

Eng. Rep.]

JACKSON v. SPITTAL.

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On being presented it was dishonoured. Bramwell, B., had made an order under section 18 of the Common Law Procedure Act, 1852, empowering the plaintiff to proceed. Upon a motion to set aside such order, it was argued that the cause of action did not arise in England, and the county court cases were cited. The Court, consisting of Pollock, C.B., Martin, Watson, and Channell, B.B., upheld the order; Pollock, C.B., and Martin, B., both stating that the cases upon the construction of the County Courts Act did not apply. In *Slade v. Noel* a cargo had been loaded abroad under a charter party made abroad, and the ship-owner claimed demurrage for delay at the port of discharge in England. Williams, J., at chambers, after, as it is stated, a careful consideration, held that the case was within section 18, and made an order empowering the plaintiff to proceed. In the case of *Nettleford v. Funcke*, Willes, J., in March, 1866, at chambers, held that on delivery of goods in England under a contract made abroad, an action brought for the price was within section 18, and made an order empowering the plaintiff to proceed. The same learned judge, in the case of *Allheusen v. Melgarco*, which had been discontinued in the Court of Queen's Bench, and brought up on a new writ of summons in the Court of Common Pleas, after the decision above cited of the Court of Queen's Bench, made an order under section 18 giving leave to the plaintiff to proceed, and the plaintiff recovered large damages. This decision is reported in the *Weekly Reporter* of June 13, 1868 (16 W. R. 855), and the learned judge said, "I make this order according to the practice followed since the Act passed, and according to the construction of the Act which I have reason to believe was intended. The cases affecting the jurisdiction of the inferior courts are, I think, quite inapplicable. The superior courts had jurisdiction in such a case before the Act by proceedings in outlawry. They have such jurisdiction now on the subject-matter confessedly. If the defendant chooses to raise the question he can do so by motion, or perhaps by plea in abatement. I do not feel myself at liberty to depart from the usual practice without a decision of the Court in which the process is—viz., Common Pleas." Upon this state of the authorities, and in the absence of any appeal to a superior tribunal, we feel bound to enquire closely and anxiously for ourselves what is the true construction of sections 18 and 19 of the statute 15 & 16 Vic. c. 76. According to a familiar canon of construction, it is first desirable to consider what was the law at the time the statute passed. So far as relates to the question of jurisdiction, we apprehend that the superior courts of England did not decline jurisdiction in the case of any transitory cause of action, whether between British subjects and foreigners resident at home and abroad, or whether any or every fact necessary to be proved, in order to establish either the plaintiff's or the defendant's case, arose at home or abroad. Though every fact arose abroad, and the dispute was between foreigners, yet the courts, we apprehend, would clearly entertain and determine the cause, if in its nature transitory, and if the process of the Court had been brought to bear against the defendant by service of a writ on him when present in England.

In *Ilderton v. Ilderton*, 2 H. Black. 145, Chief Justice Eyre, in discussing the question of the jurisdiction of the English courts to try questions arising abroad, and the fiction used as to laying the venue, says, (page 162), "Of matters arising in a foreign country, pure and unmixed with matters arising in this country, we have no proper original jurisdiction; but of such matters as are merely transitory, and follow the person, we acquire a jurisdiction by the help of that fiction to which I have alluded, and we cannot proceed without it. But if matters arising in a foreign country mix themselves with transactions arising here, or if they become incidents in an action the cause of which arises here, we have jurisdiction, &c. In the very infancy of commerce, and in the strictest times, as I collect from a passage in *Brook, Trial*, pl. 93, the cognizance of all matters arising here was understood to draw to it the cognizance of all matters arising in a foreign country, which were mixed and connected with it; and in these days we should hardly hesitate to affirm that doctrine." In *Matthews v. Erbo*, 1 Lord Raym. p. 349 "it was moved to set aside an execution upon an outlawry against the defendant, upon affidavit that the defendant was an alien merchant and lived beyond the sea, and so he will be out of the reach of the law." No objection was ever raised against the jurisdiction of the courts over the subject-matter; the difficulties which arose were always with regard to the mode of procedure. A British subject resident abroad could not be served there with a writ of summons. By a process somewhat intricate and tedious, but well established, he might be sued, nevertheless, to judgment and execution in respect of any causes of action over which the English courts had jurisdiction. The Court permitted a course of procedure against him which ended in his outlawry, and that being once established, the plaintiff proceeded to judgment and to an equivalent for execution against any property of the defendant in England. So with regard to a foreigner and alien, the Courts, by permitting a writ of *distingas* to issue against any property of his found within the jurisdiction, compelled him to appear, or pursued him to outlawry and judgment. And there is no trace of any objection ever having been maintained on the ground that in a transitory action there was no jurisdiction unless every fact necessary to be proved in order to support the action occurred within the jurisdiction. Such being the state of the law with regard to jurisdiction and procedure, the statute in question was passed. It is an Act to amend the process, practice and mode of pleading in the superior courts of common law, &c. It does not therefore, affect to give or to take away jurisdiction, but only to regulate process, practice and pleading in cases already within the jurisdiction. The mischief to be remedied is recited thus:—"Whereas the process, practice and mode of pleading in the superior courts of common law at Westminster may be rendered more simple and speedy; be it enacted," &c. The statute under the heading which precedes section 2, proceeds to deal with personal actions against defendants, whether in or out of the jurisdiction of the court: and in section 2 and subsequent sections deals not with jurisdiction, but with the writ of summons and the service of