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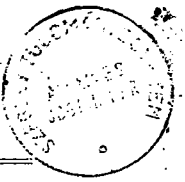

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PAPER ON

THE COMPARISON OF ENGLISH AND FOREIGN PROCEDURE.

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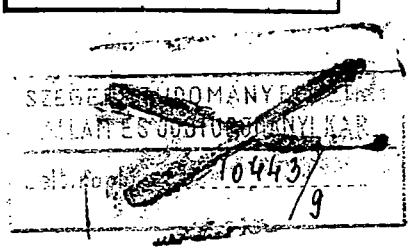

THE COMPARISON OF ENGLISH AND FOREIGN PROCEDURE.

(DEBTS: INHERITANCE: CONSEILS DE FAMILLE: BOOKS OF ACCOUNT: FOREIGN JUDGMENTS).

BY ERNEST TODD.

THE subject-matter of this paper is the discussion of certain important differences in procedure in matters arising within the civil jurisdiction of the Courts of England, France, Germany, Belgium, and other Continental countries under the following five heads, *viz.*:—(1) the recovery of civil debts; (2) the law of inheritance under wills and intestacies; (3) the institution of *conseils de famille*; (4) the keeping of books of account by traders and the making of an annual inventory; and (5) the recovery of amounts due under foreign judgments; and incidentally to suggest improvements in each system by reference to the others, and, so far as the last head is concerned, to suggest an international treaty or treaties whereby the necessity of commencing practically *de novo* may be avoided.

(1) *The recovery of civil debts.*—The first thing that strikes one under all systems having their origin in the Common Law of England is that, with one solitary exception—*viz.* the landlord's right to distrain for rent—there is no right known to the law whereby a creditor can take his debtor's goods in execution without first having proved his right so to do by bringing an action in some Court of competent jurisdiction, and obtaining a judgment of such Court in his favour. I am excluding from consideration the right to seize particular lands or goods which are the subject of mortgage or bill of sale, for the reason that the documents relating to them give the holder of the security a qualified property in the land or goods, as the case may be. In England the law knows no such right, whereas in France and Belgium, if, pursuant to Article 1317 of the Civil Code, a document creating an obligation has been entered into before a notary having power to act in the district where the instrument is executed, the

same becomes executory against the obligor on a simple one-day notice (*commandement*) served by a bailiff demanding payment of the amount due, without the necessity for bringing any action or tendering any proof beyond that afforded by the certificate of the notary before whom the same was executed. The only ways in which execution under such an instrument can be resisted are—either by a procedure known as *inscription en faux*, pursuant to Article 214 of the Code of Procedure, which stays execution until the allegation of forgery has been tried and disposed of, or by what is known as *opposition*; so that whichever of these courses is adopted the onus of proving his case is shifted from the shoulders of the obligée to those of the obligor.

The documents which in France and Belgium have to be executed before a notary, and in addition entered on a register kept for the purpose, which is open to inspection by the public, are: (1) deeds of transfer on sale of real estate; (2) annuity deeds or deeds giving the right to receive the income arising from a particular property; (3) grants of easements; (4) assignments of income for the benefit of creditors (*antichrèse*); and (5) mortgages and charges upon real estate. In addition to these, although they are not bound to be entered on the register, deeds of gift and marriage contracts must be entered into before a notary, and are rendered executory by the certificate which he adds at the end of them.

The procedure for recovery of amounts due on bills of exchange and promissory notes in Germany, France, and Belgium, although requiring an action to be brought, still recognizes that these documents ought to be treated in a manner different to that ruling in ordinary actions. Thus by Article 157 of the French Commercial Code, and by Article 48 of the Law of May 20th, 1872, in Belgium, the law is that judges shall not in such cases exercise the general power of granting time for payment which they have under Article 1244 of the Civil Code.

In the Commercial Court of Brussels, as a rule, the judges refuse all applications for time to debtors, who, having allowed judgment to go against them by default upon non-accepted bills of exchange, lodge notice of opposition with a view of gaining time. In all three countries a public register is kept of dishonoured bills of exchange, so that creditors may ascertain the financial standing of persons with whom they propose to trade In Scotland, it is true, provision is made for registration of bills of exchange and rapid and inexpensive recovery of the amounts due upon them, but in England,

since the repeal in 1883 of the Summary Procedure on Bills of Exchange Act (1855), no special procedure for recovery of the amounts due to holders of these instruments has existed, and from the point of view of their value as instruments of international exchange this is much to be deprecated.

In nearly every other European country except England the holder of an accepted bill of exchange knows that if the acceptor is solvent he can with ease, expedition, and at a minimum of expense recover the amount due to him, unless the supposed acceptor can prove that his alleged signature is a forgery, or has been obtained from him by fraud; but under the present system unfortunately this is by no means the case in England, where an action has to be brought in the ordinary manner, and, provided it is brought in the High Court, the defendant wishing for time or for an opportunity to defeat the holder's right to payment at the end of eight days from the service of the writ upon him enters an appearance, thereby postponing the date of judgment against him at least a week whilst an affidavit is being made by the holder to lead to judgment.

Even when this point is reached, if the defendant's conscience is sufficiently elastic, he can make an affidavit setting up some specious defence, or can raise some point of law and almost, as a matter of course, get leave to defend, thus putting the holder to great expense and causing great delay. In this respect the law in England could be improved, so far as bills of exchange and other negotiable instruments are concerned, by adopting the Scotch system, or at all events by reverting to the law as it existed under the Summary Procedure on Bills of Exchange Act (1855), throwing the onus on the person accepting or indorsing of making out a case for obtaining leave to defend. The great object to be kept in view is that frivolous defences, having for their object the gaining of time, should be discouraged, and it would appear that the only way to accomplish this object is by shifting the onus of proof from the holder to the defendant in the suit.

It is hardly to be expected that such an innovation as giving creditors the right to levy execution upon their debtor's goods without first obtaining a judgment after trial will ever be introduced into the English system, so firmly rooted in the English mind is the principle that a man's household effects, as well as his body, are sacred and inviolable unless and until the law has said that some other person shall have rights over them, a principle which was set out in Magna Charta, and appears woven into the very fabric of England.

(2) *The law of inheritance under wills and intestacies.*—Under my second head, in considering the law and practice ruling in countries deriving their law from English sources and those—as is the case practically all over the Continent of Europe—from earlier Roman sources, one is struck very forcibly by the entirely different standpoints from which the different systems start. In England the testator has full power of disposition over his property, whereas on the Continent his power, if there are legitimate offspring, is limited to a portion only of his estate. In France and Belgium the offspring are by Article 913 *et seq.* of the Civil Code entitled to the following shares: If the testator leaves but one child, one-half; if he leaves two children, one-third each; and if he leaves three children or more, three-quarters between them. But for the three causes set out in Article 727 of the same Code they may become unworthy of and hence excluded from the succession.

In this connection it must be remembered that the codes of law ruling in France, Germany, Austria-Hungary, Italy, Belgium, and Holland have their origin in the Roman law as codified by Justinian, and their underlying principles therefore are practically identical, although in certain respects modified to suit the exigencies of customs or rules prevailing in the different countries. Thus we find that in France and Belgium there are three kinds of wills, *viz.*:—(1) the holograph will, which must in its entirety be in the handwriting of the testator, including the date and signature to it; (2) the public will, made before two notaries in the presence of two witnesses, or before one notary in the presence of four witnesses; and (3) the mystic or secret will, signed by the testator and presented by him to the notary in the presence of six witnesses closed and sealed, the testator declaring that the contents are his will. The provisions of German law are very similar to those of the French Code, the German Civil Code, Articles 2231 *et seq.*, containing only slight differences in detail, such as giving the alternative of making the public will before a judge and his registrar or clerk, or a judge and two witnesses instead of a notary and two witnesses, or two notaries. Certain persons other than those declared incompetent for the purpose by the French Code are under the German Code prohibited from officiating as attesting witnesses. Now the English law differs from the above in two most vital essentials: first, the testator has (as above stated) full power of disposition over the whole of his estate; and next, there is no such thing as a public or a secret will as distinguished

from any other kind, and there is no provision for the intervention of a judge or a notary, nor need the document be drawn up in the proper handwriting of the testator.

Ever since the English Wills Act of 1837 all that is necessary to the making of a valid English will is that the document containing the testator's wishes should be written out by some person, and signed or acknowledged by the testator in the presence of two witnesses both present at the same time, each of whom must see the testator sign.

Whereas the will as it exists on the Continent of Europe to-day is the direct descendant of the different forms of will in use during the Roman Empire under Justinian, that ruling in England, the United States of America, and most of the British Colonies has its origin in the Anglo-Saxon "Cwiðe," or "last words," which were given by a dying man, as a rule, to the priest who was called in to shrive him when he was on the point of death. Up to the year 1540 there was no power to dispose of real estate by will, but the Statute 32 Henry VIII. cap. 1 provided that every person should as from 20th July, 1540, have full and free liberty, power, and authority to give, dispose, will and devise, as well by his last will and testament as otherwise, of all his lands, &c., at his free will and pleasure; so that after that date, subject to the rights of the King and to those of the lord to his "heriot," there was no restriction placed on the testator's rights to dispose by will of either his real or personal property.

Again, in the method of distribution of estates after death there is a very marked difference between the different systems.

In England the appointment of an executor or administrator is an absolute necessity to give power to deal with the deceased's personal estate (and probably since the Land Transfer Act (1897) with his real estate also), and the administrator derives his power to act entirely from the grant to him of letters of administration. On the Continent no such thing as a grant or formal document or authority exists. In the case of a will in France and Belgium the *executeur testamentaire*, pursuant to the powers conferred upon him by Articles 1025 to 1034 of the Civil Code, enters into possession of the personal estate, his seisin being strictly limited to such personal estate, and, so far as time is concerned, to a year and a day from the date of the death, and at the end of his year he is bound to render an account of his executorship. Although he has many of the powers possessed by an executor under English law, such powers are not nearly so wide, and

he is not regarded as the legal personal representative and as standing in the shoes of the deceased; in fact, his relationship towards the "heirs" and legatees is far more formal and far less personal than that of either an English or German executor, the latter being given very extensive powers by Articles 2197 to 2228 of the German Civil Code.

The contrast between the Continental and English systems is, however, more marked in the case of intestacy. Under all the Continental systems above referred to the "heirs" as a body have the right to enter upon the inheritance either with or without benefit of inventory. In the former case the necessary formal declaration has to be made as a preliminary, and the inventory is subsequently made out and presented in due form of law. The consequence of not taking with the benefit of inventory is that the whole of the intestate's liabilities, as well as his assets, pass to the heir, he thus taking upon his shoulders the *persona* of the deceased. Under English law, where a person dies intestate, his heir immediately becomes entitled to enter upon and take possession of his real estate and to hold the same, subject to the widow's right of dower or a subsequently appointed administrator's right to oust him from possession for the purpose of enabling the debts to be paid, for by virtue of the Land Transfer Act (1897) the real estate of an intestate now vests in the legal personal representative, who for this purpose is styled "the real representative." So far as the personal estate is concerned, although technically it immediately vests in the President of the Probate Division, nobody is entitled to take possession of it until an administrator has been appointed.

The individual member of the class of next of kin must not interfere, under penalty of rendering himself liable as an *executor de son tort*—that is to say, he incurs all the risks, and is subject to all the disadvantages, but can take none of the benefits, and is entitled to none of the advantages which attach to the office of a properly constituted executor. The risks incurred by an *executor de son tort* constitute the nearest approach in English law to those which under the Roman and Continental systems an "heir" taking without benefit of inventory lays himself open to.

The origin of this English procedure is to be found as far back at least as the thirteenth century, when the Church first commenced to take into its own hands the collection and administration of the estates of deceased persons. In 1285 a Statute (Westminster, ii. cap. 19) was passed, declaring that thenceforth the Ordinary (*i. e.* the Bishop or whoever was Judge

of the Ecclesiastical Court) should be bound to pay the debts of the testator.

In the early part of the fourteenth century the practice first arose of appointing one of the next and most lawful friends of the dead to act as administrator of his estate, and to these administrators a Statute of 1357 (31 Edward I. cap. 11) gave actions of debt in respect of the deceased's estate to and against such administrators. Ever since 1285 until the Court of Probate Act (1857) the Ecclesiastical Courts throughout the country continued to exercise jurisdiction in granting and revoking probates and letters of administration, but this Act took away such jurisdiction and vested it in a new Court styled the Court of Probate (now, by the Judicature Act (1873), merged in the High Court of Justice). Since the Statute of 1357 before referred to, it has been the rule to grant letters of administration to the widow first, failing her to the eldest child, and so on in order of seniority. If there are no direct descendants the grant is made to the nearest of kin, and failing application by any of these, after citing them to accept or refuse the grant, to a creditor. Should nobody come forward the Crown takes possession, and holds the estate until a person entitled to it can be found. The administrator is sworn to administer and distribute the estate according to law, and is required to enter into a bond with two sureties in a penal sum twice the amount at which he estimates the estate, for securing his so doing. In practice this is found to work most satisfactorily, and forms a model which might well be adopted by Continental nations as a substitute for the uncertain and unsatisfactory rule which prevails as to the right of entry by all the "heirs," the affixing of the seals, and the individual rights which immediately arise to take possession of an unascertained share of what, at the time when the right arises, is an unascertained whole.

The advantage of the English system is that a proper person is appointed, whose duty it is (under the safeguard provided by the bond referred to) to get in the estate, pay the funeral expenses and debts properly payable out of that which he gets in, and to distribute the balance in accordance with the provision of the statutes as to the distribution of intestates' estates.

In one respect the Continental system is more just than the English, namely, the devolution of real estate on intestacy. The English system of making the firstborn son the heir to the exclusion of his brothers and sisters seems unjust and

out of date, for if the head of a family desires to keep up a great name in intimate connection with a particular landed estate, he can do so without difficulty by making the necessary provision by way of family settlement. If, however, he fails to do this, the law ought fairly to assume that he did not wish so to do, and ought therefore to treat his land as it treats his personal estate—that is, distribute it equally between all those who are justly entitled to share in it.

The origin of the law of primogeniture is to be found in the feudal system, and is, in fact, almost the last relic of it remaining in English law, and the sooner it disappears, as it did in France after the Revolution, the better it will be for the cause of right and justice.

(3) *The conseil de famille.* — The Conseil de Famille is a domestic tribunal constituted for the purpose of watching over the most important interests of the members of a family, who by reason of their being minors or otherwise under legal incapacity, are unable to manage their own affairs without control and special protection. It unfortunately does not exist in England at all. It is probable, however, that if its advantages were more fully understood, something analogous to it would be adopted in England.

I propose to set out, firstly, the manner in which it is brought into existence in France, Belgium, Germany, and Italy; secondly, the cases in which it has jurisdiction, and the manner in which such jurisdiction is exercised; and, thirdly, the advantages which it has over the English system of guardianship of infants and the care of their estates.

(1) In France and Belgium, in cases of infancy, pursuant to Article 406 of the Civil Code, the Conseil de Famille may be summoned by a Juge de Paix of the district in which the infant resides, at the instance of the parents, grandparents, relatives, or creditors of an infant, and also of other persons interested, or even without application by any person, at the instance of the magistrate himself. Article 407 of the Civil Code (which is in force in both France and Belgium) provides that the Council shall consist of the Juge de Paix and six relatives or connections chosen, as far as possible, from amongst those resident in the commune where the infant's property is situate, one-half from the father's family and the other half from the mother's, relatives being preferred to strangers in blood, and the elder before the younger.

In Germany, Articles 1858 to 1881 make provision for summoning the Council by the Court of Wards (*Vormund-*

schaftsgericht), and after it has been appointed it takes the place of the judge of this Court, but if the parents of an infant who is subject to the Familienrat (as the Council is called) are living, they are empowered to dissolve it.

In Italy the Code of 1866, by Articles 249 to 263, provides that the Conseil de Famille shall be summoned by the Prætor, whose functions are somewhat similar to those of the Juge de Paix in France and Belgium.

The system is also in existence under the Codes of Switzerland, Portugal, Holland, and Spain, but appears to be absent from the Austrian Code. The origin of the institution is obscure; it is certainly not to be found in Justinian's system, and the nearest approach to anything of the kind in Roman Law is the Agnatic Council, which existed by custom in the countries subject to the sway of the Roman Emperors before Justinian's day.

This, however, is by the most competent authorities averred not to be its origin. Some French writers attribute it to French customary sources, but there are, on the other hand, German writers who claim that it first came into existence as a customary tribunal in the very early days of German civilization, and that it was adopted by Napoleon from this source for his Civil Code. Having regard to the difficulty of tracing any sign of it in the French system prior to 1801, this seems to be a theory fairly supported by probability.

(2) The jurisdiction of the Council, when brought into existence in France and Belgium, is regulated, together with the whole subject of guardianship of infants, by Title 10 of the Civil Code.

The Council does not act direct in the management of the affairs of those who are brought under its control, but through a *tuteur* or guardian, who, when the infant's parents are dead, is appointed by the Conseil de Famille, and is responsible to and removable by it.

In Germany the powers of the Familienrat are more restricted than in France and Belgium; it need not consist of more than two members of the infant's family, although it may consist of as many as six, but in other respects here and in the other countries referred to above, its functions and powers are very similar to those ruling under the Code Napoléon, except that in Germany it has control over family property whilst it is in the possession of life tenants.

(3) From the foregoing the English practitioner will observe that the Conseil de Famille takes the place of the Chancery Division of the High Court of Justice in looking to

the care and maintenance of infants, substituting a domestic tribunal consisting of persons who, from their relationship to the infant, are likely to have a more intimate knowledge of and interest in his affairs, for the cumbersome and expensive method in vogue in England, where an action has to be started, and every step not by law within the discretion and power of the guardian, has to be taken with the approval of the judge in whose Court the action is proceeding. Certainly, considering the sympathy and knowledge of the members of the council and the saving of expense and time, the Continental system has many advantages over that in force in England.

Of course a body of relatives might, if unchecked, from motives of self-interest make use of their position to the infant's detriment, but in France and Belgium the Conseil de Famille has always to be presided over by the Juge de Paix, and in Germany the Familienrat by the Judge of the Court of Wards. Thus, at all the deliberations there is an official person presiding, who, speaking generally, would have no personal ends to serve, and whose influence would be directed to applying such a check on improper motives.

Allied to but not forming part of the above subject, is the power which the proper Courts have in France, Belgium, and Germany of appointing a curator of the estate of any person who has been found to be a prodigal, and subsequently has, under Article 513 of the Civil Code in force in France and Belgium, and under Article 6 (ii) of the German Civil Code, been put under an interdict or prohibition from controlling and managing his affairs.

Under the French Civil Code such persons may be restrained by order of the Court from bringing or defending actions, from entering into contracts, from receiving personal property into their possession, and from alienating or mortgaging their real property without the sanction of a curator (in the code called *conseil judiciaire*), and in Germany Articles 114 and 1906 of the Civil Code provide that a prodigal may be put under the control of a *Vormund*, or guardian, if the Court considers that his person or estate is in jeopardy. It is a great misfortune that in England there is no such provision for protecting against themselves young men who suddenly inherit wealth, which they do not know how properly to administer. Unless they can be certified as actually insane, there is no procedure known to English law whereby their power of dissipating and wasting their fortunes can be checked.

The adoption in England of the system obtaining on the Continent may be objected to on the ground that restraint on the actions of any person of full age and sound mind is contrary to that spirit of freedom and personal responsibility which underlies its whole system of law and procedure. The answer, however, to any such contention is twofold: first, that the prodigal, as a rule, is a person who by reason of youth and inexperience may be fairly described as having too weak a mind to resist the temptations spread in his path by more experienced and dishonest persons, and therefore imperatively requires the protection of the State as much as a person actually insane; and secondly, that its adoption would not interfere with true liberty at all, but merely curtail wasteful, harmful, and purposeless licence. Doubtless the power to put the proposed law into force would have to be carefully hedged round with safeguards; but this should not be a difficult task for legislators, particularly as they have the experience of Continental nations to guide them.

(4) *The keeping of proper business books and the making of an annual inventory by traders.*—This in France is governed by Articles 8 to 17 of the Commercial Code, in Belgium by Articles 16 to 24 of Law of 15th September, 1872, and in Germany by Articles 38 to 47 of the Commercial Code.

Under all these three codes, every person engaged in trade, as defined in the respective laws, is bound to keep proper books of account showing his daily transactions, including receipts and disbursements, and showing his monthly household expenses, and he is also bound to keep letters received by him in a bundle, and to copy into a book or register those which he sends out, and each year to make out and sign an inventory of his assets, both real and personal, of debts due to and from him, and to copy the same into a book or register kept for the special purpose. Such books, if regularly kept, are made evidence in action at law between traders. Should a trader who has not complied with the provisions of the law above set out, become insolvent, he renders himself liable to be adjudged an ordinary bankrupt—in France, under Article 586 of the Commercial Code, and in Belgium, under Article 574 of the Law of 18th April, 1851—and liable to the punishment provided for by Article 402 of the French Penal Code, and Article 489 of the Belgian Penal Code, namely, imprisonment of at least one month and not exceeding two years. Similar provisions to these are to be found in the German law (see Articles 209 of the German Penal Code).

Now, English law contains no direction whatever requiring

traders to keep any books, and the only consequences arising out of their failure so to do are that by Section 28, Subsection 4(b), of the Bankrupty Act (1890), if the bankrupt has failed to keep such books of account as are usual and proper in the business carried on by him, and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy, the Court shall, if and when the debtor applies for his discharge, either (i) refuse it; (ii) suspend it for not less than two years; (iii) suspend it until a dividend of not less than 10/- in the £ has been paid to the creditors; or (iv) require the bankrupt to consent to judgment for a sum to be fixed by the Court being entered up against him.

The only criminal offences in regard to the keeping of books known to the English law are those dealt with by Section 11, Subsections 8, 9, and 10 of the Debtors Act (1869), whereby it is provided (by Subsection (8)) that if a debtor, after the presentation of a bankruptcy petition against him, prevents the production of his books or documents relating to his property or affairs (by Subsection (9)), conceals, destroys, mutilates or falsifies the same, or (by Subsection (10)) makes a false entry therein relating to his property or affairs, he shall be guilty of a misdemeanor and liable to imprisonment for any time not exceeding two years, with or without hard labour.

It will be observed that there is to this extent similarity between the English and Continental systems, that it is only in the event of the trader becoming insolvent and his affairs passing into the hands of others for investigation, that any penalty is incurred by not keeping proper books of account.

The reason, of course, is that so long as the neglect only affects the interest of the trader himself, it gives rise to no ground for interference by the State, but directly this line has been overstepped and the interests of persons dealing with the delinquent become involved, then the State punishes a person who, in neglecting his own interests, has involved those of others.

From every point of view it seems desirable that in the English system of law, as well as in those of her neighbours, there should be a specific mandatory direction to all persons engaged in trade to keep proper books of account and other business documents such as are usual and necessary in the trade which they carry on, that once at least in each year they should, by means of a balance-sheet, ascertain what their financial position is, and that the law—duly informing

them what they are required to do—should hold out to them the prospect of punishment should their affairs become involved, if they have failed to carry out the provisions which have been duly laid down for their guidance and protection.

It is only subject to these conditions that it would be just to punish criminally the failure to keep proper records of business dealings and transactions in the event of insolvency, and it is fair to assert that only when some alteration in the law is made in this direction will the administration of justice in England cease to be open to the reproach that debts are more difficult to recover there than in almost any of the chief Continental nations, and that its bankruptcy law is rather an encouragement than a deterrent to dishonest and reckless trading.

(5) *The recovery of amounts due under foreign judgments.*—In England there is no provision made for the enforcement of foreign judgments, they are simply regarded as evidence in favour of the judgment creditor of a debt due from the person against whom they are operative, and we have not with any foreign nation a treaty providing for mutual enforcement of the judgments of the Courts of the several countries. The reason of this condition of things is not difficult to find, having regard to difference in origin and point of view of the respective laws. If, as is the case with practically all the foreign countries having treaties for the mutual enforcement of their respective judgments, our law and procedure had their origin in a common source, it would be easy enough; but it is this absence of common origin which in the past has been found to be an insuperable obstacle.

The two great obstacles to anything of the kind are: (1) that the contract is differently formed under the foreign and English systems, the latter requiring a valuable consideration to support it (*ex nudo pacto non oritur actio*), whilst under the former, if there is (i) consent of the parties, (ii) capacity to contract, (iii) a certain subject-matter, and (iv) an object permissible by law, a valid contract is duly formed; and (2) that in England, in all civil cases, witnesses, including the parties themselves and all others whom they desire to call, are admitted to give evidence *viva voce* in open Court before the judge or judge and jury, whichever form of tribunal may be trying the case, such witnesses being submitted to the searching test of cross-examination. On the Continent, however, witnesses are not heard in Court during the trial of civil cases at all, but only before a judge deputed as an examiner

to take their evidence for purposes of reference (if necessary) during the trial, and even then the testimony is not subjected to such test of cross-examination. Trials of civil actions on the Continent of Europe, however, generally proceed upon written documents alone, without the intervention of *viva voce* evidence, and judgment is given upon the arguments based upon this written evidence. It therefore seems obvious that with such radically different methods different results are likely to be obtained.

Speaking generally, it is the rule with English judges to treat the judgments of foreign Courts with all respect, and through the medium of an action in our Courts, to give effect to them as evidence of contractual obligations, after due examination; but although they hold themselves bound by them, yet in the interests of justice they will go behind them. Thus, if the person sued alleges that the foreign judgment was obtained by fraud, or by the fraudulent suppression of evidence which, had it been produced, would have been likely to bring about a different result, for it is also a maxim of English law *ex turpi causa non oritur actio.* Our Courts also refuse to enforce by their judgment those of foreign Courts obtained by default, or against persons who neither by nationality nor contract were subject to the jurisdiction of the Court from which such judgment proceeded, unless the persons liable have property within such jurisdiction. The position taken up by the English Courts in this connection was admirably summed up by Lord Lindley in a recent case of *Pemberton* v. *Hughes*, where his lordship says:—"If a judgment is pronounced by a foreign Court over persons within its jurisdiction, and in a matter with which it is competent to deal, English Courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice. Where no substantial justice, according to English notions, is offended, all that English Courts look to is the finality of the judgment and the jurisdiction of the Court in this sense and to this extent, namely, its competence to require the defendant to appear before it. If the Court had jurisdiction in this sense and to this extent, the Courts of this country never inquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice, according to English notions, has been committed."

Although, owing to the difficulties and obstacles above alluded to, a treaty for complete reciprocal enforcement of foreign judgments in England seems quite hopeless, yet

within the bounds of Lord Lindley's statement of our law something might be done to mitigate the hardship in expense and delay to which holders of foreign judgments are subjected when they come to attempt to enforce them, and it seems possible that a treaty might be entered into between Great Britain, France, Belgium, Germany, America, Austria-Hungary, Italy, and Holland for mutually enforcing the judgments of each other's Courts, where such judgments have been pronounced in the presence of both parties duly summoned and submitting to the jurisdiction, upon a simple eight days' demand of payment, or performance being served upon the person against whom the judgment is given, unless within that time such person is able to satisfy a competent Court that the judgment was obtained by fraud or fraudulent concealment of material evidence, or that such judgment in some other respects is not proper to be enforced according to the standards of justice ruling in the respective countries, the foreign judgment might then be rendered executory and duly enforced by the Courts of the country where the person liable was resident or domiciled.