writ within the jurisdiction, but who had failed or refused to appear. Today, these two groups of defendants are separated in terms of the conventional analysis of the adjudicatory jurisdiction of the English courts: jurisdiction over the latter seen as being governed by the "principle of presence", identified as a principle of the common law,[130] and that over the former governed by the statutory service out regime, a regime

128 Text to n 90 above.
129 Common Law Procedure Act 1852, ss. 18-19 (text to nn 123-26 above).
130 n 3 above.

that has attracted the label "exorbitant" from a common law perspective.[131] This distinction between defendant's present and not present within the territorial jurisdiction at the time of service is also a very significant one when it comes to the common law rules governing the recognition and enforcement of judgments: a foreign court is considered to have "international competence" if the defendant was present within its territory at the time proceedings were begun but not if the foreign court only took jurisdiction on the basis of a rule corresponding to the statutory service out regime.[132] Nevertheless, as the Commissioners' Report and the terms of the 1852 Act demonstrate, it has the shallowest of foundations in historical terms. Certainly, in 1852, the English courts' adjudicatory jurisdiction with respect to defendants who did not appear in the proceedings originated in statute, not in the common law, whether or not they were in England at the time of service. The principle of presence is of legislative, not common law, origin.

As under the Uniformity of Process Act,[133] rules of court made under s 223 of the Common Law Procedure Act provided that no application to set aside process for irregularity should be allowed unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity.[134] This provision was soon applied in cases where a writ had been served out of the jurisdiction, and leave to proceed obtained in circumstances falling outside the cases referred to in s 18 or 19 of the Act. In *Forbes v Smith*,[135] the defendant, a British subject resident in France, appeared in answer to a claim upon a promissory note. Having declared, he discovered that the cause of action relied on did not arise within the jurisdiction and applied to set aside the writ and proceedings under it. The application was dismissed: the writ was held regular, and the irregular service of the writ outside the jurisdiction was incapable of being challenged by a defendant who had subsequently appeared. For Pollock CB, the defendant, having appeared when it was not necessary to do so, must abide by the consequences of his decision.[136] Similarly, Parke B concluded that "the defendant ought not to have appeared, and, having done so voluntarily, he has given the court jurisdiction".[137] Alderson B commented that a

131 *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50, 65 (Lord Diplock) (HL); *Sawyer v Atari Interactive Inc* [2005] EWHC 2351 (Ch)[2006] I.L.Pr. 8, [56] (Lawrence Collins J); *Rubin* (n 21), [126] (Lord Collins). cf *Spiliada Maritime Corp v Cansulex Ltd* [1986] AC 460, 478, 481 (Lord Goff) (HL); *Abela v Baadarani* [2013] UKSC 44, [2013] 1 WLR 2043, [53] (Lord Sumption) (SC); Dicey, Morris & Collins, [11-142], fn 404; also A Dickinson (2014) 130 LQR 197; L Collins (2014) 130 LQR 555.

132 Dicey, Morris & Collins, [14-060]-[14-067]; [14-088]-[14-089].

133 Text to n 94 above.

134 *Regulae Generales* H. 1853, r 135. See eg *Diamond v Sutton* (1866) LR 1 Ex 130.

135 (1855) 10 Exch 717, 156 ER 628. See also *Staniforth v Richmond* (1865) 13 WR 724; *Oulton v Radcliffe* (1874) LR 9 CP 189; *Dunn v Bank of New South Wales*, *Hobart Mercury*, 3 February 1866 (Supreme Court of Tasmania).

136 *Forbes v Smith* (n 135), 721.

137 Ibid 722.

defendant who enters an appearance "voluntarily subjects himself to the jurisdiction of the Court".[138]

Referring to s 18 of the Uniformity of Process Act, Martin B analysed the position of the defendant in the following way:[139]

> "By that enactment, a writ of summons in a particular form may be served on a British subject abroad. This writ is in that form. Then where a person is served with such a writ, one of two courses is open to him; he may appear or not. If he does not appear, no further proceedings may be taken on the writ except upon an affidavit … But if he does appear, the question becomes whether the Court has jurisdiction in the cause. … I think, that even if a foreigner came before the Court, and stated, that, being in ignorance what course to pursue, he appeared, the Court would, except under very peculiar circumstances, deal with him as with any other person, and refuse his application to set aside the appearance. But what pretence is there for saying that the present case is one in which the Court ought to interfere. The cause of action arose in Calcutta, and the defendant, an Englishman, but who resides in France, voluntarily appears to the writ. For these reasons it seems to me that there is not the slightest ground for saying that the writ is irregular; and that, if the motion had been to set aside the appearance, it would not have been set aside."

In *Hutton v Whitehouse*,[140] an application was made by the defendant, a British subject residing in Guernsey, to set aside the writ served on him on the ground that the cause of action did not arise within the jurisdiction. That application was set aside on the ground that the objection had not been raised within a reasonable time. Finally, in *Bayne v Slack*,[141] the plaintiff sought and obtained liberty to proceed under s 18 of the Act against the defendant, a British subject residing in Jersey, who had not appeared. The defendant sought to set aside the writ, the order giving leave to proceed and all subsequent proceedings on the ground that the affidavit in support of the order was defective. The plaintiff contended that both (1) the application had not been made within a reasonable time, and (2) the defendant had "submitted to the jurisdiction"[142] by taking the

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138 Ibid.

139 Ibid 723. See also *Oulton v Radcliffe* (n 135), 195 (Brett J): "It is true that a party residing out of the jurisdiction cannot be compelled to come before the Court without service of the writ, or that which amounts to service: that would be contrary to natural justice. But, however irregular a writ may be, no objection can be taken to it on that ground after the defendant has chosen to appear to it.".

140 (1856) 1 H & N 32, 156 ER 1106.

141 (1857) 3 CB NS 363, 140 ER 781.

142 Ibid, at 367, at 782.

declaration filed by the plaintiff out of the court office.[143] Cockburn C.J., referring to the court rule, held that the defendant had waived the irregularity as his attorney had known or had the means of knowing the cause of action relied on when he took the declaration out of the office.[144]

It is noteworthy that, as in the earlier case of *Brough v Eisenberg*,[145] the courts in these cases did not reason in terms of a single, generalised conception of "submission to the jurisdiction", notwithstanding the invitation to do so by the plaintiff's counsel in *Bayne*. Instead, they confined themselves to applying the rule of court governing the circumstances in which the right to object on the ground of irregularity would be lost. Moreover, although the entry of an appearance was taken in *Forbes* to be the reason why the defendant could not object, *Hutton* and *Bayne* demonstrate that a defendant who did not appear might equally be precluded by his conduct from challenging the court's adjudicatory authority over him if not complying with the requirements of the rule governing irregularity in process. If, at a high level, the language of submission is not out of place in a case such as *Forbes*, when the defendant has appeared unconditionally, it seems at best otiose and at worst misleading in cases of the latter kind.

2. The Court of Chancery

Chancery procedures developed, inevitably, by a different route. The basic principle, at the beginning of the 18th Century, was the same as in the King's Bench and Common Pleas: the court could not proceed to adjudicate upon a personal action against a defendant who had failed or refused to appear, withstanding the measures of compulsion applied to his person and assets.[146] However, three distinguishing features of Chancery practice with regard to appearances should be noted. First, as well as the standard method of entering an appearance with the Clerk of Court,[147] an appearance in Chancery could also be entered with the Registrar, with that act being noted in the records of the Court.[148] Secondly, a defendant in actual custody was required to enter an appearance with the Registrar.[149] By contrast with procedures before the King's Bench and Common Pleas, a plaintiff in Chancery could not before 1732[150] proceed to declare

143 On the authority of *Caswall v Martin* (1736) 2 Str 1072, 93 ER 1039, a case which refers to "appearance", although the plaintiff in *Bayne* accepted that the plaintiff in that case had not appeared.
144 *Bayne* (n 141) above, at 368-369, at 783. See Lush's Practice (n 98), vol I, 381-382.
145 Text to nn 96-97 above.
146 *Okeham v Hall* (1625) Nels 1, 21 ER 774; *Windham v Windham* (1667) 2 Freem. Ch 127, 22 ER 1103; *Moyser v Peacock* (1667) 3 Rep Ch 22, 21 ER 717; *Nodes v Batle* (1684) 2 Rep Ch 283, 21 ER 679.
147 Text to n 34 above.
148 Daniell, vol II, 4.
149 Ibid.
150 Text to n 157 below.

and to enter judgment against a prisoner who had not appeared. Thirdly, a defendant not in custody but in contempt for not appearing was required enter an appearance with the Registrar if he wished to set aside the mesne process issued against him for irregularity in the originating or mesne process or in the service of that process.[151] By entering a "conditional appearance" of this kind, he put himself in jeopardy:[152]

> "But although a defendant, against whom an attachment has been issued for a contempt by not appearing, must not, if he means to object to the service of the subpoena, put in his appearance in the usual way*, he must nonetheless submit himself to the jurisdiction of the court in such a manner that, if his objection is held invalid, the plaintiff shall not be deprived of the benefit of his process*; the Court therefore requires that before moving to discharge the attachment, he should enter his appearance with the Registrar, the effect of which is to enable the plaintiff, in case the Court should decide that the process has been regularly issued, to send the sergeant-at-arms at once against him without any intervening proceeding."

Accordingly, by entering an appearance with the Registrar for the purposes of challenging the steps that the plaintiff had taken against him, the defendant accepted the court's authority to determine the validity of his objection. For this purpose, as appearing from the above passage, it could be said that he "submitted himself to the jurisdiction of the court". Again, it may be questioned whether this usage is beneficial. Instead, it seems preferable to focus on the defendant's formal, but qualified, presence in court as the source of the court's (limited) adjudicatory authority over him. The entry of an appearance with the Registrar nevertheless enabled the defendant, in the first instance, to limit the effect of his appearance to the validity of the procedural steps taken by the plaintiff. By contrast with the position in the common law courts,[153] an appearance in Chancery did not necessarily lead to the conclusion that the means by which the defendant had been compelled to appear could no longer be scrutinised.

Equity too made inroads on the requirement of appearance as a condition for the courts' adjudicatory authority. By legislation adopted in 1732,[154] upon the issue of a subpoena or other

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151 Daniell, vol II, 13; *Davidson v Marchioness of Hastings* (1838) 2 Keen 509, 48 ER 723. The same requirement applied to a defendant raising a question as to the court's subject-matter jurisdiction (*Felkin v Lord Herbert* (1861) 1 Drew & Sm 607, 62 ER 510).

152 Ibid vol I, 667 (emphasis added). An unconditional appearance was liable to be taken to waive the irregularity (*Earl of Chesterfield v Bond* (n 54)).

153 Text to nn135-39 above.

154 Equity Procedure Act ("An Act for making Process in Courts of Equity effectual against Persons who abscond, and cannot be served therewith, or who refuse to appear.") (5 Geo 2, c 25), repealed in 1830 by the Contempt of Court Act (1 W 4, c 36), s 1 (text to n 165 below). By the latter Act, the provisions of the Equity Procedure Act and a subsequent enactment (Privilege of Parliament Act (45 Geo

process and upon the defendant's failure to enter an appearance within the time prescribed by rules of court, the plaintiff could proceed to lodge with the Court an affidavit to evidence that the defendant was beyond the seas or could not be found upon inquiry at his usual place of abode, and that there was just ground to believe that the defendant had gone out of the realm or otherwise absconded to avoid being served with the Court's process. Upon receiving such affidavit to its satisfaction,[155] (1) the Court was empowered to make an order directing the defendant to appear on a certain day, and (2) such order was to be advertised in the London Gazette, in the Parish Church where the defendant had previously resided and in a specified public place. If the defendant did not then appear within the time limited by that order, the Court was further empowered to take the plaintiff's bill *pro confesso* (i.e. as if the matter were confessed by the defendant) and to make such decree thereon as was considered just.[156]

The Act also made provision, in the next following section, for persons brought into court by a writ of *habeas corpus* who refused to enter an appearance according to the rules.[157] In this case, and by contrast with the solution adopted for absconding defendants (above), the Court was authorised to appoint a Clerk or Attorney of Court to enter an appearance for the defendant with the consequence that "such proceedings may thereupon be had in the cause as if the party had actually appeared".[158]

With respect to overseas defendants, the potential significance of this enactment was tempered by a proviso that the Act "shall not extend or be construed to extend to warrant or make good any Proceeding against any Person beyond the Seas" unless the Court was satisfied by an affidavit[159] that the defendant had been in England within two years before the issue of the subpoena.[160]

The problems encountered by litigants in Chancery proceedings in the first half of the 19th Century are well known.[161] In 1823, a Royal Commission was appointed, under the chairmanship

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3, c 124), concerning defendants with Parliamentary privileges), were consolidated, and further provision made in relation to contempt proceedings and the taking of Bills *pro confesso*. The 1830 Act was, in turn, repealed by the Civil Procedure Acts Repeal Act 1879, s 2 (alongside the abolition, by s 3, of outlawry in civil proceedings).

155 *Short v Downer* (1788) 2 Cox 84, 30 ER 39; also *Burton v Maloon* (n 52).

156 Ibid s 1. cf n.61 above.

157 cf. text to nn 149-50 above.

158 5 Geo 2, c 25, s 2.

159 *Neale v Norris* (1799) 5 Ves Jun 1, 31 ER 441.

160 5 Geo 2, c 25, s 8.

161 *Oxford History*, vol XI, Ch 4, esp 660.

of the Lord Chancellor, Eldon,[162] to examine and report on Chancery practice. Their Report, published in 1826, was timid in its ambition.[163] For present purposes, it suffices to note that, aside from recommending changes to the mechanism created by the 1732 statute for entering appearances on behalf of prisoners,[164] the report apparently had little to say on the subject of appearances and judgments by default. Within five years, after the death of the Lord Chancellor, the Solicitor General (Edward Sugden) introduced a Bill which, upon its adoption in 1830, repealed and replaced the earlier legislation described above, without materially altering the approach that these statutes had taken to the question of the court's adjudicatory jurisdiction over those who did not enter an appearance.[165]

More significantly, in the following years, Parliament enabled the courts of equity to permit process to be served outside the jurisdiction in certain cases and to proceed to judgment in default of appearance by the overseas defendant.[166] First, by an enactment of 1832[167] reciting the "great inconvenience and delays of justice" arising "from the Defect in Jurisdiction in Courts of Equity to effect the Service of their Process in such Parts of the United Kingdom of Great Britain and Ireland as are not within the Jurisdiction of the said respective Courts", it was provided that in suits concerning lands or tenements or hereditaments situated in England and Wales, the Courts of Chancery and Exchequer could order and direct that service of a subpoena or other process elsewhere in the Kingdom or in the Isle of Man shall be deemed good service, enabling the court to proceed as if service had been effected within the jurisdiction.[168] Thereafter,

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162 The other members of the Commission were Lord Redesdale, Lord Gifford (Master of the Rolls), Sir John Leach (Vice Chancellor); Sir Charles Wetherell (Solicitor General); Samuel Cox and William Courtenay (Masters in Chancery); Anthony Hart (later Vice Chancellor of England and Lord Chancellor of Island), Stephen Lushington (later an Admiralty Judge), Robert Percy Smith (a Member of Parliament), Joseph Littledale (later a Judge of the King's BenChDivision), John Herman Merivale, Nicholas Conyngham Tindal (later Chief Justice of the Common Pleas) and John Beames.

163 *Oxford History of the Laws of England*, (n 27), vol XI, 661.

164 Report by the Commissioners Appointed to Enquire into the Practice of Chancery (1826), p. 61.

165 Contempt of Court Act (1 W 4, c 36), esp s 2-3, 10 (n 154 above). See *Baker v Keen* (1833) 4 Sim 498, 58 ER 186.

166 *Cookney v Anderson* (1862) 31 Beav 452, 468; 54 ER 1214, 1220 (Romilly MR) (affd (1863) 1 de G J & S 365, 46 ER 146) (see text to n 175 below); *Drummond v Drummond* (n 53), 37-39 (Lord Chelmsford LC), 42-43 (Turner LJ).

As to service out of the jurisdiction in Chancery proceedings before the statute, see also *Bourke v Macdonald* (1781) Dick 587, 21 ER 399 (regularity of attachment upon subpoena served in Scotland upheld, although doubted); *Fernandez v Corbin* (1829) 2 Sim 544, 56 ER 891 (attachment upon *subpoena* served in Guernsey set aside); *Hawkins v Hall* (1839) 1 Beav 73, 48 ER 866, affd (1839) 4 My & C 280, 41 ER 109 (service out of the jurisdiction in France held irregular) and the authorities referred to in *Drummond v Drummond* (1866) LR 2 Ch App 32 (HL) in argument (at 32-33) and in the speech of Lord Chelmsford LC (at 37-39).

167 Service of Process out of the Jurisdiction (England and Ireland) Act (2 & 3 W 4, c 33), repealed by the Statute Law Revision Act 1890, s 1 and Sch. 1.

168 Ibid s 1.

plaintiffs could proceed, with leave of the court,[169] to take further steps to punish the contempt of a non-appearing defendant. Of itself, this development was of limited significance in the context of the present discussion, as (1) it was narrowly circumscribed in terms of its subject-matter and territorial remit, (2) the Chancery Court had already shown itself to be willing to authorise substituted service upon the agents and other representatives of persons outside the jurisdiction, enabling further steps to be taken to compel their appearance,[170] and (3) the statute did not authorise the court to proceed to enter judgment against a defaulting defendant.

A second enactment, made in 1834, extended the Courts' authority to proceed against defendants outside the jurisdiction in three ways, each of which was significant in its own right. First, the subject-matter scope of the power to approve service outside England and Wales was extended both to suits concerning charges, liens, judgments or incumbrances upon land etc. within the jurisdiction and to suits concerning money vested in government or public stock or shares in public companies or concerning their dividends or produce.[171] Secondly, the territorial scope of the permitted service was extended to defendants resident in any place out of the United Kingdom.[172] Thirdly, and most importantly for present purposes, the statute made provision, following service of a subpoena upon the defendant or on a person receiving or remitting his rents, for the court to order an appearance to be entered for the defendant and for the plaintiff to proceed accordingly.[173] If the defendant could not be found at his usual place of abode, and the plaintiff could demonstrate by affidavit evidence that the defendant had hidden or withdrawn himself so as to avoid being served with the process, the Court could order substituted service.[174]

A later Master of the Rolls, Sir John Romilly, summarised the effect of these developments in the following way:[175]

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169 Ibid s 3.

170 The authorities on substituted service in Chancery are reviewed in *Hobhouse v Courtney* (1841) 12 Sim 140, 59 ER 1085. See also Daniell, vol I, 268-70; *Hope v Hope* (1854) 4 De G.M.&G. 328, 341-43; 43 ER 534, 539-40 (Lord Cranworth).

171 Service of Process out of the Jurisdiction England and Ireland Act (4&5 W.4, c 82), repealed by the Statute Law Revision Act 1890, s 1 and Sch 1.

172 Ibid.

173 Ibid.

174 Ibid s 2. As to the pre-existing practice of the courts of equity in ordering substituted service with respect to defendants resident abroad, see n170 above. This practice was not followed after the Judicature Acts (*Wilding v Bean* [1891] 1 QB 100 (CA); Dicey, Morris & Collins, [11-111]).

175 *Cookney v Anderson* (1862) 31 Beav 452, 468; 54 ER 1214, 1220 (affd (1863) 1 de G J & S 365, 46 ER 146).

In the same passage of his judgment, his Lordship stated that "nothing contained in the statutes relating to the service of *subpœnas* abroad has the effect of extending the jurisdiction of this Court" and

> "Before those Acts, the power of serving a *subpœna* on a Defendant abroad existed, but it was simply useless, because, unless the Defendant voluntarily appeared, no further steps could be taken against him. ... Now, under these Acts, an appearance may be entered for the Defendant by the Plaintiff, who may thereupon proceed to obtain against the Defendant, in his absence, such a decree as the facts proved or taken *pro confesso* will justify."

In 1840, Parliament delegated the task of procedural reform to the judiciary, authorising the Lord Chancellor, with the advice and consent of the Master of the Rolls and Vice Chancellor, to make procedural rules and orders to be laid before Parliament and given force of law unless objected to by vote of either House.[176] The first set of General Orders made under this statute, in the following year, made significant changes to the existing practice.[177] In particular, these Orders abolished certain forms of contempt proceedings, and substituted for the former practice of ordering the arrest of the defendant to compel him to appear to the bill[178] a new provision for the plaintiff to seek leave to enter an appearance for the defendant if the defendant failed to appear, having been "duly served" with a subpoena to appear to and answer the bill.[179] A further set of General Orders made the following year provided that, in cases where the plaintiff had entered an appearance for the defendant in accordance with these provisions, and the defendant had failed to appear by his own clerk, the plaintiff could move for the bill to be taken *pro confesso*[180] on the basis that the defendant should be deemed to have absconded.[181] These

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that "all questions of jurisdiction remain exactly on the same principles as they did before" (ibid). There is a certain tension in the references in these statements to "jurisdiction". The first is unobjectionable if taken to refer to the power to serve a subpoena abroad (an aspect of the court's *prescriptive jurisdiction*), which Romilly MR considered in existence before the statutes. If, on the other hand, it is taken to refer to adjudicatory jurisdiction, it seems inconsistent with the passage quoted in the text, which acknowledges a statutory extension in the court's *adjudicatory jurisdiction*. The second, by contrast, is better explained as a reference to the continuing requirement of an appearance for the exercise of the court's *adjudicatory jurisdiction*. The two statements are more easily reconciled if they are taken to refer instead to the court's *subject-matter jurisdiction* (ibid, at 469-470, at 1220; see also n 19 above).

176 Court of Chancery Act (3 & 4 Vict, c 94), s 1, amended by the Court of Chancery Act (4 & 5 Vict, c 52), and repealed by the Statute Law Revision (No. 2) Act 1874, s 1 and Sch. See *Drummond v Drummond* (n 164), 44.

177 *Oxford History*, vol XI, 664; Dr*ummond v Drummond* (n 53), 44-45.

178 General Orders of 26 August 1841 (Ord Can. 165), Ords VI and VII. As a result, the procedures for entry of conditional appearances (text to nn151-53 above) were adjusted so as to provide for an undertaking by the defendant to submit to any process which the Court might direct to be issued against him, for want of appearance, in the event that the subpoena should not be set aside for irregularity (*Price v Webb* (1843) 2 Hare 511, 67 ER 210; L Field and E Dunn (eds.), *Daniell, The Practice of the High Court of Chancery* (4th edn, 1865), vol II, 495).

179 Ibid Ord VIII. See also Ord XIV as to the form of words to appear in the subpoena, and Ords XXIII-XXIX as to proceedings against formal parties (ie those against whom no direct relief was sought).

180 Text to n 156 above

provisions were carried forward into the consolidated General Orders made in 1845.[182] After early doubts, it was shortly established that the plaintiff's ability to enter an appearance for the defendant, and thereafter to proceed to judgment, extended beyond cases in which the subpoena had been personally served upon the defendant in England to include cases in which substituted service had taken place in accordance with the court's existing practice[183] and those in which service had taken place outside the jurisdiction.[184]

The 1845 Orders also made detailed provision, expressed in general terms, for the obtaining of leave from the Court to serve the subpoena to appear out of the jurisdiction.[185] The same Order provided that, if the overseas defendant had been duly served and failed to appear, the plaintiff might seek and the court may order that an appearance be entered for the defendant, with the consequences described above.[186] This provision (and its successor in materially identical terms[187]) immediately gave rise to a controversy, as to whether the rule enabled the Court to allow service abroad, and ensuing judgment even if the defendant did not appear, in cases falling outside the terms of the statutes of 1832 and 1834.[188] Two conflicting lines of authority established themselves: the first in favour of a broad interpretation, not confining the procedural rule in the General Orders to land, stock or shares in England or Wales,[189] and the second (resting principally in three decisions of Lord Westbury[190]) adopting the narrower approach. The former view ultimately prevailed.[191] These decisions reveal differing judicial opinions as to the limits of the adjudicatory jurisdiction of the English courts, and it will be necessary to return to them below.[192]

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181 General Orders of 11 April 1842 (Ord Can. 197), Ord I. cf *Zulueta v Vinent* (1852) 15 Beav 272, 51 ER 542, emphasising the court's discretion of allowing a bill to be taken *pro confesso* in these circumstances.

182 General Orders of 8 May 1845 (Ord Can. 294). See Ord XVI, r 4, Ord XXIX and Ords LXXVII-LXXIX.

183 *Zulueta v Vinent* (1851) 3 Mac & G 246, 42 ER 255; *Forster v Menzies* (1853) 16 Beav 468, 51 ER 899. cf *Marquis of Hertford v Suisse* (1844) 13 Sim 489, 60 ER 190; *Sewell v Godden* (1847) 1 De G & Sm 126, 63 ER 1000.

184 *Flight v Camac* (1842) 13 Sim 32, 60 ER 13.

185 General Orders of 8 May 1845 (n 180), Ord XXXIII, r 1.

186 Ibid Ord XXXIII, r 4.

187 Consolidated Orders of the High Court of Chancery 1860, Ord X, r 7.

188 Text to nn166-175

189 *Whitmore v Ryan* (1846) 4 Hare 611, 67 ER 792; *Blenkinsopp v Blenkinsopp* (1846) 2 Phil 1, 41 ER 841; *Steele v Stuart* (1863) 1 H & M, 71 ER 347.

190 *Cookney v Anderson* (n 52); *Foley v Maillardet* (1864) 1 De G J & S 389, 46 ER 155; *Samuel v Rogers* (1864) 1 De G J & S. 396, 46 ER 158. See *Daniell* (4th edn) (n 178), vol I, 409;

191 *Drummond v Drummond* (n 53). The overruling of *Cookney v Anderson* was regretted by Sir Francis Piggott (n 17), vol I, 206-207.

192 Section III.C.1.

The clamour for reform had not yet ceased, and a further Royal Commission was appointed to examine Chancery procedures in 1850. Its members[193] reported in 1852, in the year that Dickens' *Bleak House* was first serialised. The opening sections of the Report were concerned with the mischiefs arising from the division between courts of law and equity. Putting questions of fundamental reform to one side, it made certain recommendations to put the two courts on a more equal footing in terms of their remedial powers.[194] The Commissions also reviewed the existing procedures, and made a number of recommendations to produce swifter justice.[195] Of these, the proposed abolition of the writs of subpoena and summons commanding the defendant to appear, being replaced with service of the bill itself, is of worthy of mention here.[196] This recommendation was implemented by legislation made in the same year.[197] By s 4 of that enactment, service of the bill would "entitle the Plaintiff in such Suit to such Remedies for Default of Appearance and otherwise as he is now entitled to" under the pre-existing procedures.[198]

3. *The Judicature Acts and Rules of the Supreme Court*

Thus, by the 1850s, reforms to the procedures of the courts of common law and equity, as described in the preceding sections, had produced a substantial shift in the role of the formal appearance in defining the courts' adjudicatory jurisdiction. On both sides, significant exceptions had been recognised to the former requirement that former presence before the court, in most cases through an appearance, was necessary for the court to give judgment. Formal presence secured by imprisonment of the defendant had been greatly diminished, and the possibility of proceeding to judgment in default of appearance greatly extended. Both systems had recognised the possibility under certain circumstances of allowing service or notice of originating process outside England and Wales, and of obtaining a judgment in such circumstances in default of

193 Sir John Romilly (Attorney General, appointed Master of the Rolls in 1851, the last person to hold this post while sitting in the House of Commons), Sir George Turner (appointed Vice Chancellor in 1851 and later a Lord Justice), Richard Bethell (later Lord Westbury), James Parker (appointed Vice Chancellor in 1851, but died the following year), William Page Wood (Vice Chancellor County Palatine Court of Lancaster, later Vice Chancellor, Lord Justice and - as Lord Hatherley - Lord Chancellor), Charles Cromption (later a Judge of the Queen's Bench), William Milbourne James (later Vice Chancellor and a Lord Justice), later joined by Sir James Graham and Joseph Henley, both MPs.

194 First Report of HM Commissioner's appointed to inquire into the process, practice and system of pleading in the Court of Chancery etc (1852), 1-3 ("a transfer or blending of jurisdiction"). See *Oxford History*, vol XI, 758-759; First Report of the Judicature Commission (1869), 6.

195 Ibid, 5-14, 24-26.

196 Ibid, 25.

197 Court of Chancery Procedure Act (15 & 16 Vict, c 86), ss. 2-5, repealed by the Statute Law Revision and Civil Procedure Act 1883 (46 & 47 Vict, c 49).

198 Consolidated General Orders of Chancery, Ord X, r 7.

appearance. The key difference remaining between the two was a purely technical and optical one: whereas the common law courts had openly embraced the possibility of a judgment in default of appearance,[199] the courts of equity persisted in the device of allowing the plaintiff to enter an appearance on behalf of the defaulting defendant.[200]

Within two decades, the courts were united in a single Supreme Court of Judicature. The Judicature Acts of 1873 and 1875, which achieved this end,[201] were founded on the work of the Royal Commission established in 1867 to enquire into the operation and effect of the system of courts operating in England and Wales.[202]

The Commission produced five reports between 1869 and 1875. In their first Report, alongside the main structural reforms to implement unification, the Commissioners sketched out a more harmonised and streamlined procedure for the new Supreme Court.[203] The detailed implementation of that recommendation was left to a group of four of the Commissioners,[204] whose work led to the formulation of rules of court scheduled to the 1873 Act.[205] A small committee then drafted the rules scheduled to the 1875 Act.[206] The key features of the latter set of rules for present purposes were as follows:

- Every action was to be commenced by writ of summons (Ord. II, r 1).

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199 Text to n 129 above.

200 Text to n 174, 179-82, 184 above; Consolidated Orders of the High Court of Chancery 1860, Ord X, r 4.

201 Supreme Court of Judicature Act 1873 (36&37 Vict, c 66); Supreme Court of Judicature Act 1875 (38&39 Vict, c 77), both consolidated and repealed by the Supreme Court of Judicature (Consolidation) Act 1925, s 226 and Sch. 6.

202 *Oxford History*, vol XI, 760-764. The 27 members of the Commission included Sir Hugh Cairns (later Lord Cairns, Lord Chancellor in 1868), Sir William Page Wood (n 191 above), Sir William Erle (former Chief Justice of the Common Pleas), Sir James Wilde (Chief Justice of the Probate and Divorce Court, later Lord Penzance), Sir Robert Phillimore (Judge in Admiralty), William James (n 91 above), Sir George Bramwell (later Lord Bramwell), Sir Colin Blackburn (Justice of the King's Bench), Sir Edward Montague Smith (Justice of the Common Please), John Duke Coleridge (Lord Coleridge, later Chief Justice of the Common Pleas, President of the Common Pleas Division and Lord Chief Justice†) and Sir Roundell Palmer (as Lord Selbourne, Lord Chancellor in 1872-1874 and 1880-1885). The three serving Chief Justices and the serving Chancellor (Lord Chelmsford) at the time of appointment were omitted. [†It was in the latter capacity that Lord Coleridge opened the Royal Courts of Justice in 1883.]

203 First Report of the Judicature Commission (1869), 10-15. In particular, the Report recommended (at 15) the use of attachment of property in cases where the defendant was about to leave, or keeping out of the jurisdiction in order to avoid process, in preference to the use of writs of capias and *ne exeat regno* which were, the Commissioners noted, sometimes used oppressively.

204 Hatherley, James, Sir John Quain (Judge of the Queen's Bench) and John Hollams, a solicitor. As to the part played by the latter, see J Slinn, *Clifford Chance: Its Origins and Development* (Cambridge: Grants Editions, 1993), 22-23.

205 1873 Act, s 69 and Sch (see *Oxford History*, vol XI, 764).

206 1875 Act, s 16 and Sch. 1 (see *Oxford History*, vol XI, 765).

- No writ of summons for service out of the jurisdiction, or requiring notice to be given out of the jurisdiction, was to be issued without leave of the Court or Judge (Ord. II, r 4).[207]

- Upon presenting the writ of summons for sealing, the plaintiff or his solicitor was required to leave with the officer a signed copy for filing, with an entry of the filing being made in the cause book, following the practice of the Court of Chancery (Ord. V, rr 7-8).

- Unless the defendant, by his solicitor, had agreed to accept service and had entered an appearance (Ord. IX, r 1), the writ was to be served personally. The court had power to make an order for substituted or other service if the plaintiff was unable promptly to effect personal service (Ord. IX, r 2; also Ord. 10).

- Service out of the jurisdiction of a writ of summons, or notice of writ of summons, might be allowed by the Court of Judge whenever (1) the whole or any part of the subject-matter of the action is land or stock, or other property situate within the jurisdiction, or any act, deed, will or other thing affecting such land, stock or property, or (2) a contract had been made or entered into within the jurisdiction or had been breached within the jurisdiction, wherever made, or (3) any act or thing sought to be restrained or removed is within the jurisdiction, or (4) any act or thing for which damages are sought to be recovered is within the jurisdiction (Ord. XI, r 1).[208]

- Every application for an order for leave to serve out was to be supported by evidence showing the defendant's probable whereabouts, whether such defendant is a British subject and the grounds on which the application is made (Ord. XI, r 3).[209]

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207 The former practice, established under the Common Law Procedure Act 1852, of serving notice of the writ upon a foreigner resident out of the jurisdiction continued after the Judicature Acts (*Westman v Aktiebolaget Ekmans Mekaniska Snickarefabrick* (1876) 1 Ex D 237 (DivCt); *Fowler v Barstow* (1881) 20 ChD 240, 243 (Jessel MR) (CA)). As to the form of the writ for service out, see 1875 Act, Sch. 1, Appendix A, pt. 1, Form 2; also *Bacon v Turner* (1876) 3 ChD 275 (Ch).

208 Numbering added for ease of reference. cf 1873 Act, Sch, r 6 ("Whenever it appears fit to the Court or to a Judge in a case in which the cause of action has arisen within the jurisdiction, or is properly cognizable against a defendant within the jurisdiction, that any person out of the jurisdiction of the Court should be served with the writ or other process of the Court, the Court or Judge may order such service, or such notice in lieu of service, to be made or given in such manner and on such terms as may seem just.")

209 *Young v Brassey* (1875) 1 ChD 277 (Ch); *Fowler v Barstow* (n 207), 245-246 (Jessel MR), 249 (Lush LJ); *Great Australian Gold Mining Co v Martin* (1877) 5 ChD 1 (CA).

- Ordinarily, the defendant was required to enter his appearance in London (Ord. XII, r 1) by delivering to the proper officer a memorandum in writing in the prescribed form (Ord. XII, r 10) containing the name of his solicitor or specifying that he defends in person (Ord. XII, r 6). The officer must then promptly enter the appearance in the cause book (Ord. XII, r 11).

- If the defendant did not appear, the plaintiff was entitled in most cases (having filed an affidavit of service or of notice in lieu of service: Ord. XIII, r 2) to enter judgment against the non-appearing defendant (Ord. XIII, rr 3-8).[210]

- Non-compliance with any rule would not render the proceedings void, unless the Court or Judge so direct, but the proceedings might be set aside as irregular (Ord. LIX).

As will be evident, these elements of the rules were an amalgam of the former practices of the courts of common law and equity, most strongly influenced by the common law side[211] The stated grounds for service out of the jurisdiction combined the specific cases in which service out had formerly been allowed on both sides[212] and a requirement to secure the court's leave to serve out in advance was introduced in all cases.[213]

Section 17 of the 1875 Act provided for the judiciary to make, alter or amend rules of court, subject to annulment by Parliament.[214] Subsequently, that power was vested in a committee consisting of senior members of the judiciary and judges appointed by the Lord Chancellor.[215] In 1883, a new set of rules was adopted in place of those scheduled to the 1875 Act.[216] In large part, the provisions described above were reproduced without change. Some significant changes were

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210 cf. Ord XIII, rr 9-10 and Ord XV, r 1.

211 *Oxford History*, vol XI 765, fn.65.

212 Text to nn125, 168, 172 above. The former Chancery practice, not limited to the cases set out in the statutes of 1832 and 1834 (text to nn185-192 above), was thereby curtailed (*Re Eager, Eager v Johnstone* (1882) 22 ChD 86 (CA)).

213 *Fowler v Barstow* (n 207), 248-249 (Lush LJ). By contrast with the Common Law Procedure Act, Ord XI, r 1 did not exclude the possibility of service in Scotland and Ireland (see *Comber v Maclean* (n 123), where the Lord Justice-Clerk expressed surprise at this development). See also text to n 221 below.

214 1875 Act, s 17.

215 Appellate Jurisdiction Act 1876 (39&40 Vict, c 59), s 17; Supreme Court of Judicature Act 1881 (44&45 Vict, c 68). Whereas s 19 of the Common Law Procedure Act 1852 had been held not to apply to foreign corporations (*Ingate v La Commissione del Lloyd Austriaco* (1858) 4 CB NS 704, 140 ER 1269), Ord XI, r 1 was not construed in a similarly restrictive manner (*Scott v Royal Wax Candle Co* (1876) 1 QBD 404 (QB)).

216 Rules of the Supreme Court 1883 (**1883 Rules**).

made to the grounds for service out of the jurisdiction, narrowing some,[217] and removing,[218] reworking[219] or adding[220] others, and fresh provision (Ord. XI, r 2) was made for cases where a service was to take place in Scotland or Ireland and a concurrent remedy was available in those jurisdictions.[221] The evidence required to secure leave to serve the writ out of the jurisdiction now included in express terms a statement of the deponent's belief that the plaintiff had a good cause of action, and sufficient information to enable the court or judge to conclude that the case was a proper one for service out of the jurisdiction.[222] The rules also clarified that when the defendant was neither a British subject, nor in the British dominions, the document to be served was notice of the writ and not the writ itself, preserving the former practice under the Common Law Procedure Act and under the 1875 Act.[223]

So far as appearances, and judgments in default of appearance were concerned, the 1883 Rules did not make any adjustments of note. A significant change was, however, made to the provision dealing with the effect of non-compliance with the rules, now re-numbered as Ord. LXX (formerly LIX). A new rule, following the earlier common law practice,[224] was adopted to the effect that no application to set aside any proceeding for irregularity was to be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity.[225] Further, Ord. XII, r 30 of the 1883 Rules provided for the first time a formal mechanism for a defendant to apply to set aside service of the writ or an order authorising such service without the need to enter a conditional appearance.[226]

Before proceeding to examine the application of these rules in greater detail, two points require to be emphasised. First, in the formulation of the rules, the draftsman found no place for the

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217 eg those relating to land situate within the jurisdiction (Ord XI, r 1(a)) and concerning contractual matters (Ord XI, r 1(e)). cf text to n 206 above, numbered paras. (1) and (2). See *Agnew v Usher* (1884) 14 QBD 78 (QB).

218 eg the former references to stock and property other than land situate within the jurisdiction were deleted in Ord XI, r 1(a), and the rules no longer provided for damages claims flowing from acts within the jurisdiction. cf text to n 206 above, numbered paras. (1) and (4).

219 eg as to injunctions (Ord XI, r 1(f)). cf text to n 208 above, numbered para. (3).

220 eg Ord XI, r 1(c) (claims for relief against persons domiciled or ordinarily resident), 1(d) (administration of estates and trusts), (g) (necessary or proper parties).

221 cf. Ord XI, r 1a, introduced by amendment to the 1875 rules (see *Ex p McPhail* (1879) 12 ChD 632 (Ch); *Tottenham v Barry* (1879) 12 ChD 797 (Ch).

222 Ord XI, r 4. These requirements have endured (see CPR, r 6.37(1)(b) and (3)).

223 n 207 above.

224 *Regulae Generales* H. 1853, r 135 (n 132).

225 Ord LXX, r 2. This became Ord 2, r 2 when the Rules of the Supreme Court were revised in 1962 (see below). It has no equivalent in the CPR.

226 cf. the former Chancery practice: *Maclean v Dawson* (1859) 4 De G & J 150, 45 ER 58.

concept of submission to the jurisdiction, although it was familiar to practitioners and judges[227] of the time.[228] Secondly, the defendant's conduct in the suit was capable of establishing the court's adjudicatory jurisdiction in one of two ways. The defendant might appear, in which case the court's jurisdiction to proceed to judgment would be established by his formal presence in court, if unqualified.[229] Alternatively, without appearing, he might conduct himself in such a way that his ability under the rule to raise an objection to the plaintiff's irregular procedural conduct was lost, in which case the court's adjudicatory jurisdiction would be established by service coupled with the default in appearance and the waiver of any irregularity. In this latter case, the defendant's position would be no different than if he had failed to take any action at all. Although these two sets of circumstances have the same procedural outcome, there is an important difference between them. In the first case (appearance), the defendant is properly before the court, and must participate in the proceedings according to the court's procedural rules.[230] In the second case (non-appearance), the defendant is not properly before the court and will not be permitted to take any step in the cause until he enters an appearance, but the court

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227 Many of the cases using the terminology of "submission to the jurisdiction" in the 19th and first half of the 20th Century concern the immunities and privileges of foreign sovereigns and diplomats (see eg *Hullett (Hullet) v King of Spain* (1828) 1 Dow & Cl 169, 6 ER 488 and (1833) 7 Bligh N S 359, 5 ER 808; *Glyn v Soares* (1836) 1 Y & C Ex 643, 160 ER 1134; *Queen of Portugal v Glyn* (1840) 7 Cl & F 466, 7 ER 1147; *Duke of Brunswick v King of Hanover* (1844) 6 Beav 1, 49 ER 724; *Taylor v Best* (1854) 14 CB 486, 139 ER 201; V*avasseur v Krupp* (1878) 9 LR Ch 351 (CA); *Mighell v Sultan of Johore* [1893] 1 QB 149 (CA); *South African Republic v La Compagnie Franco-Belge du Chemin de Fer du Nord* [1896] 1 Ch 190 (Ch); Re *Republic of Bolivia Exploration* [1914] 1 Ch 139 (Ch); *Re Suarez* [1918] 1 Ch 176 (CA); *Duff Development Co Ltd v Government of Kelantan* [1923] 1 Ch 385 (CA) and [1924] AC 797 (HL); *Kahan v Pakistan Federation* [1951] 2 KB 1003 (CA); *Baccus v Servicio Nacional del Trigo* [1957] 1 QB 438 (CA)). The reasoning in these cases focuses on the sovereign's deliberate choice to participate (or to authorise the participation of a diplomatic representative) in proceedings in the manner of an ordinary litigant, being treated as a waiver (by election or otherwise) of customary or statutory immunities from suit, but not necessarily other immunities to which he, or his representatives or property, was entitled. These cases were decided against the background of emerging, and now well understood, rules of customary international law concerning the immunities and privileges of States and those who represent them, and provide limited assistance in the present context. The language of "submission" is nonetheless principally deployed as a rhetorical flourish, emphasising that the otherwise equal relationship of sovereigns (*par in parem non habet imperium*) had been departed from on a particular occasion. See *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31, [2011] 2 AC 495, [120]-[126]; also H Fox and P Webb, *The Law of State Immunity* (Oxford: OUP, 3rd edn, 2015), Ch 11.

228 *Daniell* (4th edn) (n 178), 494 ("Appearance is the process by which a person, against whom a suit has been commenced, submits himself to the jurisdiction of the court"); J W Smith (with S Prentice (ed.)), *An Elementary View of the Proceedings in an Action at Law* (London: Stevens and Sons, 10th edn, 1868), 66.

229 As to qualified or conditional appearances, see text to nn 235-240, 300-305 below.

230 If he does not comply with these rules, a judgment in default may follow, but it would be a judgment in default of an answer or defence or on account of non-compliance with an order, not a judgment in default of appearance.

nevertheless has the statutory authority to proceed to judgment in the case on account of the circumstances of the defendant's default.[231]

Preston v Lamont provides an example of the former type of case: a defendant who had appeared could not raise by his defence a question as to the validity of the order granting the plaintiff leave to serve the writ out of the jurisdiction.[232] *Boyle v Sacker* [233]and *Fry v Moore*[234] illustrate the latter type of case: there, the defendants had not formally appeared but had, through their attorneys, taken steps in the proceedings that were held, under the terms of Ord. XII, r 30 of the 1883 Rules to waive any irregularity in the process authorising the service.

The new rules gave rise to a number of technical difficulties. First, although Ord. XII, r 30 referred in terms to a "conditional appearance", it was unclear whether the new rules countenanced a qualified appearance of this kind and, if so, what effect was to be given to it. Prior to the adoption of the 1883 Rules, there had been a tendency to revert to the practices that had formerly been adopted by the courts having jurisdiction over cases of a particular type.[235] The terms of Ord. XII, r 30, however, cast doubt upon whether a conditional appearance was allowed by the rules, and the courts at first appeared to rule this out, treating a purported conditional appearance as a nullity.[236] However, the possibility of an appearance under protest was recognised in *Firth & Sons v De Las Rivas*,[237] and a practice soon developed allowing a conditional appearance to be entered with the leave of the court and subject to the proviso that the appearance would stand as unconditional unless an application to set aside the writ was made within a particular time and an order was obtained to that effect.[238] In *Keymer v Reddy*, Fletcher Moulton LJ acknowledged that there was no authority in the Rules for this practice. He nevertheless endorsed it as striking a sensible balance between the right of the defendant to

231 *Daniell* (4th edn) (n 176), 494, referring to *Felkin v Lord Herbert* (n 151). cf *Rein v Stein* (1892) 66 LT 469, 471 (QB), where the Judge (Cave J) conflated the case of an ordinary appearance with waiver of irregularity (see text to n 239 below).

232 (1874) LR 1 ExD 361 (DivCt).

233 (1888) 39 ChD 249 (CA).

234 (1889) 23 QBD 395 (CA).

235 *The Vivar* (1876) 2 P.D. 29 (appearance under protest in Admiralty action); *Fowler v Barstow* (n 207) (conditional appearance following former Chancery procedure).

236 *Davies & Co v André & Co* (1890) 24 QBD 598, 606 (Lord Esher MR) (CA); *Mayer v Claretie* (1890) 7 TLR 40 (QB), allowing an appearance under protest; *Western National Bank of the City of New York v Perez, Triana & Co* [1891] QBD 304, 313 (Lord Esher MR) (CA). cf *Rein v Stein* (n 231), 471 (Cave J).

237 [1893] QBD 768 (QB).

238 *Keymer v Reddy* [1911] 1 KB 219 (CA).

object to the exercise of jurisdiction over him and the right of the plaintiff to proceed with his action:[239]

> "It is obvious, however, that no Court will permit a formal protest to its jurisdiction to create a delay in its process, which delay is to be so entirely in the hands of the defendant that the defendant can tie the hands of the Court indefinitely by not taking any further steps. Now suppose a case in which an appearance is entered under protest. It is evident that such an appearance must be taken as an actual appearance unless the defendant with reasonable promptitude obtains an order setting aside the writs or it would be the means of imposing upon a plaintiff who has a good cause of action a great and unjustifiable delay in recovering his rights. Hence the practice has arisen that the Master indorses on the appearance a period of time during which the application to set aside the writ ought to be made. In my opinion that means that if the application is not made within that time it will be taken prima facie to be an abandonment of the conditional and limited character of the appearance so that the officials of the Court will be justified in treating it as an absolute appearance."

In the following passages, Fletcher Moulton LJ acknowledged that the mere effluxion of the time prescribed might not demonstrate an intention to abandon the protest, or an improper attempt to impede the administration of justice, and that in such cases the court might still allow the protest to proceed. That approach was entirely consistent with the general approach in identifying whether a step taken in the proceedings was a "fresh step" that was sufficient under Ord. LXX, r 2 to disbar the defendant's entitlement to challenge an irregularity in the writ or service of the writ.[240] In *Rein v Stein*, Cave J had expressed the view that "in order to establish a waiver, you must show that the party alleged to have waived his objection has taken some step which is only necessary or only useful if the objection has actually been waived, or if the objection has never been entertained at all".[241] Although not approved judicially until the latter

239 Ibid 219-220.
240 Text to n 225 above.
241 *Rein* (n 231), 471.

part of the 20th Century,[242] this statement proved influential in practice, being cited in the notes to Ord. XII in the *Annual Practice*.[243]

A second technical issue concerned the definition of an "irregularity" to which the rule of disbarment in Ord. LXX, r 2 applied. The cases drew a distinction, albeit not easy to draw in practice, between "mere irregularities" (to which the rule applied)[244] and defects which rendered the proceedings a nullity (to which it did not).[245] Service of a writ, rather than notice of a writ, was held to be a nullity in *Hewitson v Fabre*[246] but a defect in an order authorising service on a person outside the jurisdiction was an irregularity only.[247]

A third technical issue concerned the extent to which the parties could contract out of the rules with respect to service of the writ. The limits were tested in a series of cases involving agreements by foreign parties to submit to the jurisdiction of the English courts and to accept service of process by a particular method. No difficulty was presented with such contracting out where service was to take place within the jurisdiction.[248] However, the Court of Appeal in *British Wagon v Gray* held otherwise where the agreed method of service was to be performed elsewhere, notwithstanding a clear contractual agreement to the jurisdiction of the English courts.[249] The reason given for denying the efficacy of the parties' agreement was that the Rules required that an order for service out of the jurisdiction be made, and the parties could not extend the power of the court to make such an order which could not (as the Rules then stood) be invoked in that case.

Technical issues such as these would remain to the fore as the rules of court were refined and recast over the course of the next century, the final chapter in the story of the development of the adjudicatory jurisdiction of the English courts.[250]

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242 The reasoning of Cave J in *Rein v Stein* appears to have been applied in a single case only (*Gray v Cambridgeshire Area Health Authority*, unreported, 1 May 1980 (CA)) before its approval by the House of Lords in *Williams & Glyn's Bank plc v Astro Dinamico* (n 23) (text to n 320-21 below). It has also been adopted, out of context, to define the concept of submission to jurisdiction in relation to the recognition and enforcement of foreign judgments (*Rubin* (n 21), [159]).

243 eg *Annual Practice 1961* (London: Sweet & Maxwell), vol I, 1988.

244 *Fry v Moore* (n 234); *Moore v Gamgee* (1890) 25 QBD 244 (QB).

245 *Hewitson v Fabre* (1888) 21 QBD 6 (QB); also *Bonnell v Preston* (1908) 24 TLR 756 (QB) (service in a different country from that for which leave given a nullity).

246 Ibid.

247 *Fry v Moore* (n 234).

248 *Tharsis Sulphur and Copper Company v Société Industrielle et Commerciale des Métaux* (1889) LT 924 (QB); *Montgomery, Jones & Co v Liebenthal* [1898] 1 QB 487 (CA).

249 [1896] 1 QB 35.

250 Section III.D below.

C. *19th Century Perspectives on Adjudicatory Jurisdiction with respect to Absent Persons*

1. *First steps – before the Judicature Acts*

As appears from the preceding section of this article, it was only in the mid-19th Century that Parliament vested the courts of common law and equity with powers to authorise service of originating process on persons outside England and Wales, and to proceed to judgment if the defendant did not appear. As those powers were extended, the courts themselves had to wrestle with questions as to the limits (if any) imposed upon them. These judicial perspectives are striking and a brief diversion from this chronological account is necessary to take account of them.

The first significant debate occurred in the Court of Chancery following the adoption in 1845 of General Orders which included an apparently general power to approve service of originating process abroad and to authorise the plaintiff in such a case to enter an appearance for the defendant and to proceed to judgment in default of appearance.[251] As noted above,[252] the contention was advanced that these powers could only be exercised in the specific cases for which Parliament had expressly contemplated service out in two statutes enacted a little more than a decade previously. This view found favour, in particular, with the Lord Chancellor, Lord Westbury, but was ultimately rejected by the Court of Appeal in *Drummond v Drummond*, leaving judicial discretion as the main tool for controlling the exercise of this extra-territorial jurisdiction.[253] For present purposes, it is of interest to record the perspectives of leading members of the judiciary on both sides of the debate.

Although not chronologically first in time, it is convenient to start with the judgment of Lord Westbury in *Cookney v Anderson*.[254] In his view, Parliament should be taken to have respected the limits of jurisdiction laid down under public international law doctrines when it enabled the courts of common law and Chancery to allow service out of the jurisdiction of their originating process in certain cases only, and any attempt by a court to exercise jurisdiction beyond these statutory limits was "simply unauthorised and void".[255] Accordingly, although "it may be right in order to prevent a failure of justice to give [local Courts] the power of exercising complete jurisdiction and therefore of citing absent parties under the penalty if they do not appear of having judgment pronounced against them in their absence", that jurisdiction "should be given

251 Text to n 185 above.
252 Text to nn189-191.
253 *Drummond* (n 53).
254 *Cookney* (n 51).
255 Ibid 383.

and exercised with great caution and only where it is clear on the principles of public law[256] that the judgment against the absent party ought to be treated as binding by the Courts of foreign countries".[257]

His Lordship considered that there were two grounds upon which the legislature of any country could legitimately confer on its civil tribunals an extra-territorial jurisdiction of this kind: "one the right which it possesses of binding universally by its laws the persons who owe to it a natural allegiance" and "the other a right which it receives by international law … of summoning all persons interested wherever resident, where the subject of suit arises or is situate within its own territory and falls to be determined by its own law and the judgment of its own Courts".[258] As to the first, his reference to "natural allegiance" is to be understood as a reference to the exercise of jurisdiction over natural born subjects.[259] As to the second, although to the eyes of a modern private international lawyer this appears to conflate issues of jurisdiction with issues of applicable law (choice of law),[260] the reasoning is understandable in light of the predominance at that time of choice of law rules with a territorial focus (*lex loci actus*, *lex loci solutionis*). It is, in any event, clear that Lord Westbury had in mind the legitimate exercise of sovereign jurisdiction based upon a sufficient connection between the subject-matter of the suit and the territory over which the court exercises jurisdiction.

This approach, drawing upon developing doctrines of public international law, may be contrasted with that of Sir James Wigram VC in *Whitmore v Ryan*, the first case adopting the broader discretionary approach.[261] the Vice Chancellor opened his judgment with the following statement:[262]

> "I do not think it is necessary that I should express any opinion whether the Act of Parliament, and the orders made in pursuance of it, are proper or not with reference to questions of international law; nor whether it may be considered certain that foreign countries will treat as conclusive the judgments of the courts of this country pronounced

256 ie public international law.
257 *Cookney* (n 51), 381.
258 Ibid 382.
259 Ibid 379.
260 See also his Lordship's earlier statement (ibid, 379-380) that "where it is well settled by the comity of nations, that any question of private right falls to be determined by the law of a particular country, it would seem reasonable that the Courts of that country should receive jurisdiction and the power of citing absent parties, though residing in a foreign land".
261 *Whitmore* (n 189).
262 Ibid 616.

> in the absence of a party, who has not appeared to a *subpoena* served upon him in a foreign country."

Having examined the terms of the General Orders, he continued:[263]

> "I do not deny that great weight is, for some purposes, due to the observation which has been made as to the extensive nature of the [Order], that it empowers the Court, if it thinks fit, to order a *subpoena* to be served upon a foreigner who has never been within the jurisdiction. But my opinion is that the order does in terms give the Court authority to do so; and I cannot see that such an order exercised with discretion does in any respect violate the rules of natural justice. The order does not give the Plaintiff a right to call upon the Court in all cases to order service of the subpoena abroad, but it gives the Court power to do so, in exercise of a sound discretion, according to the circumstances of the case. The material question in judicial proceedings is whether the Defendant has due notice of the proceedings, so that he may be enabled to come in and make his defence, and not whether he receives that notice at Boulogne or Dover."

After further argument, the order for service was upheld. In this connection, Wigram V-C is reported as stating that "[h]e thought the power of the Court to direct service abroad should be exercised with great caution, but he would not throw any doubt upon the jurisdiction by discharging the order in the present case".[264]

This approach advances considerations of natural justice as providing the principal source of restraint upon the existence and exercise of adjudicatory power over persons abroad. Lord Westbury himself used this device in *Foley v Maillardet*, where it was submitted to him that *Cookney* rested on its own facts and had not overruled *Whitmore*.[265] Lord Westbury held himself bound by his own decision, but added:[266]

> "In the present case, there is nothing to warrant an order to bring the Appellant within the jurisdiction of the court. Whoever takes the first step in doing so must abide by the consequences of this Act. Those consequences would be a decree made in the personal absence of the Appellant, which decree would have to be enforced by any available means in the power of the Court; and should the person against whom it is made at any

263 Ibid 617.
264 Ibid 618.
265 *Foley* (n 190, 393. The decision of Vice-Chancellor Wood referred to is *Steele v Stuart* (n 189).
266 Ibid 395.

> time be found within the jurisdiction, the process of enforcing the decree would have to be carried into effect. This would be a course quite at variance with natural justice …"[267]

The point of law at issue was settled in *Drummond*. Lord Chelmsford L.C. took a different view as to the dictates of public international law than his predecessor: in his view, the general principles laid down in *Cookney* were applicable to compulsory (i.e. mesne) process rather than "the mere notification of proceedings": "the Legislature of every country has power to regulate the course of proceeding in its own Courts".[268] His reasoning in the case turned on the construction of the legislation under which the General Orders were made. Turner L.J., who had been a member of the committee that prepared the General Orders, reached the same conclusion. Having referred to *Cookney*, he commented:[269]

> "The question in this case, as I view it, is not against whom, or under what circumstances, or with relation to what property, the Legislature of a country may be justified in authorizing the process of its Courts to be served out of the jurisdiction of those Courts, but whether the Legislature of this country has not in fact authorized the process of this Court to be so served."

Acknowledging that the arguments advanced in *Cookney* against the assumption of extra territorial jurisdiction weighed against attributing such intention to Parliament, Turner LJ countered this by pointing out that Parliament had reserved to itself the right to veto rules made by the judges to whom it had delegated full powers, but had not exercised that veto, and also that Parliament had expressly authorised service out of the jurisdiction in certain cases. Finally, he noted that the exercise of the power to serve out of the jurisdiction had been left entirely in the discretion of the Court, and that the enforcement of any judgment in default in the place where the defendant resided would be a matter reserved to the courts of that country.

2. *Developing practices – after the Judicature Acts*

Some years later, after the new Ord. XI of the Rules of the Supreme Court 1883 had exhaustively[270] defined the cases in which service out was to be authorised,[271] the Courts edged

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267 His Lordship referred here to *Buchanan v Rucker* (1808) 9 East 192, 103 ER 546 (also (1807) 1 Camp 63, 170 ER 877), the leading English authority on the recognition and enforcement of judgments prior to *Schibsby v Westenholz* (n 51).

268 *Drummond* (n 53), 37.

269 Ibid 46.

270 *Re Eager* (n 212).

271 Text to nn217-221 above.

towards a more restrictive approach, both as to the construction of the rules themselves and as to the exercise of their discretion to authorise service out.[272]

As to the exercise of discretion, Ord. XI, r 4 now required that the evidence supporting the application for leave to serve out must demonstrate that the case was a "proper one" for service out. The courts' approach to this discretion was influenced both by considerations of fairness towards the defendant and of the perceived limits of jurisdiction under international law.[273] This combination of factors is illustrated in the following statement by Pearson J in *Société Générale de Paris v Dreyfus Brothers*,[274] which has been influential ever since:[275]

> "But of course it becomes a very serious question, and ought always to be considered a very serious question, whether or not even in a case like that, it is necessary for the jurisdiction of the Court to be invoked, and whether this Court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this Court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction."

Like considerations informed the approach taken in defining the limits of the adjudicatory jurisdiction of the English courts over foreign, absent parties. In *Russell v Cambefort*[276] and in *Western National Bank of the City of New York v Perez, Triana & Co*[277] the Court of Appeal construed

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272 'Some Aspects of Service out of the Jurisdiction in English Law', Ch III in Collins, Essays in International Litigation and the Conflict of Laws (Oxford: OUP, 1994), 228, referring to *Comber v Leyland* [1898] AC 524, 527 (Earl of Halsbury LC) (HL); *Field v Bennett* (1886) 56 LJ QB 89, 91 (Lord Coleridge CJ) (QB); *Firth v de las Rivas* (1893) 69 LT 666, 677 (Lord Esher MR) (CA).

273 It early practice, the courts were willing to grant leave subject to an undertaking from the plaintiff not to seek judgment insofar as the case was held at trial to fall outside Ord XI (*Thomas v Hamilton* (1886) 17 QBD 592 (CA); *Manitoba and North West Land Corp v Allan* [1893] 3 Ch 432 (Ch)). This practice was eventually disapproved by the House of Lords in *Vitkovice Horni A Hutni Tezirstvo v Korner* [1951] AC 869.

274 (1885) 21 ChD 239, 242-243 (CA). The Judge's decision to uphold the order for service out in that case, was later reversed by the Court of Appeal ((1887) 37 Ch.D. 215).

See also *Great Australian Gold Mining Co v Martin* (n 209), 10-11 (James LJ), a case involving a British subject residing abroad. cf *Harris v Fleming* (1879) 13 ChD 208, 215 (Hall VC): Ord XI, r 1 "must ... receive a wide construction, so as not to prevent proper and reasonable cases from being brought within it". See also Piggott, vol III, 186-188.

275 See eg *The Hagen* [1908] P. 189, 201 (Farwell LJ) (CA) (text to nn290-92 below); *Tyne Improvement Commissioners v Armement Anversois SA (The Brabo)* [1949] AC 326, 350 (Lord Simonds) (HL; *Alliance Bank JSC v Aquanta Corp* [2012] EWCA Civ 1588, [2012] 2 CLC 1027, [44]; *Brownlie v Four Seasons Holdings Inc* [2015] EWCA Civ 665, [2016] 1 WLR 1814, [17] (Arden LJ). cf *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438, 458 (Lord Goff) (HL); *Abela v Baadarani* (n 131) (see text to nn 380-385 below).

276 (1889) 23 QBD 526 (CA).

277 *Western National Bank* (n 236). See also *Ex p Blain, In re Sawers* (1879) 12 ChD 522 (bankruptcy jurisdiction) (CA); *Re Busfield* (1886) 32 ChD 123 (originating summons) (CA). cf *Haggin v Comptoir*

Ord. IX, r 6 of the 1883 Rules, which authorised service upon members of a firm by service upon a partner or at its principal place of business within the jurisdiction, as not extending to partners residing abroad or to firms not having any such place of business. In the former case, Cotton LJ stated:[278]

> "No doubt the rule in question is made under the authority of an Act of Parliament, and that has been relied on as giving it as great an effect as an Act of Parliament; but although an Act of Parliament can give jurisdiction to the Court against British subjects, as to foreigners Parliament has not and does not assume to have jurisdiction against those who are residing abroad, and have not submitted to the jurisdiction of the English Courts. *Therefore, in construing the rule, we must have regard to what Parliament has the power to do, and, in my opinion, we should be wrong in construing it as giving jurisdiction against those who are in no way subject to the English Parliament;* and although the rule does authorize service on one member of a partnership in general terms, yet it ought to be construed only as applying to partnerships the members of which either by their nationality or residence have become subject to English law and to the power of Parliament. Looking at it in that view I do not think the rule applies to firms consisting of foreigners who have in no way become subject to the English Parliament."

His Lordship declined to express an opinion as to whether the defendants could have been served under Ord. XI.[279]

In *Western National Bank*, Bowen LJ suggested that a judgment given against a firm having no business presence within the jurisdiction would be "contrary to the doctrines of international law … useless abroad, and unjust both abroad and here".[280] Lord Esher M.R., dissenting on this point, considered in detail the procedural position of defendants, local and foreign, who failed to appear in the proceedings following service of the writ.[281] The following passage in his judgment, commenting upon Ord. XI, is worthy of note:[282]

> "Can the English Court serve such a writ abroad - first, on an English subject; secondly, on a foreigner? Order XI., r 1, is a direct enactment that the Court can give leave to serve

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d'Escompte de Paris (1889) 23 QBD 519 (CA) (foreign corporation). Cotton LJ was a member of the Court in every decision except *Western National Bank*.

278 *Russell* (n 276), 528 (emphasis added). See also *Grant v Anderson & Co* [1892] 1 QB 108, 112 (Lord Coleridge CJ) (CA).

279 Ibid 528.

280 *Western National Bank* (n 236), 315.

281 Ibid 308-313.

282 Ibid 311-312 (emphasis added).

> its writ abroad. The cases in which it can are exhaustively included in Order XI. But in those cases it can. It is only by virtue of that rule being equivalent to an enactment that the Court could give such leave. *Whether such enactment is strictly within international comity is a question which no English Court can entertain.* The order binds the Court. The order is conclusive that, to the extent to which it goes, the Court must exercise its jurisdiction over a foreigner neither resident nor domiciled in England. … *If, therefore, the leave is given under Order XI., and the service is effected, then all the effects enacted by the other rules and orders must have the same force against the defendants so served as against a defendant served in England. The Plaintiff may, on proper affidavits, obtain judgment for default, with all its consequences*."

A middle course was steered in relation to Ord. XI by Wills J in *Massey v Heynes*:[283]

> "Of course if any clear principle of international law or comity existed for construing the rules otherwise than according to the natural meaning of the words used there would be some reason for doing so, but there is no such reason. I think the rule was intended to apply precisely to this class of case."

A more fundamental challenge to a statutory power to permit the service of process abroad arose before the Privy Council in *Ashbury v Ellis*,[284] in which the New Zealand legislative rules authorising the country's courts to proceed to judgment against absent, foreign defendants were challenged on the basis that they were not "Laws for the Peace, Order and good Government of New Zealand" within the New Zealand Act of 1852.[285] The New Zealand rules were "framed on principles adopted in England".[286] In *Ashbury*, the claim concerned a contract purportedly made by the defendant's agent in New Zealand and to be performed there. Lord Hobhouse, delivering the opinion of the Panel, stated:[287]

> "If the New Zealand Legislature had enacted that, in a concrete case such as the present one, the New Zealand Courts should have power to give the plaintiff a decree notwithstanding that the defendant held himself aloof, we should hardly have heard the suggestion that such a law was not one for the peace, order, and good government of New Zealand. … [T]heir Lordships are clear that it is for the peace, order, and good government of New Zealand that the Courts of New Zealand should, in any case of contracts made or to be performed in New Zealand, have the power of judging whether

283 See also *Massey v Heynes & Co* (1888) 21 QBD 330, 334 (CA).
284 [1892] AC 339.
285 15 &16 Vict, c 72, s 53.
286 *Ashbury* (n 284), 341.
287 Ibid 344.

> they will or will not proceed in the absence of the Defendant. The power is a highly reasonable one. …"

Having rejected the contention that the enforceability of the judgment abroad was relevant to the question before him, Lord Hobhouse continued:[288]

> "The only other contention related to the word 'absent' in [the New Zealand rule under consideration]. The appellant seeks to confine it to persons who at some previous time have been domiciled or resident in New Zealand. It is not easy to appreciate the reasons why such an artificial sense should be put upon the word; and during the argument their Lordships expressed agreement with the judges of the Court of Appeal, who held that the word is used in its ordinary sense, and describes persons who are not in New Zealand."

It is not necessary to multiply examples.[289] The foregoing account of the English courts' early encounters with the exercise of adjudicatory jurisdiction over persons outside England and Wales will suffice to show that a variety of factors influenced their approach. Foremost among these were the sovereignty of Parliament, perceived limits on jurisdiction imposed by doctrines of international law and considerations of justice and reasonableness as between the claimant and the defendant. The second and third of these factors, although not capable of trumping the clearly expressed intent of Parliament, resulted in a cautious approach to the exercise of statutory jurisdiction, particularly over foreigners. In 1908, Farwell LJ provided the following summary which has been frequently cited since and has been approved by successive editions of Dicey: [290]

> "During these present sittings Vaughan Williams LJ and myself have on more than one occasion had to consider Order XI, and we have had many authorities discussed and fully considered by the Court, and the conclusion to which the authorities led us I may put under three heads."

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288 Ibid 344-45.

289 See Piggott, vol I, 231-234; Collins, *Essays* (n 272), 228-230.

290 *The Hagen* (n 275), 201. See Dicey, Morris & Collins, [11-142] echoing a statement first made in the 5th edition (A Berriedale Keith (ed), London: Stevens & Sons, 1932). To the three points advanced by Farwell L.J., the editors add a fourth proposition, that "the court will refuse permission if the case is within the letter but outside the spirit of the rule" (*Johnson v Taylor Bros & Co Ltd* [1920] AC 144, 153 (Viscount Haldane); (HL) *George Monro Ltd v American Cyanamid & Chemical Corp* [1944] KB 432, 427 (Scott LJ) (CA); *Citigroup Global Markets Ltd v Amatra Leveraged Feeder Holdings Ltd* [2012] EWHC 1331 (Comm), [2012] 2 CLC 279, [36] (Andrew Smith J). cf *Sharab v Al-Saud* [2009] EWCA Civ 353; [2009] 2 Lloyd's Rep 160, [35], where this consideration was held relevant only to the exercise of the jurisdiction.

First, his Lordship adopted the statement of Pearson J., in *Société Générale de Paris v. Dreyfus Brothers* cited above.[291] He continued:[292]

> "The second point which we considered established by the cases was this, that, if on the construction of any of the sub-heads of Order XI there was any doubt, it ought to be resolved in favour of the foreigner; and the third is that, inasmuch as the application is made *ex parte*, full and fair disclosure is necessary, as in all ex parte applications, and a failure to make such full and fair disclosure would justify the Court in discharging the order, even although the party might afterwards be in a position to make another application."

Considerations of justice between the parties (and, in particular, justice towards the defendant) were, and remain,[293] relevant also where the adjudicatory jurisdiction of the English courts was established otherwise than through service out of the jurisdiction authorised under the rules of court. In *Matthaei v Galitzin*,[294] a Chancery action between two foreigners relating to transactions which took place outside the jurisdiction, the defendant had appeared to the bill, and demurred for want of equity. Her demurrer was upheld. The Vice Chancellor, Sir Richard Malins, stated:[295]

> "It would be a grievous hardship if a foreigner residing in a foreign country, and having property in that country, where there are tribunals in which the rights of subjects of that country can be asserted, could be dragged into the Courts of this country and be subjected to the annoyance of all the proceedings in these Courts. It is certainly a jurisdiction which ought not to be exercised except in cases of absolute necessity. …"

He continued:[296]

> "[W]hen neither party had anything to do with this country, and the subject-matter was not situated here, as in that case, then, if the plea were overruled, the Court might as well be called upon to interfere in the affairs of all countries."

Similar considerations underlay the English courts' exercise in the early years of the 20th Century of a power to stay proceedings indefinitely, notwithstanding valid service upon a defendant

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291 Text to n 275.
292 *The Hagen* (n 275), 201.
293 *Spiliada* (n 131) (see text to nn 298-99 below).
294 (1874) LR 18 Eq 340 (Ch).
295 Ibid 347.
296 Ibid 348.

within the jurisdiction, on the ground that they were "such as practically to work a serious injustice upon a defendant and be vexatious:[297]

> "The English Courts are freely open to persons foreign to this country seeking to enforce their rights against our corporations, companies and citizens, in cases in which the Courts can properly exercise jurisdiction, but, while I think we ought to be careful not to check this freedom, I am of opinion that we ought not to allow this hospitality to be abused. The difficulties which arise in the exercise of this power of the Court do not appear to be so much difficulties in stating the law as difficulties in administering or applying it. The Court should, on the one hand, see clearly that in stopping an action it does not do injustice, and, on the other hand, I think the Court ought to interfere whenever there is such vexation and oppression that the defendant who objects to the exercise of the jurisdiction would be subjected to such injustice that he ought not to be sued in the Court in which the action is brought, to which injustice he would not be subjected if the action were brought in another accessible and competent Court."

D. *To the Present – the Abolition of Appearance and the New Procedural Regime*

The most significant development in the adjudicatory jurisdiction of the English courts in the course of the 20th Century has undoubtedly been the evolution of the courts' willingness to stay proceedings to avoid injustice to the defendant[298] into the principle of *forum non conveniens*, under which an action may be stayed (or permission to serve originating process out of the jurisdiction refused) if "there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.".[299]

Otherwise developments of the English court's adjudicatory jurisdiction in the course of the past century have been of a more technical character, but not unimportant for that. For convenience, the following account is divided into three sections: (a) procedures for challenging the courts' jurisdiction, (b) contracting out of the rules, and (c) other changes.

1. *Procedures for challenging the court's jurisdiction*

(a) *Revision of the 1883 Rules*

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297 *Logan v Bank of Scotland (No 2)* [1906] 1 KB 141, 150-151 (Gorell Barnes P) (CA). The quotation is from p. 150 of the judgment. See also *Egbert v Short* [1907] 2 Ch 205 (Ch); *Re Norton's Settlement* [1908] 1 Ch 471 (CA); *Baroda v Wildenstein* (n 3). This line of cases has now evolved into the developed principle of *forum conveniens* (see text to nn 298-99 below).

298 Text to nn 297 above.

299 *Spiliada* (n 131), 474.

In *Keymer v Reddy*,[300] Fletcher Moulton LJ suggested that two courses were open to a defendant who objects to the jurisdiction:[301]

> "He may disregard the writ and refuse to enter an appearance at all; or he may out of respect for the Court enter an appearance under protest, reserving his right to object to the jurisdiction."

His Lordship omitted a third option, expressly available to the defendant under Ord. XII, r 30, to seek to set aside service of the writ, or the order for service, without entering an appearance.[302]

The decision in *Keymer* to adopt the prevailing practice for the entry of conditional appearances[303] was formalised by a change in the rules in 1961, as part of the first comprehensive revision of English procedure since the adoption of the 1883 Rules.[304] A new Ord. 12, r 7, entitled "Conditional appearance" provided:

> "(1) A defendant to an action may with the leave of the Court enter a conditional appearance in the action.
>
> (2) A conditional appearance … is to be treated for all purposes as an unconditional appearance unless the Court otherwise orders or the defendant applies to the Court, within the time limited for the purpose, for an order under Rule 9 and the court makes an order thereunder."

Rule 9(1), to which the above rule referred, provided:

> "A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within fourteen days after entering the appearance, apply to the Court for an order setting aside the writ or service of the writ, or notice of the writ on him, or declaring that the writ or notice has not been duly served on him or discharging any order giving leave to serve the writ or notice on him out of the jurisdiction."

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300 Text to n 239 above.
301 *Keymer* (n 238), 219.
302 *Western National Bank* (n 236), 309 (Lord Esher MR).
303 Text to nn 241-45 above. This practice differed from the earlier Chancery procedure (see n 180 above).
304 Rules of the Supreme Court (Revision) 1962 (SI 1962/2145). The revision followed the recommendations made by the Committee on Supreme Court Practice and Procedure chaired by Sir Raymond Evershed. The Committee produced three interim reports and a final report between 1949 and 1953. A further revision took place in 1965: Rules of the Supreme Court (Revision) 1965 (SI 1965/1776) (**RSC 1965**).

Finally, the effect of an unconditional appearance was addressed by Ord. 10, r 1(3) which provided:

> "Where a writ is not duly served on a defendant but he enters an unconditional appearance in the action begun by the writ, the writ shall be deemed to have been duly served on him and to have been so served on the date on which he entered the appearance."

These provisions, in combination, placed defendants, and particularly those defendants who had been served outside England and Wales, in an unenviable position, as Salmon LJ noted in *Somportex Ltd v Philadelphia Chewing Gum Corporation*:[305]

> "The [defendants], when they were served with the notice, had ... several courses open to them. First, they might do nothing. Secondly, they could move by originating motion to have the service set aside on the ground that the English courts had no jurisdiction. Thirdly, they could enter a conditional appearance and apply by a summons in the action to have the writ set aside on the same grounds. Fourthly, they could enter an unconditional appearance. There is no doubt that the [defendants] were extremely anxious that the matter should not be litigated in the English courts, and, therefore, there was no question of their taking the fourth course. If they had taken the first course, judgment would have been entered against them in default of appearance. If they had taken the second course and had been successful on their originating motion, the action would have been killed stone-dead. Had they failed on the originating motion (and there seems to be a distinct possibility that they might have done so), judgment would have been entered against them in default of appearance.[306] .... Had the [defendants] taken the third course of entering a conditional appearance, and succeeded in persuading the master or the judge or the Court of Appeal or the House of Lords that the English courts had no jurisdiction, the action would also have been stone-dead. If they had failed, however, the conditional appearance would now become unconditional. The advantage for the [defendants] in taking the third course would be that they would have preserved their position in the event of failing on the summons to have the writ set aside. In such an event, they would be safeguarded against judgment being entered against them in

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305 [1968] 3 All ER 26, 30-31 (CA). See Collins, *Essays* (n 270), 246-252; also *Carmel Exporters v Sea-Land Inc* [1981] 1 WLR 1068, 1071-1072 (Goff J) (QB).

306 His Lordship here noted that the defendant's willingness to take this risk would likely depend on whether it had substantial assets within the jurisdiction, and the prospect of a default judgment being enforced abroad.

> default of appearance. This advantage would, however, be of no practical value unless they had assets here or intended to bring assets here. Nor in any event would it be of any value unless they had some chance of succeeding in the action. On the other hand, if the summons to set aside the writ failed, the conditional appearance then becoming unconditional, it would in law amount to a submission to the jurisdiction of the English courts. This would enable the English company to execute any judgment which they might obtain against the [defendants] in [their home jurisdiction]."

Two, related points are worthy of note. First, Salmon LJ (and Lord Denning M.R.[307]) used the language of "submission to the jurisdiction", although it did not appear anywhere in the rules. Although of doubtful utility in this context,[308] the usage highlights the influence of Dicey's "principle of submission". Secondly, dissatisfaction with the defendant's lot, highlighted in *Somportex*, led to a further, and more fundamental, change in the rules in 1979.[309] The institution of a formal "appearance" was thereby consigned to history, and replaced with the twin institutions of the acknowledgment of service[310] and the "statutory submission".[311] This change was explained by Goff J (as he then was) in *Carmel Exporters v Sea-Land Inc*:[312]

> "Under the new procedure, much has changed; but for present purposes the most important change is that the step of 'appearance' has been abolished. In its place, we now have the step of 'acknowledgment of service'; but the two steps are by no means the same. Nowadays, every writ for service must be accompanied by a form of acknowledgment of service; and it is the duty of each defendant who wishes to acknowledge service of the writ, and to defend the action, to complete (either himself or by his solicitor) the form in accordance with the directions set out on it, and then to return it to the appropriate court office. If he fails to do so within the prescribed time, then judgment in default of acknowledgment of service may be entered against him. But, although the acknowledgment of service may operate as a statement of intention to defend the proceedings, nevertheless it does not operate as a waiver of any irregularity in

307 *Somportex* (n 304), 28.

308 Text to nn 97 and 145 above.

309 Rules of the Supreme Court (Writ and Appearance) 1979 (SI 1979/1716).

310 RSC 1965 (as amended), Ord 12, rr 1, 3, 4, 6.

311 This terminology is taken from the later Court of Appeal decision in *Deutsche Bank v Petromena* [2015] EWCA Civ 226; [2015] 1 WLR 4225, discussed text to nn 342-347 below.

The 1979 reforms also brought an end to the practice of allowing a defendant to appear *gratis*, without service of the writ or an equivalent step having been taken (*Abu Dhabi Helicopters v Aeradio Ltd* [1986] 1 WLR 312 (CA)).

312 *Carmel Exporters* (n 305), 1072. See also *European Capital Trade Finance Ltd v Antenna Hungria RT* [1995] CLC 530, 531-533 (Rix J) (QB).

> the issue or service of the writ. This is expressly stated in the new Ord. 12, r 7. … Moreover, not only has the step of 'appearance' been abolished, but the practice of entering a conditional appearance has likewise been abolished. Instead, we find a new procedure for disputing the jurisdiction of the court. This procedure is set out in Ord. 12, r 8."

The new Ord. 12, r 7 provided:

> "The acknowledgment by a defendant of service of a writ or notice of a writ shall not be treated as a waiver by him of any irregularity in the writ or notice or service thereof or in any order giving leave to serve the writ or notice out of the jurisdiction or extending the validity of the writ for the purpose of service."

The new Ord. 12, r 8 required a defendant who wished to raise any "irregularity"[313] of the kinds mentioned in the preceding rule to apply to the court within 14 days, or within such additional period as the court might allow.[314] For present purposes, the following provisions of that rule are of particular significance:

> "(6) A defendant who makes an application under paragraph (1) shall not be treated as having submitted to the jurisdiction of the court by reason of his having given notice of intention to defend the action; and if the court makes no order on the application or dismisses it, the notice shall cease to have effect, but the defendant may, subject to rule 6 (1), lodge a further acknowledgment of service and in that case paragraph (7) shall apply as if the defendant had not made any such application.
>
> (7) Except where the defendant makes an application in accordance with paragraph (1), the acknowledgment by a defendant of service of a writ or notice of a writ shall, unless the acknowledgment is withdrawn by leave of the court under Ord. 21, r 1, be treated as a submission by the defendant to the jurisdiction of the court in the proceedings."

The new acknowledgment of service had a double significance: first, if the defendant failed to lodge the form of acknowledgment within the prescribed time after service of the writ, the

313 A change to Ord 2, r 1 in 1964 had removed, for all practical purposes, the former distinction (text to nn244-47) between a mere irregularity and a nullity (see *Annual Practice 1966* (London, Sweet & Maxwell), vol I, 11; *Harkness v Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729, 735-736 (Lord Denning MR) (CA); *Carmel Exporters (Sales) Ltd v Sea-Land Services Inc* [1981] 1 WLR 1068 (QB); *Leal v Dunlop Bio-Processes International Ltd* [1984] 1 WLR 874 (CA)). Otherwise Ord 2, concerning applications to set aside process for irregularity, carried forward the provisions of Ord LXX of the 1883 Rules (nn 224-25 above). See now CPR, r 3.10, referring to "errors of procedure".

314 RSC 1965 (as amended by SI 1979/1716), Ord 12, r 8(1)-(2).

plaintiff could enter judgment in default;[315] and, secondly, if the defendant lodged his acknowledgment within that time indicating an intention to defend the action, no default judgment could be entered but a further period of time to challenge the writ or service of it (or to lodge a defence) would begin to run. If that period expired without an application being made, the defendant was treated under the amended Rules as having submitted to the jurisdiction (i.e. no longer able to raise a challenge and bound to participate in the proceedings to judgment). Thus far, the position of the defendant under the amended Rules would be more or less the same as a defendant under the former rules who entered a conditional appearance.[316] The key difference would arise if the defendant were to make but be unsuccessful in his jurisdiction challenge. In this case, by contrast with the defendant under the former Rules who entered a conditional appearance followed by an unsuccessful challenge to jurisdiction (who would then be treated as having entered an unconditional appearance), the defendant's acknowledgment of service under the amended Rules would cease to have effect and the defendant would left to decide afresh whether to acknowledge service and thereby to express an intention to defend the claim on its merits. If a second acknowledgment was filed, the defendant would be treated under the Rules as submitting to the jurisdiction.

Thus, the defendant was now entitled to a ruling from the court as to its jurisdiction in the case before being required to elect whether to participate formally in the action up to judgment. As Rix J explained:[317]

> "It follows that where an acknowledgment of service is followed by a timely challenge under r 8(1), there is no submission to the court at all save for the limited purpose of giving to the court jurisdiction over the defendant to decide its own jurisdiction."

The novel references in the amended Rules to "submission to jurisdiction" led Robert Goff LJ to attempt a comprehensive definition of that concept in *The Messiniaki Tolmi*, as follows:[318]

> "Now a person voluntarily submits to the jurisdiction of the Court if he voluntarily recognizes, or has voluntarily recognized, that the Court has jurisdiction to hear and determine the claim which is the subject-matter of the relevant proceedings. In particular,

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315 RSC 1965 (as amended), Ord 13.

316 No leave is required to acknowledge service with a view to contesting the court's jurisdiction.

317 *European Capital Trade Finance* (n 310), 532. In that case, Rix J held that it was not possible to pursue an application for summary judgment (RSC 1965, Ord 14, now CPR, Part 24) against a defendant before a further acknowledgment of service has expired. The position is now different under the CPR, although such an application should only rarely be allowed to proceed before a challenge to jurisdiction has been determined (*Moloobhoy v Kanani* [2013] EWCA Civ. 600).

318 [1984] 1 Lloyd's Rep 266, 270 (CA).

> he makes a voluntary submission to the jurisdiction if he takes a step in proceedings which in all the circumstances amounts to a recognition of the Court's jurisdiction in respect of the claim which is the subject-matter of those proceedings. The effect of a party's submission to the jurisdiction is that he is precluded thereafter from objecting to the Court exercising its jurisdiction in respect of such claim. Whether any particular matter, for example an application to the Court, amounts to a voluntary submission to the jurisdiction must depend on the circumstances of the particular case."

In the present author's view, however, this exercise in definition was superfluous, as Ord. 12, rr 7-8 defined in exact terms what would, and what would not, to amount to a submission under the Rules and the statutory regime governing challenges to the jurisdiction provided little, if any, room to accommodate a common law concept of submission that remained both unclear and untested.

Elsewhere, although sometimes resorting to the language of submission as a high level concept, the courts predominantly analysed the effect of the defendant's conduct in the proceedings in terms of whether there had been a waiver of any irregularity in the prior process.[319] The test suggested by Cave J in *Rein v Stein*[320] was revived and adopted as the test to determine whether there had been a waiver.[321] In following the approach taken under the earlier (1883) Rules, the courts may be criticised for having overlooked overlooked the significant changes that had been made since then, in particular in the detailed provisions of Ord 12 r 7-8 introduced in 1979 concerning irregularities in the writ or service of the writ.[322]

(b) *The Civil Procedure Rules*

The same key features of the landscape remain under the Civil Procedure Rules, adopted in 1998 following the Woolf Report, with a few modifications of note.[323] Except in the Commercial Court, whose practice requires an acknowledgment of service in all cases,[324] a defendant who wishes to defend the claim may now choose to serve his Defence as the first formal step in the

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319 eg *William's & Glyn's Bank* (n 23); *Esal (Commodities)* (n 6); *Sage v Double A Hydraulics* (1992) The Times, 2 April (CA); *Spargos Mining NL v Atlantic Capital Corp* (1995) The Times, 11 December (QB); *Caltex Trading Pte v Metro* [1999] 2 Lloyd's Rep 724 (QB).

320 Text to n 241 above.

321 *Williams & Glyn's Bank* (n 23), 444 (Lord Fraser); *Esal (Commodities)* (n 6), 482 (Slade LJ); *Sage* (n 319), transcript, p. 8; *Caltex* (n 319), 731. The standard is an objective one (see *Esal (Commodities)*, 483; *Sage*, transcript, p. 7)

322 See further text to nn 350-57 below.

323 Lord Woolf M.R., *Access to Justice: Final Report* (London: HMSO, 1996).

324 CPR, r 58.6(1).

proceedings.[325] He may choose instead to file an acknowledgement of service if he is unable to file a defence within the period specified by the rules,[326] and must do so if he wishes to dispute the court's jurisdiction.[327] If the defendant fails to file an acknowledgment of service or defence within that period, the claimant may in most cases[328] obtain judgment in default by following the procedure set out in Part 12.[329]

CPR Part 11, entitled "Procedure for disputing the court's jurisdiction", applies to a defendant who wishes (a) to dispute the court's jurisdiction to try the claim, or (b) argue that the court should not exercise its jurisdiction.[330] It is a "single procedural code"[331] for both types of challenge relating to jurisdiction; the former Ord. 12, r 8, by contrast, was held to apply only to a defendant who intended to dispute the court's jurisdiction, and not one who admitted the jurisdiction but sought a stay.[332] Now, a defendant who contests the jurisdiction, or resists the exercise of the jurisdiction from the outset, must comply with its requirements of Part 11,[333] although a stay of proceedings may also be sought (or granted by the court of its own motion) outside this framework,[334] at least in circumstances where the facts supporting the stay have arisen after the defendant has served a defence or otherwise lost his opportunity to invoke the Part 11 procedure.[335]

A defendant who files an acknowledgement of service does not, by doing so, lose any right to dispute the court's jurisdiction,[336] even if he ticks the box that now appears on the acknowledgment of service form indicating that he intends to contest the claim and not the box

325 CPR Part 15.
326 CPR, r 10.1(3)(a).
327 CPR, rr 10.1(3)(b), 11(2).
328 cf. CPR, rr 12.2, 12.3(3).
329 CPR, rr 10.2, 12.3. This type of default judgment is labelled as a "judgment in default of an acknowledgment of service", as opposed to a "judgment in default of defence" which the claimant may seek if an acknowledgment of service has been filed but a defence has not followed (r. 12.3(1)-(2)). In many cases, the judgment may be obtained simply by filing a request with the court. As to the cases in which a formal application is required, see CPR, rr 12.4(3), 12.10
330 CPR, r 11(1).
331 *IMS SA v Capital Oil and Gas Industries Ltd* [2016] EWHC 1956 (Comm), [34] (Popplewell J).
332 *The Messiniaki Tolmi* (n 318), 270 (Robert Goff LJ); *Texan Management Ltd v Pacific Electric Wire & Cable Co Ltd* [2009] UKPC 46, [58]-[66] (Lord Collins).
333 *Le Guevel Mouly v AIG Europe Ltd* [2016] EWHC 1794 (QB), [34] (Hickinbottom J); *IMS* (n 331) [34]-[36].
334 CPR, r 3.1(2)(f). As to the Court's power to grant a stay of its own motion, see *Cook v Virgin Media Ltd* [2015] EWCA Civ 1287, [2016] 1 WLR 1672 (CA).
335 *Texan Management* (n 332), [68]-[73]; *IMS* (n 331), [38].
336 CPR, r 11(3).

that indicates an intention to challenge jurisdiction.[337] Unless the court extends time, the jurisdiction application must be made within 14 days after the acknowledgement of service and be supported by evidence.[338] If a defendant fails to do so, having acknowledged service, "he is to be treated as having accepted that the court has jurisdiction to try the claim".[339] If, following an application, the court does not make the declaration sought, (a) the acknowledgment of service shall cease to have effect, and (b) the defendant may choose to file a further acknowledgment of service within 14 days (or such other period as the court may order.[340] A defendant who files a second acknowledgment of service shall also "be treated as having accepted that the court has jurisdiction to try the claim".[341]

Part 11 does not use the language of submission, although the words "treated as having accepted that the court has jurisdiction to try the claim" have been treated as equivalent to those used in the corresponding provisions of the RSC, and have been labelled as a "statutory submission".[342] Like the former Ord. 12, r 8 regime, Part 11 provides two examples of "statutory submission": the case of a defendant who acknowledges service but does not lodge a jurisdiction challenge within time, and the case of a defendant who files a second acknowledgment of service after his challenge to jurisdiction has been rejected. Although the court has power to relieve a defendant from this consequence, in the first case by a retrospective extension of time[343] and in the second by permitting withdrawal of the second acknowledgment,[344] the defendant's acceptance of the jurisdiction is otherwise mandatory and unqualified.[345] It cannot be overridden by arguments that the defendant's conduct did not amount to a submission at common law, or demonstrate an unequivocal waiver of the irregularity in the proceedings.[346] Thus, a defendant will be disbarred

337 *IBS Technologies (PVT) Ltd v APM Technologies SA* [2003] All ER (D) 105 (Apr), [23]-[26] (Michael Briggs QC) (Ch); *American Leisure Group Ltd v Wright*, 2015 WL 3953014, [48]-[49] (George Bompas QC) (Ch).

338 CPR, r 11(4).

339 CPR, r 11(5).

340 CPR, r 11(7).

341 CPR, r 11(8).

342 *Deutsche Bank* (n 311), [24], [33], [36].

343 *Texan Management* (n 332), [73]. As to the approach to be taken upon such an application, see *Zumax Nigeria Ltd v First City Monument Bank plc* [2016] EWCA Civ 567, [25]-[29] (Kitchin LJ); also L*e Guevel-Mouly* (n 330), a34]-[35]; *IMS* (n 328), [38].

344 *Deutsche Bank* (n 311), [36], referring to CPR PD10, [5.4].

345 *Deutsche Bank* (n 311), [36].

346 Ibid [33], [36] (""The disinterested bystander test has no application to what I have called statutory submission to the jurisdiction"). This departs from the test adopted under the former rules in *Sage* (see n 321).

from challenging the court's jurisdiction even if he continues to protest or has lodged an appeal against the decision to reject his challenge.[347]

In *Texan Management Ltd v Pacific Electric Wire & Cable Co Ltd*, Lord Collins suggested that the wording of r 11(5) (and, presumably also, r 11(8)) was "superfluous in the case of a defendant within the jurisdiction, because there could never be any doubt that the court has jurisdiction over such a defendant".[348] However, by acknowledging service and then acting in such a way that r 11(5) or r 11(8) treats him as accepting the court's jurisdiction, the defendant who has been served within the jurisdiction does put himself in a very different position procedurally. He has not ignored the proceedings, and the overall effect of his formal participation is the same as an appearance at common law: it provides a secure basis upon which the court may proceed to exercise its adjudicatory jurisdiction, and (unless the statutory bar is lifted retrospectively by an order of the court) he may no longer object to any defect in the process that compelled his appearance.[349] If he should fail to file a defence, the judgment against him will be a judgment in default of defence, and not a judgment in default of acknowledgment of service.

In *SMAY Investments v Sachdev*, Patten J questioned whether the common law concept of submission, or arguments about waiver of irregularities, had any useful role to play under the CPR regime:[350]

> "One would have thought that, with the advent of the CPR, we could finally have adopted an all-embracing and exhaustive code for dealing with challenges to jurisdiction and assigned to history arguments about implied waiver and submissions to jurisdiction, which seem to me to be an affront to any mature legal system."

This approach is to be commended. Now that the Rules refer neither to submission as an independent concept nor to waiver irregularity, and provide a detailed code regulating the

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347 A defendant who wishes to appeal should ask for an extension of time for lodging the second acknowledgment of service while an appeal, or application for permission to appeal, is pending: *Deutsche Bank* (n 312), [51].

348 *Texan Management* (n 332), [68]; also [86]: "The application for an extension of time for defence was not a submission to the jurisdiction because [the defendants] were in any event subject to the jurisdiction as BVI companies."

349 *Hoddinott v Persimmon Homes (Wessex) Ltd* [2007] EWCA Civ 1203, [2008] 1 WLR 806. In that case, the Court suggested that the reference in r 11(5) to "the court's jurisdiction is shorthand for both the court's jurisdiction to try the claim and the court's exercise of its jurisdiction to try the claim". This was doubted by Lord Collins in *Texan Management* (n 332), [69], [73]; see also *IMS*, [39]. No difficulty is presented with the reasoning in *Hoddinott*, however, if the wording of the rule is only taken to estop the defendant from raising an objection that he could have raised before the date upon which the "statutory submission" takes effect.

350 *SMAY Investments v Sachdev (Practice Note)* [2003] EWHC 474 (Ch); [2003] 1 WLR 1973, [40].

procedures and incidents of challenges to jurisdiction, the old technology of the common law and of the former Rules of the Supreme Court seems superfluous, indeed unhelpful.[351] Even if one does not accept that criticism, there is force in the contention that the existence of the detailed Part 11 procedure should limit cases of (non-statutory) "submission" or "waiver" almost to vanishing point. As Patten J reasoned:[352]

> "It seems to me that when a defendant has complied with CPR Pt 11 with a view to challenging the jurisdiction of the court, and the time for making his application under CPR r 11(4) has not yet expired, then any conduct on his part said to amount to a submission to jurisdiction, and therefore a waiver of that right of challenge, must be wholly unequivocal."

This reasoning has been endorsed by the Court of Appeal, and extended to conduct after the making of a Part 11 application.[353] Perhaps inevitably, claimants faced with challenges to the jurisdiction continue to engineer raise arguments of submission and waiver, but successes in the future are likely to be few and far between.[354] The most obvious cases,[355] of defendants who file defences before seeking to challenge jurisdiction (whether before or after acknowledgment of service) can be explained on the basis of a procedural election between the different choices presented by CPR, r 10.1(3): a defendant who files a defence cannot file an effective acknowledgment of service and a defendant who acknowledges service and then files a defence can no longer rely on the prior acknowledgment of service to satisfy the procedural condition in r 11(2) for the making of a Part 11 application. In other cases, the defendant's conduct (if sufficiently blatant) may be such that it is capable of being classified as an abuse of process, and dealt with on that basis.[356] If the matter is not so clear cut then, rather than treating submission as a judicial game of cat and mouse in which the unwary may be trapped once and for all, a better approach would require the claimant or the court to draw the defendant's attention to any

351 See *Deutsche Bank* (n 311), [36].
352 *SMAY Investments* (n 350), [41].
353 *Zumax* (n 342), [45].
354 *Meerza v Al Baho* [2015] EWHC 3154 (Ch) provides a rare recent example, albeit one that can be explained on the basis of abuse of process. Arguments of submission/waiver were rejected eg in *American Leisure Group* (n 337), *Zumax* (n 342) and *Le Guevel-Mouly* (n 333).
355 As to the court's jurisdiction to entertain counterclaims against the claimant, as provided for in CPR, r 20.4, see *Marketmaker Technology Ltd v CMC Group plc* [2008] EWHC 1556 (QB), [26] (Teare J).
356 *Meerza* (n 354), [14], [16] (Peter Smith J).

inconsistency in his procedural behaviour and to require him to make a choice between maintaining his challenge to the jurisdiction and taking some other step in the proceeding.[357]

2. *Contracting out of the rules*

The decision of the Court of Appeal in *British Wagon v Gray*[358] was reversed by a rule introduced in 1920.[359] The new Ord. 11, r 2A provided that the parties to a contract may agree (a) that the High Court shall have jurisdiction to entertain any action in respect of that contract, and (b) that service of any writ may be effected at any place within or outside the jurisdiction on any person and in any manner specified. In the case of an agreement within (b) above, service in the prescribed manner "shall be deemed to be good and effective service wherever the parties are present". If no mode of service was specified, service out of the jurisdiction might be ordered.

Thus, the rule contemplated that, in some cases, the writ might be served out of the jurisdiction without the court's leave. This led the editors of the Annual Practice to speculate that it might be *ultra vires*.[360] In 1965, it was replaced by two separate provisions: Ord. 10, r 3, which enabled the writ to be served in accordance with the parties' agreement but subject to a requirement to obtain leave to serve out if the place of service was outside England and Wales, and Ord. 11, r 2, which provided the basis for the grant of such permission.[361] The latter rule was subsequently brought within the grounds for service out in Ord. 11, r 1, which allowed service out whenever a claim was brought in relation to a contract which "contains a term to the effect that the High Court shall have jurisdiction to hear and determine any action in respect of the contract".[362] The corresponding rules are now to be found in CPR, r 6.11 and PD 6B, para. 3.1(6)(d), although the latter rule is presently of very limited significance in light of the overriding effect of Art. 25 of the Brussels Ia Regulation.

A contractual arrangement does not provide the only means (other than a formal step in court proceedings) by which the defendant's conduct may found the court's adjudicatory jurisdiction. Ordinary principles of the law of agency may establish the validity of service upon the locally present agent of a foreign defendant, most commonly his solicitor. The amended version of the Rules of Supreme Court introduced in 1962 contained a provision to the effect that "where a

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357 cf *Australian Commercial Research & Development v ANZ McCaughan Merchant Bank Ltd* [1989] 3 All ER 65 (Ch).

358 Text to n 249 above.

359 Rules of the Supreme Court (No. 3) 1920 (SI 1920/1296); *Kenneth Allison Ltd v Limehouse & Co* [1992] 1 AC 105, 117 (Lord Bridge) (HL).

360 *Annual Practice 1966* (n 313), vol I, 110.

361 Rules of the Supreme Court (Revision) 1965 (SI 1965/1776); *Kenneth Allison* (n 359), 117-118.

362 Rules of the Supreme Court (Amendment No 2) 1983 (SI 1983/1181).

defendant's solicitor indorses on the writ a statement that he accepts service of the writ on behalf of that defendant, the writ shall be deemed to have been duly served on that defendant and to have been so served on the date on which the indorsement was made".[363] Such an indorsement is not, however, necessary to validate service upon an agent of the defendant in England and Wales who has been duly and specifically authorised for this purpose.[364] The defendant in such a case is in the same position as a defendant personally served within the jurisdiction,[365] unless he or his agent specifically reserves the right to challenge jurisdiction on the basis that he will be treated no differently from a defendant served abroad.[366] Rule 6.7 of the CPR now requires service of the claim form on a solicitor or European lawyer in the UK or in any other EEA State in cases where the defendant or his legal representative have given written notice that the claim form may be served by this method.

This agency principle has been given extended effect with respect to overseas companies who have established a place of business in England and Wales. Between 1907[367] and 2006, the Companies Acts required overseas companies establishing such a place of business to place on the register the names and addresses of one or more person within the jurisdiction authorised to accept service. Service on those persons at the designated address constituted valid service notwithstanding that the company had ceased to have a place of business, and those persons had ceased to reside, within the jurisdiction and their authority to accept service had been terminated.[368] This conclusion rested upon the conferral of authority that was made irrevocable by statute. Now, under s 1056 of the Companies Act 2006, a company may state that there is no person resident in the United Kingdom authorised to accept service of documents on behalf of the company.[369]

3. *Other changes*

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363 cf. 1883 Rules, Ord IX, r 1.

364 *Kenneth Allison* (n 359), 118-120 (Lord Goff dissenting in the reasoning on this point); also *Manta Line Inc v Sofianites* [1984] 1 Lloyd's Rep 14, 20 (Sir John Donaldson MR) (CA): "They were the defendant's agents, so the defendant accepted service, and he accepted service in this country. If you once accept service in this country, that is the end of the story.").

365 *Manta Line* (n 364), 20.

366 Ibid 19; *Sphere Drake Insurance plc v Gunes Sigorta* [1988] 1 Lloyd's Rep 139 (CA).

367 Companies Act 1907, s 35, carried forward into the Companies (Consolidation) Act 1908, s 274. See also Companies Act 1929, s 344; Companies Act 1948, s 407; Companies Act 1985, s 691(1).

368 *Sedgwick Collins & Co. v Rossia Insurance Co of Petrograd* [1926] 1 KB 1, esp 14-15 (Sargant LJ) (CA), affd. [1927] AC 95 (HL; *Rome v Punjab National Bank (No 2)* [1989] 1 WLR 1211 (CA); Dicey, Morris & Collins, [11-116]. As to the use of the language of "submission" in this case, see Dicey, Morris & Collins, [11-132].

369 Overseas Companies Regulations (SI 2009/1801), reg 7(1)(e). Under reg 13 of these Regulations, a company may alter registered particulars.

Although the terminology has changed, the requirement to obtain the court's permission to serve the claim form out of the jurisdiction in cases falling outside the EU regimes remains,[370] and the requirements under the CPR for an application to obtain such permission are not radically different from those which appeared in the 1883 Rules. By r 6.37(1), the application, made in writing without notice to the defendant, must set out (a) which ground or grounds for service out are relied on, (b) that the claimant believes that the claim has a reasonable prospect of success; and (c) the defendant's address or, if not known, in what place the defendant is, or is likely, to be found.[371] Rule 6.37(3) provides that "the court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim".

The grounds on which service out of the jurisdiction is authorised have evolved over time.[372] The four grounds recognised in the 1875 Rules of the Supreme Court, have now extended to twenty three numbered (or numbered and lettered heads) heads, many including more than one separate ground, which are set out in a practice direction to the CPR.[373] A notable recent addition is the new ground (4A) which allows additional claims to be tagged to those falling within other grounds if they arise out of the same or closely connected facts. By contrast, ground (3), which allows a defendant to be served out of the jurisdiction as a "necessary or proper party" to proceedings properly brought against another defendant, traces its pedigree back to the 1883 Rules.[374] These broad general grounds, coupled with a wide variety of grounds linking the subject-matter of the action to England and Wales, ensure a very extensive range of jurisdiction controlled principally by the court's discretion and, in particular, by the requirement that England be the "proper place" in which to bring the claim,[375] putting the burden on the claimant show that England and Wales is clearly "the appropriate forum" for the trial of the action.[376]

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370 CPR, r 6.36. Following the introduction of the CPR in 1999, the former Ord 11 was retained for a transitional period. The Lord Chancellor's Department produced a consultation document suggesting that the requirement for leave to serve out be removed, and replaced with a requirement for leave to proceed to enter judgment. This option was rejected.

371 See also *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804, [71] (Lord Collins) (PC).

372 See the notes to Ord 11, r 1 in the *Annual Practice 1966* (n 313) and *The Supreme Court Practice 1999* (London: Sweet & Maxwell).

373 CPR, PD6B, [3.1]. For criticism of the use of a practice direction to define the adjudicatory jurisdiction of the English courts, see A Dickinson, 'Restrained no more? Service out of the jurisdiction in the 20th Century.' [2012] LMCLQ 1, 11-12; also Dicey, Morris & Collins, [11-140].

374 n 222 above. See *Altimo Holdings and Investment Ltd* (n 371), [73].

375 CPR, r 6.37(3).

376 *Spiliada* (n 131), 481.

In recent years, the courts sometimes[377] (but not always[378]) appear to have lost some of their former inhibitions[379] in allowing service out of the jurisdiction, and have shown a tendency to take a more relaxed approach when construing the grounds for service out. The spirit underlying this apparent drift in approach is apparent in Lord Sumption's (*obiter*[380]) remarks in *Abela v Baadarani* regarding the use of the term "exorbitant" to describe the power to serve process out of the jurisdiction.[381] In his Lordship's view, (1) it is no longer a realistic view of the situation to view service abroad as an assertion of sovereign power over the defendant and a corresponding interference with the sovereignty of the State in which process was served, (2) the grounds for service out and the doctrine of *forum non conveniens*[382] ensure in the overwhelming majority of cases where service out is authorised that there will have either been a contractual submission to the jurisdiction of the English court or else a substantial connection between the dispute and England, (3) litigation between residents of different states is a routine incident of modern life and one which many other countries approach in a similar fashion, and (4) although it may once have been superficially plausible to characterise the service of process abroad as an assertion of sovereignty, "it is, and probably always was, in reality no more than notice of the commencement of proceedings which was necessary to enable the defendant to decide whether and if so how to respond in his own interest".[383] Detailed discussion of this reasoning lies beyond the scope of this article.[384] For present purposes, it suffices to note the strong hint in Lord Sumption's reasoning that, in the future, considerations of natural justice may be seen as being more influential than considerations of "comity" or perceived limits on the territorial exercise of jurisdiction in shaping the adjudicatory jurisdiction of the English courts.[385]

E. *Conclusions*

377 Dickinson, 'Restrained no more' (n 373), 3-11.

378 eg *Alliance Bank JSC v Aquanta Corp* (n 275), [44]; *Brownlie v Four Seasons Holdings Inc* [2015] EWCA Civ 665, [2016] 1 WLR 1814, [17] (Arden LJ: "When the court is deciding whether it has jurisdiction, it must scrutinise most jealously the factor which gives rise to jurisdiction.").

379 cf. text to nn 290-92 above.

380 No contested issue as to the court's power to permit service out of the jurisdiction arose in *Abela*, which was a case concerning the method of service.

381 *Abela* (n 131), [53]. See also text to n 131 above; *Deutsche Bank AG v Sebastian Holdings Inc* [2014] EWHC 112 (Comm), [20] (Cooke J). cf *Standard Bank plc v Just Group LLC* [2014] EWHC 2687 (Comm), [217] (Walker J).

382 Text to n 299 above.

383 *Abela* (n 131), [53].

384 See A Briggs [2014] LMCLQ 492; A Dickinson (2014) 130 LQR 197; L Collins (2014) 130 LQR 555.

385 cf. the cases discussed in Section III.C.1 above.

Through the myriad of detail, and slowly shifting changes of approach and emphasis over time, the following key points emerge:

- The sole basis of the adjudicatory jurisdiction of the English superior courts at common law was the parties' formal presence in court, secured in most cases by a voluntary appearance.

- In terms of provenance, no distinction is to be drawn between service within England and Wales and service outside the territorial jurisdiction as a means of establishing the courts' adjudicatory jurisdiction over persons not formally present in court. In both cases, the jurisdiction is statutory and does not derive from the common law.

- That is not to say that there are not differences of detail and emphasis in the courts' approach to the two cases. In particular, although considerations of justice as between the parties to the dispute have been at the forefront of the development of the statutory jurisdiction over persons not formally present in court, such considerations are more acute for a defendant who is overseas as the summons to appear to defend himself before an English court places a heavier burden on him than a defendant who resides locally.[386] Moreover, the service of court process abroad, particularly on a foreign national, has traditionally been thought to require a measure of caution on account of consideration of the perceived limits of jurisdiction under international law, the interests of the foreign sovereign and comity between legal systems.

- The concept of submission to the jurisdiction had little or no role to play in the evolving procedural regime, with the language of "submission" being used mostly as a rhetorical flourish to describe the consequence of the defendant's formal presence in court. Questions concerning the effects of the parties' formal participation in proceedings were dealt with by the institution of the voluntary appearance, and procedural rules governing the waiver of irregularities. Even today, despite more frequency usage by judges and writers, the concept of "submission to jurisdiction" is ill-defined and relevant only at the margins of the detailed procedural regime laid down in the CPR for the resolution of challenges to the jurisdiction.

- Accordingly, neither the principle of presence nor the principle of submission has a firm footing in *common law* principle.

386 A similar burden is, however, imposed on a defendant who is only temporarily present in England.

What useful purposes might these conclusions serve? First, they lead one to reflect on the question whether the statutory rules governing service still provide an appropriate means to control the adjudicatory jurisdiction of the English courts or whether, as Lord Sumption's statements in *Abela* suggest, the service rules should be concerned only with one aspect of natural justice, ie due notification of the claim to the defendant, leaving the limits of jurisdiction to be controlled by other principles and rules. Although it seems unlikely, given the absence of a comparable constitutional framework and the well-established role of the statutory rules in England, that the English Supreme Court will follow the path taken by its Canadian counterpart[387] in undertaking extensive judicial reform in this area, the foregoing account may provide useful insights for the future interpretation of the rules or the formulation of legislative reform proposals, especially if such reform is considered desirable following the UK's EU exit. Secondly, the foregoing account casts doubt upon the placement of the principles of presence and submission at the heart of the English common law rules for the recognition and enforcement of judgments. There is little doubt that English courts' approaches and attitudes to their own adjudicatory jurisdiction in the 18th and 19th Centuries informed their developing approach to the recognition and enforcement of foreign judgments in that period. There appears, however, a stark contrast between the flexible, justice oriented mindset which has been described in this article, and which is a characteristic feature of the earlier case law on foreign judgments,[388] and the rigid, unbending rules for the recognition and enforcement of judgments that emerged in the late 19th and early 20th Century.[389] Although the Supreme Court[390] has recently shown a reluctance to revisit the common law rules on the recognition and enforcement of judgments, the case for future judicial or legislative intervention in this area appears more pressing given the unsatisfactory state of the authorities, which may be argued to be built upon a bed of sand. Again, the approach taken by the Canadian Supreme Court,[391] bringing the rules governing the recognition and enforcement of foreign judgments rules more closely into line with the rules governing its own adjudicatory jurisdiction, may provide a useful counterpoint.

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387 *Club Resorts Ltd v Van Breda* [2012] 1 SCR 572; *Lapointe Rosenstein Marchand Melançon LLP v Cassels Brock & Blackwell LLP*, 2016 SCC 30.

388 eg *Buchanan* (n 267); *Molony v Gibbons* (1810) 2 Camp 502, 170 ER 1232; *Cavan v Stewart* (1860) 1 Stark 525, 171 ER 551; *Douglas v Forrest* (1828) 4 Bing 686, 130 ER 933; *Arnott v Redfern* (1826) 3 Bing 353, 130 ER 549; *Becquet v MacCarthy* (1831) 2 B & Ad 951, 109 ER 1396; *Don v Lippmann* (1837) 5 Cl & F 1, 7 ER 303; *Ferguson v Mahon* (1839) 11 Ad. & El 179, 113 ER 382; *Reynolds v Fenton* (1846) 3 CB 187, 136 ER 75; *Cowan v Braidwood* (1840) 1 M & G 882, 133 ER 589; *Russell v Smyth* (1842) 9 M & W 810, 152 ER 343; *Ricardo v Garcias* (1845) 12 Cl & F 368, 1450; *Bank of Australia v Nias* (1851) 16 QB 717, 117 ER 1055; *Kelsall v Marshall* (1856) 1 CB NS 241, 140 ER 100; *Sheehy v Professional Life Company* (1857) CB NS 597, 140 ER 875.

389 *Schibsby* (n 51); *Singh* (n 51); *Carrick* (n 3).

390 *Rubin* (n 21), [109]-[113] (Lord Collins)

391 *Beals v Saldahna* [2003] SCR 416; *Chevron Corp v Yaiguaje* [2015] 3 SCR 69.

These enquiries must await another day. To conclude for now, the foregoing account suggests that Professor Dicey did not faithfully capture every feature of the landscape of private international law in England and Wales at the end of the 19th Century, and that his undoubted influence on the law's development in the 20th and 21st Centures may have led the law astray. That is not to undervalue his immense contribution. Rather, it should serve to encourage further investigation of the evolution of private international law rules as a tool to aid judges and commentators in the future.