an offence under s.263(a) of the Public Health Ordinance. Accordingly, I set aside his conviction by the learned Stipendiary Magistrate and order that the fine of £50, if paid, be refunded to the appellant.

Order accordingly.

[1980–87 Gib LR 39]

OLD RELIABLE FIRE INSURANCE COMPANY v. CASTLE REINSURANCE LIMITED

SUPREME COURT (Davis, C.J.): June 1st, 1981

Conflict of Laws—jurisdiction—submission to jurisdiction of foreign court—defendant submits to jurisdiction of foreign court if contests case there on merits, e.g. by submitting defence and entering counterclaim, even if entering available counterclaim mandatory under court's procedural rules—no submission if appearance merely to protest jurisdiction

Conflict of Laws—reciprocal enforcement of judgments—execution of foreign judgments—Gibraltar court unable to impeach foreign judgment unless obtained by fraud against court or judgment offends against substantial justice—fraud between parties no ground for impeachment

The plaintiff brought proceedings for the enforcement of a foreign judgment against the defendant.

The plaintiff, a Missouri company, sought the sum of US$341,322 plus interest from the defendant, a Gibraltarian company, having already obtained judgment in its favour in the US District Court for the Eastern District of Missouri. In that court, the defendant had made a preliminary application to have the claim struck out for lack of jurisdiction; when this was rejected, it submitted a defence and a counterclaim against the plaintiff, while maintaining that the court lacked jurisdiction. Upon obtaining judgment in its favour the plaintiff brought the present proceedings in Gibraltar, and applied for judgment under the Rules of the Supreme Court, O.14, on the ground that the defendant had no defence to its claim.

The defendant submitted that it should be given leave to defend as there were matters at issue which ought to be tried, namely (a) whether the Missouri court had jurisdiction over the case—the defendant having consistently argued that it did not, and the defendant not having submitted to the jurisdiction, having only entered a counterclaim in the

court because the US Federal Rules of Civil Procedure, r.13(a) compelled it to include all counterclaims at the time of pleading its defence; and (b) that the Missouri judgment was obtained by fraud on the part of the plaintiff.

The plaintiff submitted in reply that (a) having entered a substantive reply to the proceedings in the Missouri court, the defendant could not, having failed on the merits, continue to assert a lack of jurisdiction; and (b) the defendant had no basis on which to claim that the Missouri court had been misled, as was required to impeach the judgment on the basis of fraud; in addition, the allegations of fraud had already been dealt with in the Missouri court, which had found none, and it was not open to the Gibraltar court to examine the propriety of the Missouri proceedings.

Held, allowing the application:

(1) There was no basis on which leave to defend could be given, as there was no matter at issue that ought to be tried, or other reason for a trial. On the issue of jurisdiction, though the defendant did not submit to the jurisdiction of the Missouri court when entering its preliminary objection against jurisdiction, it did so when it entered a substantive defence and counterclaim, despite the requirement in the Federal Rules of Civil Procedure that counterclaims had to be asserted at the time of pleading, as it was not possible for a party to fight a case on its merits and then, after failing, assert a lack of jurisdiction (para. 11).

(2) The possibility of fraud would not provide a basis for a defence. There was nothing to suggest that there had been a fraud against the Missouri court, as the alleged fraud was against the defendant, rather than the court itself. The alleged fraudulent misrepresentations on which the defendant relied had been raised and adjudicated upon in the Missouri court. It was therefore not open to the court to impeach this decision unless it offended against substantial justice, which was not the case (para. 12; paras. 16–17).

Cases cited:

(1) *Abouloff* v. *Oppenheimer & Co.* (1882), 10 Q.B.D. 295; 52 L.J.Q.B. 1, followed.

(2) *Colt Indus. Inc.* v. *Sarlie (No. 2)*, [1966] 1 W.L.R. 1287; [1966] 3 All E.R. 85; [1966] 2 Lloyd's Rep. 163, referred to.

(3) *Duchess of Kingston's Case*, [1775–1802] All E.R. Rep. 623, followed.

(4) *Dulles' Settlement, In re (No. 2)*, [1951] Ch. 842; [1951] 2 All E.R. 69, *dicta* of Denning, L.J. applied.

(5) *Ellerman Lines Ltd.* v. *Read*, [1928] 2 K.B. 144; [1928] All E.R. Rep. 415, referred to.

(6) *Jacobson* v. *Franchon* (1927), 138 L.T. 386; 44 T.L.R. 103, referred to.

(7) *Nouvion* v. *Freeman* (1889), 15 App. Cas. 1, referred to.

(8) *Ochsenbein* v. *Papelier* (1873), L.R. 8 Ch. App. 695, referred to.

(9) *Pemberton* v. *Hughes*, [1899] 1 Ch. 781, *dictum* of Lindley, M.R. followed.
(10) *Vadala* v. *Lawes* (1890), 25 Q.B.D. 310; 63 L.T. 128, referred to.

Legislation construed:
Federal Rules of Civil Procedure, r.12(b):
". . . [T]he following defenses may at the option of the pleader be made by motion . . .
(2) lack of jurisdiction over the person."
r.13(a): "Compulsory Counterclaims. A pleading shall state as a counterclaim any claim that at the time of serving the pleading the pleader has against any opposing party."

J.E. Triay for the plaintiff;
P. Lindsay for the defendant.

1 **DAVIS, C.J.:** This is an application under the Rules of the Supreme Court, O.14, as applied to Gibraltar by r.8 of the Supreme Court Rules 1979, for the final judgment for the amount of US$541,322 with interest and costs claimed in the statement of claim filed by the plaintiff on March 19th, 1981. The plaintiff company is a Missouri company incorporated under the laws of the United States; the defendant company is a Gibraltarian company incorporated under the laws of Gibraltar. Acknowledgement of service was filed by the defendant on March 26th, 1981 and on April 3rd, 1981 the plaintiff filed its application for judgment on the ground that the defendant had no defence to the plaintiff's claim. On April 22nd, 1981 the defendant filed a defence to the plaintiff's claim.

2 The plaintiff's claim is for the enforcement in Gibraltar of a judgment of the US District Court for the Eastern District of Missouri given in their favour, in the sum of US$541,322 plus interest at 9% per annum. The proceedings in the State of Missouri were brought by the plaintiff to recover the amount compromised in claims made by them against the defendant under a quota share treaty of reinsurance. Under this treaty the defendant agreed to reinsure a 10% proportion of various insurance risks undertaken by the plaintiff. Article XVIII of the treaty reads as follows:

"**ARTICLE XVIII—SERVICE OF SUIT CLAUSE (U.S.A.)**

(Applies only to those Reinsurers who are domiciled outside the United States of America)

It is agreed that in the event of the failure of Reinsurers hereon to pay any amount claimed to be due hereunder, the Reinsurers hereon, at the request of the Company, will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will

comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

It is further agreed that service of process in such suit may be made upon Messrs. Mendes & Mount, 27 Williams Street, New York 10005 and that in any suit instituted against any one of them upon this Agreement, Reinsurers will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.

The above-named are authorized and directed to accept service of process on behalf of Reinsurers in any such suit and/or upon the request of the Company to give a written undertaking to the Company that they will enter a general appearance upon Reinsurers' behalf in the event such a suit shall be instituted."

3 Upon claims under the treaty being made upon the defendant by the plaintiff, the defendant declined to pay the claims on the grounds of alleged misrepresentation and non-disclosure by the plaintiff. The plaintiff accordingly began proceedings in the State of Missouri on November 22nd, 1978, alleging breach of the contract of reinsurance by the defendant. The defendant applied to the Eastern District Court of Missouri to dismiss the plaintiff's claim for lack of jurisdiction over the defendant, but this application was dismissed on May 8th, 1979. On May 19th, 1979 the defendant filed an answer to the plaintiff's complaint in the Missouri District Court, in which, besides setting out its grounds of defence, it repeated its claim that the Missouri court lacked jurisdiction over the defendant, they counterclaimed against the plaintiff and made further claims against certain named third parties. At the trial the defendant was legally represented and submissions were made on its behalf in relation to the issues for determination.

4 On January 14th, 1981, the learned District Judge gave judgment in favour of the plaintiff in the sum of US$541,322 and dismissed the defendant's counterclaim and third-party claim. The defendant has appealed against the decision of the Missouri District Court, but it is not disputed that such appeal does not give rise to an automatic stay of execution pending determination of the appeal. Accordingly, the defendant having failed to pay the judgment debt arising from the proceedings in the Missouri District Court, the plaintiff applies to this court for judgment for this amount, on the ground that the defendant has no defence to its claim.

5 Lord Herschell in *Nouvion* v. *Freeman* (7) said (15 App. Cas. at 9):

"The principle upon which I think our enforcement of foreign judgments must proceed is this: that in a Court of competent jurisdiction, where according to its established procedure the whole merits of the case were open, at all events, to the parties, however

> much they may have failed to take advantage of them, or may have waived any of their rights, a final adjudication has been given that a debt or obligation exists which cannot thereafter in that Court be disputed, and can only be questioned in an appeal to a higher tribunal."

In *Pemberton* v. *Hughes* (9), Lindley, M.R. said ([1899] 1 Ch. at 790):

> "If a judgment is pronounced by a foreign Court over persons within its jurisdiction and in a matter with which it is competent to deal, English Courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice. Where no substantial justice, according to English views, is offended, all that English Courts look to is the finality of the judgment and the jurisdiction of the Court, in this sense and to this extent—namely, its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it. If the Court had jurisdiction in this sense and this extent, the Courts of this country never inquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice, according to English notions, has been committed."

6 It is disputed in this case that the judgment of the Missouri District Court is final and conclusive insofar as that court is concerned (see also *Colt Indus. Inc.* v. *Sarlie (No. 2)* (2)). Mr. Lindsay for the defendant opposes the plaintiff's application for judgment, however, on the grounds—

(a) that the defendant was not subject to the jurisdiction of the Missouri District Court and that it never submitted to the jurisdiction of that court; and

(b) that the judgment of the Missouri District Court was obtained by fraud on the part of the plaintiff, and that these are matters in issue between the parties which should be tried and in view of which leave to defend should be granted.

7 Dealing first with the question of whether or not the defendant submitted to the jurisdiction of the Missouri District Court, I refer to what was said by Denning, L.J. in *In re Dulles' Settlement (No. 2)* (4) ([1951] Ch. at 850):

> "I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court, when he has all the time been vigorously protesting that it has no jurisdiction. If he does nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference in principle does it make, if he does not merely do nothing, but actually goes to the

> court and protests that it has no jurisdiction? I can see no distinction at all. I quite agree, of course, that if he fights the case, not only on the jurisdiction, but also on the merits, he must then be taken to have submitted to the jurisdiction, because he is then inviting the court to decide in his favour on the merits; and he cannot be allowed, at one and the same time, to say that he will accept the decision on the merits if it is favourable to him and will not submit to it if it is unfavourable. But when he only appears with the sole object of protesting against the jurisdiction, I do not think that he can be said to submit to the jurisdiction."

8 In the present case, on proceedings being instituted against the defendant in the District Court for the Eastern District of Missouri, the defendant applied to that court to dismiss the plaintiff's complaint for lack of jurisdiction over the defendant. On the dismissal of this application, the defendant filed an answer to the plaintiff's claim including therein a counterclaim against the plaintiff and a third-party claim. Mr. Lindsay has referred me, in the affidavit of Mr. Aronson—a member of the firm representing the defendant in the proceedings instituted by the plaintiff—to rr. 12(b) and 13(a) of the US Federal Rules of Civil Procedure, cited by Mr. Aronson, and to a number of American authorities dealing with the effect of these rules.

9 Rule 12(b) of the Federal Rules provides for the presentation of a defence to a claim for relief in any pleading and lays down, *inter alia*, that a defence of lack of jurisdiction over the person be made by motion. It provides further that such a defence is not waived by being first pleaded by motion. Rule 13(a) provides for the compulsory inclusion in a pleading of any counterclaim which at the time of pleading the pleader may have against an opposing party.

10 Mr. Lindsay, citing in support Mr. Aronson's affidavit and the authorities there referred to, distinguishes the present case from what was said by Denning, L.J. in *In re Dulles' Settlement (No. 2)* (4) on the basis that in the present case the defendant has from the outset contested the jurisdiction of the Missouri District Court; and, having entered a defence to the plaintiff's complaint, which included the defence of lack of jurisdiction (as allowed by r.12(b) of the Federal Rules of Civil Procedure), they were obliged under r.13(a) of those Rules to include in that defence their counterclaim against the plaintiff, and that the making of such defence and counterclaim cannot be said to be a submission to jurisdiction of the Missouri District Court.

11 In my view, however, with respect, it is. While the defendant cannot be said to have submitted to the jurisdiction of the Missouri District Court when on the institution of proceedings against them by the plaintiff in that

court they made a preliminary application contesting the court's jurisdiction, it appears to me that once they filed their answer to the plaintiff's complaint and fought the case—not only on the question of jurisdiction but also on the merits—they must be taken to have submitted to the jurisdiction of the Missouri District Court. To quote Evershed, M.R. in *In re Dulles' Settlement (No. 2)* ([1951] Ch. at 847):

> "It is, of course, plain that where a question of jurisdiction arises a man cannot both have his cake and eat it. He cannot fight the issue on the merits, and at the same time preserve the right to say, if the worst comes to the worst, that the court has no jurisdiction to decide against him . . ."

12 Turning then to the question that the judgment of the Missouri District Court was obtained by fraud on the part of the plaintiff, it is well established that a foreign judgment which has been obtained by fraud will not be recognized or enforced by the English courts—see 8 *Halsbury's Laws of England*, 4th ed., para. 727, at 480–481, and the authorities cited in n.1. However, it is equally clear, as submitted by Mr. Triay for the plaintiff, that for the foreign judgment to be impeached the fraud must have been a fraud on the court by the successful party whereby the court was misled.

13 De Grey, C.J. in the *Duchess of Kingston's Case* (3), as quoted by Lord Selborne, L.C. in *Ochsenbein* v. *Papelier* (8) said (L.R. 8 Ch. App. at 698) of a judgment that—

> "like all other acts of the highest judicial authority, it is impeachable from without; although it is not permitted to shew that the court was mistaken, it may be shewn that they were misled. Fraud is an extrinsic collateral act which vitiates the most solemn proceedings of Courts of justice."

Lord Coleridge, C.J., after quoting these words of De Grey, C.J. in *Abouloff* v. *Oppenheimer & Co.* (1) said (10 Q.B.D. at 301):

> "I believe that the principle has never been either better or more tersely and neatly stated than it was in the foregoing passages; and, as it appears to me, the question for the Courts of this country to consider is whether, when a foreign judgment is sought to be enforced by an action in this country, the foreign court has been misled intentionally by the fraud of the person seeking to enforce it, whether a fraud has been committed upon the foreign court with the intention to procure its judgment. From the time of the decision in the *Duchess of Kingston's Case* until the present time it has been held that fraud of that kind can be pleaded in the courts of this country to an action on a judgment, and that, if it can be proved, it

vitiates the judgment and discharges the defendant from the obligation which would otherwise be thereby created."

14 *Abouloff* v. *Oppenheimer & Co.* was a case in which it was alleged by the defendant that the judgment of a Russian court had been obtained by the fraud of the plaintiff. Brett, L.J. said (10 Q.B.D. at 307)—

"I wish to say, however, that I am strongly of the opinion that in the present action no question can be raised whether the judgment of the Russian courts was erroneous: it is immaterial to consider whether it was erroneous by reason of a wrong appreciation of the evidence of the law, or by reason of frauds perpetrated on the courts by witnesses other than the plaintiff and her husband: the only manner in which that foreign judgment can be rendered ineffective upon the ground of fraud, is by proving that it was obtained by fraud of the plaintiff, who now relies upon it."

15 Mr. Lindsay alleges that the defendant entered into the treaty of reinsurance with the plaintiff as a result of fraudulent misrepresentations made by the plaintiff and a third party. This was specifically pleaded in the defendant's answer to the plaintiff's complaint in the Missouri District Court and was specifically adjudicated upon by the learned District Court Judge in his judgment.

16 There is here no question of the Missouri District Court having been misled by the plaintiff, as in the cases referred to above (see also *Vadala* v. *Lawes* (10) and *Ellerman Lines Ltd.* v. *Read* (5)), and, as stated in the judgments in those cases and many others, it is not for this court to inquire into whether the Missouri District Court was mistaken in its findings on the evidence or the law before it. This applies equally to the doctrine of *uberrima fides* which, Mr. Lindsay claims, was not taken into consideration as it should have been by the learned District Court Judge in coming to his decision in the proceedings in the Missouri District Court.

17 The question of fraudulent misrepresentation and non-disclosure was or could have been raised by the defendant in the proceedings in the Missouri District Court. It is not open to the defendant to seek to impeach the judgment of the Missouri District Court upon those same grounds in this court—see *Jacobson* v. *Franchon* (6), and the judgments of Lord Hanworth, M.R. (138 L.T. at 390) and Atkin, L.J. (*ibid.*, at 392) citing the passage from the judgment of Lindley, M.R. in *Pemberton* v. *Hughes* (9) set out earlier in this judgment ([1899] 1 Ch. at 790):

"If a judgment is pronounced by a foreign Court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice."

In my view the proceedings in the Missouri District Court in no way so offended.

18 Accordingly I find that neither of these two grounds—the Missouri District Court's alleged lack of jurisdiction or the alleged fraud on the part of the plaintiff—furnishes the defendant with reasonable grounds of defence to the plaintiff's statement of claim in this court. On consideration of the affidavits and their appendices submitted by counsel on both sides as well as the submissions made by counsel, I have come to the conclusion that the defendant had not shown that it has a defence to the plaintiff's claim or that there is an issue or question for trial between the parties arising out of the plaintiff's statement of claim or, for any other reason, that there ought to be a trial of that claim. Accordingly I give judgment for the plaintiff. In view, however, of the appeal against the decision of the District Court for the Eastern District of Missouri at present pending in the Eighth Circuit Court of Appeals in the United States, I order that execution of this judgment be stayed until the determination of that appeal.

Order accordingly.
